Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16164/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 15th July 2016	**On 26th July 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MRS MARIA KAUSAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Ms L Kullar (Solicitor)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, against a decision of the First-tier Tribunal (Judge Shergill hereinafter "the judge") dismissing her appeal against a decision of an Entry Clearance Officer made on 20th November 2013 to refuse to grant entry clearance as a spouse.

2. By way of background, the Appellant is a national of Pakistan who was born on 28th July 1991. Her UK based Sponsor Mr Shahban Hussain is a British citizen and a permanent UK resident. It is said that the two met each other, for the first time, in February of 2012 and that they entered into an arranged marriage, that marriage having taken place in Pakistan on 10th April 2013. An application for entry clearance was submitted on 20th August 2013 and it was indicated, in that application, that the two had lived together in Pakistan from 10th April 2013 (the date of marriage) to 5th May 2013 when the Sponsor had returned to the United Kingdom. Since the marital visit there had been a further visit by the Sponsor to Pakistan, his arriving on 1st September 2013 and returning to the United Kingdom on 5th November 2013. Entry clearance was refused on 20th November 2013. On 28th May 2014 the Appellant gave birth to a child. The Sponsor had not visited Pakistan between the date of his return on 5th November 2013 and the date of his hearing before the judge (18th August 2015).

3. At the hearing of 18th August 2015 both parties were represented and the Sponsor gave oral evidence. The judge concluded that the Appellant had failed to demonstrate that she had a genuine and subsisting relationship with her Sponsor and had failed to demonstrate that she and he intended to live together permanently in the UK. Accordingly, it was decided that relevant requirements contained within Appendix FM of the Immigration Rules had not been met. The judge did not go on to consider the maintenance and accommodation requirements of those Rules which had also formed a part of the Entry Clearance Officer's adverse decision. The judge did, though, go on to consider any possible application of Article 8 of the European Convention on Human Rights (ECHR) but, unsurprisingly, given the finding in relation to the relationship, decided that the Appellant was unable to successfully rely upon that provision.

4. In setting out relevant factual findings and relevant reasoning the judge had this to say;

> "15. I am satisfied that the couple met in February 2012 and that they are not related except by marriage.
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> 16. It is not in dispute that they are married; and that they married on 10/04/03 is uncontroversial.
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> 17. As at the date of application on 20/08/13 they claimed to have lived together for about three weeks.
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> 18. The Sponsor went back to Pakistan on 01/09/13 and returned to the United Kingdom on 05/11/13. The refusal was made on 20/11/13; therefore after that nine week period of the second visit.
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> 19. The Appellant had a child on 28/05/14. The Sponsor has not been to see the Appellant since he came back to the United Kingdom on 05/11/13. He has never met the Appellant's child.
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> 20. I was not persuaded by the Sponsor's reason as to why he had not been back; namely that he takes tablets. He has clearly been to

Pakistan in the past for periods of time and there was nothing to suggest his medical condition would prevent him from doing so again. I found it highly unusual in those circumstances that he has not been back to see the child which he claims is his own daughter. I was not persuaded by the reasons put forward.

21. There is no evidence to support the Sponsor's assertion that he and the Appellant maintained contact after their initial meeting and wedding i.e. between 2012 and 2013.

22. The Lyca phone records which the Sponsor confirmed represented the contact he has maintained with his wife since marriage are of little evidential value. He said the Appellant's number ended with 68. I have looked at the calls made to "[ ]68". There.a (sic) multiple entries for 0 seconds; multiple entries for very short calls of a minute or two mainly and some less than five minutes; a hand full of calls over five minutes; a handful over ten minutes and the same for over twenty minutes. The multiple short calls to this number are consistent with other numbers called. There was nothing about this telephone number being dialled which stood out as one which was dialled up and for blocks of time for example.

23. I noted that the bill period spans from May to July 2013 and looking at the total time spent actually on the phone to that number it is a relatively short period of time in total. That is aside from the fact that the Appellant was unable to recollect the wife's actual number which I have inferred would have to be entered manually if using a calling card. There is also a lack of any evidence confirming it is her number. All in all, this evidence was weak in terms of him remaining in touch, his wife (sic). It was also time limited to July 2013 with no plausible explanation as to how he has maintained contact in the two years since.

24. I was not persuaded by the money transfer slips either. They only cover the post-decision period in my view [page 42 being 04/12/13]. There were no receipts for transfers before the wedding; or prior to the decision.

25. There is no evidence from the Appellant herself as to the way in which she has maintained the relationship long distance; and what her intentions are for the future.

26. I was not persuaded by the submissions relating to the child. That is a post-decision fact and in any event there is no evidence to confirm paternity. By his own admission the Sponsor has not been to see the child which is unusual.

27. The photographic evidence when looked at in the round with the rest of the evidence does not alter my conclusions that this is a weak case.

28. I am not satisfied that the Appellant has shown that she meets the requirements of Appendix FM of the Immigration Rules. In particular, I am not satisfied that the relationship between the applicant (sic) and Sponsor is genuine and subsisting (under paragraph E-ECP.2.6). There was little persuasive evidence at the date of decision that this was the

> case. Furthermore, I was not persuaded that there was a "*clear commitment from both parties that they will live together permanently"* in the United Kingdom. I was not satisfied that this was a *"real relationship as opposed to the merely formal one of a marriage which has not been terminated."*
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> 29. My finding against the Appellant is fatal to her case by operation of paragraph EC-P1.1.(d). I am not satisfied it is necessary to go on to consider the other aspects of the case."

5. The Appellant, through her representatives, applied for permission to appeal to the Upper Tribunal. The grounds, it is fair to say, for the most part comprised a detailed attempt to re-argue matters of fact. There were suggestions contained therein that the judge had erred in doubting the parentage of the child, in failing to appreciate that there would have been no need or reason for the Sponsor to send money to the Appellant prior to the marriage, in failing to adequately consider medical evidence relating to the Sponsor which suggested that amongst other things he had brain damage, in failing to properly scrutinise the evidence of contact between the parties and in failing to adequately consider the possible application of Article 8 of the ECHR.

6. Permission, as indicated above, was granted. The salient part of the grant reads as follows;

> "For the most part the grounds on which permission to appeal is sought amount to disagreement with the judge and an attempt to reargue the appeal. However I consider that it is arguable that the judge erred in law by failing to take into account the correlation between the Sponsor's accepted presence in Pakistan in September 2013 and the birth of the Appellant's child in May 2014. It is arguable that had this been taken into consideration the appeal might have been decided differently."

7. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that consideration could be given to the question of whether the judge had erred in law and, if so, what ought to flow from that. Representation at that hearing was as indicated above. I am grateful to both representatives for their assistance.

8. Ms Kullar, for the Appellant, told me that she would rely upon the written grounds in their entirety. She said that the child had been conceived when the Sponsor had visited Pakistan, that it was not the case that there had been no evidence before the judge of a subsisting relationship, that the Sponsor had explained his difficulties in obtaining more than a small number of telephone calling cards during the hearing and that there was a limit to the evidence which telephone companies could provide. She submitted that the judge had failed to have regard to cultural traditions in the sense that the Sponsor would not have been expected to financially support the Appellant prior to marriage, that there had been sufficient evidence before the judge to lead to a favourable conclusion from the Appellant and Sponsor's perspective regarding paternity, that the Sponsor

could not have been expected to recall the Appellant's telephone number in light of his medical problems and that the judge's findings had been against the weight of the evidence. Mr Mills, for the Respondent, acknowledged, accurately I think, that many other judges would have decided the appeal differently on the same evidence. However, he contended that that did not mean this judge had erred in law. He had explained his reasoning and had been entitled to conclude that the evidence suggested only limited contact between the parties. The judge had not ignored the Sponsor's medical condition and had taken a rational view that it was highly unusual for a father not to return to see his own child. Medical evidence had not demonstrated that he was unfit to travel to Pakistan. The conclusions, whilst tough ones, had been open to the judge. Ms Kullar, replying to the those points, said that the judge had not made a finding as to the Sponsor's presence in Pakistan at the likely time of conception and should have done. The medical evidence had shown that there were health concerns.

9. I have no doubt at all that many judges would have resolved this appeal differently on the basis of the same evidence. I do think it is accurate to characterise certain of the findings as being tough ones. Mr Mills is right, though, when he points out that that, of itself, does not mean that the judge has made an error of law.

10. I have carefully considered the points advanced orally and in writing on behalf of the Appellant as to the error of law issue. I have to say, and I mean no disrespect in saying so, that I find it very difficult to characterise the majority of what has been said on the Appellant's behalf as anything other than an expression of factual disagreement with the judge's findings. It seems to me that on the basis of the evidence before him the judge was entitled to conclude that, given the claimed length and claimed seriousness of the relationship, the evidence of ongoing contact and of financial support was limited. In this context I do bear in mind what was stated in **Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC)** and in particular paragraphs 10 and 11 of that decision, but, nevertheless, hold to my view.

11. Of particular concern to the judge was the Sponsor's failure to return to Pakistan to see his child who had, of course, been born in his absence. The judge's reference to the medical evidence, insofar as it was relevant to that issue, was a little terse or cursory but it is right to say, as Ms Kullar accepted at the hearing, that that evidence did not demonstrate that the Sponsor was unfit to travel to see his wife and his claimed child and, indeed, he had travelled to Pakistan for the marriage and on one occasion thereafter. The judge had not been offered an explanation containing any detail as to why there had been no such visits after the child's birth and, in these circumstances, was entitled to accord significant weight to the matter. It may be that the judge was wrong to take a point against the Appellant, if that is what he did, through a lack of evidence of financial support prior to the marriage but that was no more than a peripheral

consideration in the judge's mind as is apparent from a reading of the determination as a whole.

12. I did wonder, although the point was not put in quite this way, whether the judge might have erred by failing to make a sufficiently clear finding regarding paternity. Mr Mills says that, as a post-decision event, the question is irrelevant anyway. However, if the judge had accepted paternity that would have been capable of informing as to what the strength of the relationship between the couple might have been as at the date of the decision under appeal which is, of course, the date to which the judge was required to have regard. However, it seems to me that at paragraph 26 the judge was effectively saying that, in his view, the evidence before him did not meet the requisite standard of proof regarding paternity. Once he had decided that then there was no relevance in a consideration as to whether the birth of the child did inform upon the state of the relationship at the material time. Whilst he did not specifically make the point, as to paternity, that the Sponsor was in Pakistan as at the likely time of conception that does not mean he was unaware of it. The mere fact that there was a correlation in that regard did not establish paternity. The judge could not have materially erred with respect to Article 8 because any Article 8 argument that there might have been was utterly destroyed by the findings concerning the nature of the relationship.

13. In light of the above I have had to conclude that the judge reached rational findings, that the findings he did make were open to him and that they were adequately explained. It is important to stress in this case, given the points which were put to me, that I am not permitted, in deciding an error of law issue, to substitute my own view of the facts for that made by a first instance Tribunal. My conclusion, therefore, albeit not without some hesitation given the evidence, is that the judge did not err in law. Accordingly, his decision shall stand.

14. I do not know but perhaps a suitable way forward for the Appellant and Sponsor, if they seek to continue to assert the genuineness of the relationship, might be for DNA testing to be conducted and then a further entry clearance application to be lodged. That, however, is not a matter for me and, of course, the Appellant and Sponsor may take further advice from Ms Kullar.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision shall stand.

Anonymity

I make no anonymity direction.

Signed Date **26th July 2016**

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date **26th July 2016**
Upper Tribunal Judge Hemingway