



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/14704/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)

**Decision & Reasons
Promulgated**

On 24 August 2017

On 7 September 2017

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MOHSIN RAZA SHAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M McGarvey of McGarvey Immigration & Asylum Practitioners Limited

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 16 October 1987. He entered the United Kingdom on 24 January 2011 as a Tier 4 Student with leave valid until 14 June 2012. That leave was subsequently extended until 30 January 2015.
2. In 2003, the appellant met a British citizen, Rubila Nisar Malik. They married on 13 August 2014. They have a child together who was born on 7 October 2014 and the appellant's wife has a child from a previous relationship who was born on 27 May 2005. Both children are British citizens.

3. On 24 October 2014, the appellant made an in time application for leave to remain as the spouse of a British citizen.
4. On 18 March 2015, the Home Office wrote to the appellant requiring him to provide a DNA test to establish that he was the father of the child born on 7 October 2014. That evidence was not subsequently provided although the appellant is named on the child's birth certificate as the father.
5. On 20 April 2015, the Secretary of State refused the appellant's application for leave as a spouse.
6. First, the Secretary of State refused the application as the appellant did not meet the suitability requirement in S-LTR.1.7 as he had failed without reasonable excuse to comply with the requirement to provide information or physical data, namely the DNA test concerning the parentage of the child.
7. Secondly, in any event, the Secretary of State was not satisfied that the relationship with his spouse was a genuine and subsisting one and so the eligibility requirement in E-LTRP.1.7 of Appendix FM was not met. Consequently, the appellant could not meet the requirements for leave as a partner under the five-year route in R-LTRP1.1(c).
8. For the same reasons, the appellant could not succeed under the ten-year route set out in R-LTRP1.1 as the suitability and eligibility requirements in S-LTR.1.7 and E-LTRP1.7 were mandatory requirements under that route also.
9. Thirdly, the Secretary of State concluded that the appellant could not succeed as a parent under R-LTRPT.
10. Fourthly, the appellant could not succeed based on his private life under para 276ADE.
11. Finally, the respondent was not satisfied that there were exceptional circumstances to justify the grant of leave outside Art 8 of the ECHR.
12. The appellant appealed to the First-tier Tribunal.
13. Judge Holder accepted that the appellant's marriage was a genuine and subsisting one. However, agreeing with the Secretary of State's view, he found that the appellant could not satisfy the suitability requirement in S-LTR.1.7 because he had failed to provide the DNA test as required. Further, the judge found that the appellant could not succeed as a parent under Appendix FM or based upon his private life under para 276ADE and under Art 8 outside the Rules.
14. The appellant sought permission to appeal on a number of grounds including that S-LTR.1.7 could not apply as there was no legal requirement for the appellant to provide a DNA test when applying for leave as a partner under Appendix FM. Further, the judge had failed properly to

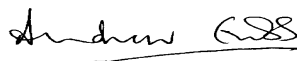
consider whether the appellant could otherwise succeed under the Rules and under Art 8 of the ECHR outside the Rules.

15. On 20 April 2017, the First-tier Tribunal (Judge E S Martins) granted the appellant permission to appeal.
16. On 5 May 2017, the Secretary of State filed a rule 24 notice seeking to uphold the decision.
17. Thus, the appeal came before me.
18. Mr Diwnycz, who represented the Secretary of State, conceded that there was no power to require the appellant to provide a DNA test as set out in the Home Office letter of 18 March 2015. There was, he said, a discretion but the IDI in force at the time stated that case owners may not demand DNA evidence in establishing paternity in in-country applications. They may request it but cannot direct it. He accepted that the judge was therefore wrong to find that the appellant did not meet the suitability requirement in S-LTR.1.7.
19. In the light of that, Mr Diwnycz accepted that the appellant met the requirements for leave to remain as a partner in section R-LTRP of Appendix FM. The Judge had accepted the relationship was genuine. Mr Diwnycz accepted that the appellant had the necessary English language certificate, which had been provided with the application. He acknowledged that no point had been taken in relation to the financial requirements on the basis of the evidence submitted with the application concerning the sponsor's finances. Having accepted that the appellant met the requirements of the Rules as a partner, he did not seek to argue that the appellant should not succeed under Art 8 in his appeal.
20. On the basis of Mr Diwnycz's concession, which in my judgment was properly made, the judge erred in law in finding that the appellant could not meet the suitability requirement in S-LTR.1.7 as the Secretary of State could not require that he provide the DNA test as stated in the letter of 18 March 2015. Further, if that finding cannot stand, as Mr Diwnycz accepted, the appellant has established (and had established before the judge) that he met the requirements for leave to remain as a partner in section R-LTRP of Appendix FM. He was entitled to succeed under the five-year route set out in R-LTRP.1.1(c) of Appendix FM. His application did not fall for refusal under the suitability requirements and he met all the eligibility requirements for leave to remain as a partner.
21. In this appeal, however, the appellant's right of appeal is limited to Art 8. Mr Diwnycz did not seek to argue that, once it was clear that the appellant met the requirement for leave to remain as a partner, that there was any basis upon which it could be argued that his removal was not a breach of Art 8.
22. Consequently, I am satisfied that the appellant's removal would be a disproportionate interference with his family life and a breach of Art 8.

Decision

23. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision is set aside.
24. I remake the decision allowing the appellant's appeal under Art 8.

Signed



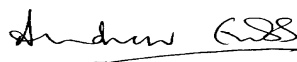
A Grubb
Judge of the Upper Tribunal

Date: 6 September 2017

**TO THE RESPONDENT
FEE AWARD**

I have allowed the appeal. The appeal should have been allowed by the First-tier Tribunal and having regard to all the circumstances, I consider it appropriate to make a full fee award in respect of any fee paid or payable.

Signed



A Grubb
Judge of the Upper Tribunal

Date: 6 September 2017