



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/00591/2015

THE IMMIGRATION ACTS

Heard at Bradford
On 12th April 2016

Decision & Reasons Promulgated
On 6th June 2016

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER

Appellant

And

IMRAN KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Hussain, Hussain Immigration Law Limited

DECISION AND REASONS

1. I shall refer in this decision to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant appealed to the First-tier Tribunal (Judge Grimshaw) against a decision of the Entry Clearance Officer to refuse him entry to the United Kingdom as a spouse under Appendix FM of HC 395 (as amended). The date of the refusal was 19 November 2014. The sponsor, Mrs Ruby Sadiq, is the appellant's spouse. The parties accepted that the appellant could not succeed under the Immigration Rules because the sponsor did not have evidence of a sufficient income over the necessary period in order to satisfy Appendix FM. As Judge Grimshaw noted [18] the sponsor

was unable to provide wage slips until January 2014, a period of five months (rather than the required six). Also, the minimum income threshold could not be met because the sponsor did not have paid employment in December 2013.

2. The judge went on to consider Article 8 ECHR outside the Immigration Rules. She found that the case as “unusual” [22] the sponsor having undertaken maternity leave from her employer in September 2012 and returned to work in January 2014. It was not clear to the judge why the sponsor had not made a claim for maternity allowance during her absence from work and at [23], the judge wrote:

Of course, it may very well be that the sponsor had not worked for her current employer for the required period to be eligible for statutory maternity pay. However, given the totality of her work history I consider it reasonable to expect her to have been eligible for maternity allowance from the State if not from her employer. I bear in mind that if the sponsor had made a valid claim she would have been entitled to 9/10 of her weekly pay for a period of six weeks. I estimate that amount to be £1,512 in total. When I add that sum to the figure of £8,400 which she earned in the five months prior to the application it is evident the minimum income threshold is met.

3. The judge went on to record that the sponsor had provided a copy of her bank account showing her savings exceeding £13,000. The judge considered that the case might “reasonably be described as exceptional” noting that the couple have a genuine and subsisting relationship since they married in 2012 and “have had a child together.” The judge stated that, “For the reasons given above, I do not doubt that the financial requirements of Appendix FM are currently met.” In particular, the judge noted that, “If [the sponsor] had [claimed maternity payments] it is likely the appellant could show the minimum income threshold was met.” The judge went on to invoke [26] *SS (Congo)* [2015] EWCA Civ 387 and refers to the relevance of “near miss” cases in assessments of appeals under Article 8 ECHR. The judge concluded by finding that “The requirement for the appellant to complete a fresh application would be a disproportionate response to the legitimate public end of fair and effective system of immigration control.”
4. I find that the judge erred in law. Clearly, it is for the First-tier Tribunal Judge, adopting a robust attitude towards judicial fact-finding, to determine in any given case whether exceptional circumstances arise. However, the judge should not, in my opinion, have concluded that such circumstances arose before properly applying to the facts all relevant Rules and statutory provisions. As the grounds point out, there was no reference made in the judge’s assessment to section 117B of the 2014 Act. Furthermore, the judge arrives at the conclusion that exceptional circumstances exist in this case via a tortuous and highly speculative route; the judge appears to regard this as a “near miss” case but only by including in the sponsor’s income putative payments in respect of a maternity claim which the sponsor never actually made. An exceptional case should be apparent on the basis of the actual factual matrix before the judge; I cannot see that exceptional circumstances may arise where that factual matrix is based upon pure speculation.
5. I have no doubt that Judge Grimshaw felt sympathy for the appellant, sponsor and their child. However, for the reasons I have given, I believe that she erred in law. I

set aside her decision and have remade the ECO's refusal. As the parties acknowledged, the appeal under the Immigration Rules must be dismissed. I acknowledge the fact that the sponsor and appellant are in a subsisting relationship and have a child but these are not exceptional circumstances but rather circumstances fully within the ambit of Appendix FM. The sponsor may or may not have been eligible to make a maternity payment claim the fact remains that she did not make one so I have not taken that factor into consideration. Having proper regard to matters set out in Section 117 of the 2014 Act and to the public interest arising in this case, I do not consider the decision to refuse the appellant entry clearance as to a disproportionate interference with private and family lives of the individuals involved. That finding is underlined by the fact there appears to be no reason why family life between the appellant, sponsor and their child may not carry on their family life together in Pakistan. I therefore dismiss the appeal on human rights grounds also.

Notice of Decision

6. The decision of the First-tier Tribunal which was promulgated on 31 July 2015 is set aside. I have remade the decision. The appellant's appeal against the decision of the Entry Clearance Officer dated 19 November 2014 is dismissed under the Immigration Rules and on human rights grounds (Article 8 ECHR).
7. No anonymity direction is made.

Signed

Date 2 June 2016

Upper Tribunal Judge Clive Lane

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 2 June 2016

Upper Tribunal Judge Clive Lane