



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/21013/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 September 2017**

**Decision & Reasons Promulgated  
On 26 September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

Appellant

**PRITAM KUMAR  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow of the Specialist Appeals Team  
For the Respondent: Ms S Munira, Solicitor of Dr Law Solicitors

**DECISION AND REASONS**

**The Respondent**

1. The Respondent, Pritam Kumar, to whom I shall refer as “the Applicant” is a citizen of India born on 5 November 1980. On 23 October 2009 he arrived and was granted leave to enter as a Tier 4 (General) Student migrant. He did not seek further leave. On 10 July 2014 he married Arzou

Jhan Beg at the Croydon Registry Office. She is a British citizen by birth. She also holds an Identity Card issued by the Pakistani authorities to overseas Pakistanis.

2. At the date of the hearing in the Upper Tribunal the Applicant's wife was on the verge of going into labour: the Expected Due Date (EDD) for her first child was 5 September 2017.
3. On 11 October 2015 the Applicant applied for further leave on the basis of his private and family life which was eventually refused on 19 May 2016.

### **The SSHD's Decision**

4. On 19 May 2016 the Appellant to whom I shall refer as "the SSHD" refused the Applicant's application noting he did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules. The SSHD considered that the obstacles to his re-integration to India were not very significant and there were no exceptional circumstances warranting grant of leave to remain under Article 8 of the European Convention outside the Immigration Rules.
5. On 1 June 2015 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds focus first on the Applicant's Indian Hindu origin and his conservative family background; second his wife's mother being a Muslim of Pakistani extraction and third there is a general reference to the oppression of women in India. The grounds assert the consequences for the Applicant and his wife are that there are very significant obstacles to the Applicant's wife settling in India.

### **First-tier Tribunal Proceedings**

6. By a decision promulgated on 12 January 2017 Judge of the First-tier Tribunal Stewart allowed the appeal under the Immigration Rules and on human rights grounds.
7. The SSHD sought permission to appeal on the basis that the Judge had noted that the Applicant's wife had contemplated living with her husband in the same area as his family and had found that she simply did not like the prospect. The Respondent asserted the Judge had not assessed the risk and had considered the Applicant's subjective fear was sufficient to dispose of the appeal. There had been no meaningful balancing exercise to assess the proportionality to the public interest of the decision.
8. On 20 July 2017 Judge of the First-tier Tribunal J M Holmes granted permission on all grounds, noting that at the time of his marriage the Applicant's immigration status was not "precarious" but unlawful since he was an overstayer with no pending application. Consequently, the Judge's approach to the factors identified in Section 117B of the 2002 Act was arguably an error. He also noted that subsequent to promulgation the

Supreme Court handed down judgment in *R (Agyarko) v SSHD [2017] UKSC 11*.

### **The Hearing at the Upper Tribunal**

9. The Applicant did not file any response pursuant to Procedure Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 but late on 6 September filed evidence of his wife's EDD of 5 September.
10. The Applicant attended the hearing. I explained the purpose and procedure to be adopted and he confirmed his current address as recorded in the Tribunal file.

### **Submissions for the SSHD**

11. Mr Tarlow relied on the permission grounds. The Judge at para.27 of his decision had considered only re-location to Haryana, the Applicant's home state. India was a very large country and it would be possible for the Applicant and his wife to settle elsewhere without his family learning their whereabouts. This omission materially infected the Judge's consideration of the claim under Article 8 of the European Convention outside the Immigration Rules. Further, the Judge had not given consideration to any of the relevant factors identified in Section 117B of the 2002 Act.
12. Subsequent to the hearing the Applicant's wife had become pregnant and now was at full term. The decision contained material errors of law such that it should be set aside.

### **Submissions for the Applicant**

13. Ms Munira submitted the judgment in *Agyarko* was handed down after the decision had been promulgated. There were no factual parallels shared by the applicants in *Agyarko* and this appeal. The Applicant's wife held a Pakistani national Identity Card and any prospective re-location had to be considered in the light that the Applicant and his wife follow their own different religions.
14. Ms Munira referred extensively to the background evidence about the general risk to women in India and the advice issued by the Foreign and Commonwealth Office at page 97 of the Applicant's bundle. I note that the section dealing with the Northern States makes no specific reference to the state of Haryana. I asked her to focus on the First-tier Tribunal decision and to explain why the submissions made for the SSHD did not disclose any material error of law.
15. Ms Munira then submitted that it was not a material error of law that the Judge had failed to consider the facts identified in Section 117B of the 2002 Act because the Applicant's claim under Article 8 was sufficiently strong and there was enough evidence to support his claim that he and his wife would be at risk in India. She relied on the statements of law contained in paras.23-26 of the Judge's decision. He had made a sound

assessment at para.28 of the reasons why the Applicant with his wife could not relocate anywhere in north India, namely that she was a British national about to give birth to a British child and was a Muslim of Pakistani origin.

16. The Applicant's wife was self-sufficient as evidenced by the various bank statements to be found at pp.1ff of the Applicant's bundle. Private and family life overrode the factors referred to in Section 117B of the 2002 Act and in addition the circumstances had now changed because of the Applicant's child. The best interests of the child needed to be considered.
17. Ms Munira submitted that Indian law did not recognise dual nationality. As the holder of an identity card issued by the Pakistani authorities the Applicant's wife would not be able to acquire Indian nationality. The terms of any leave she might be able to obtain would require her to report to the police. Ms Munira repeated there were insurmountable obstacles which overrode the provisions of Section 117B and that the Applicant satisfied the criteria of the Immigration Rules. The First-tier Tribunal decision should be upheld.

### **Response for the SSHD**

18. Mr Tarlow pointed out that the Applicant's child had not yet been born and accordingly no duty had yet arisen under Section 55 of the Borders, Citizenship and Immigration Act 2009. He conceded the duty might well arise in a few days once the Applicant's child had been born.

### **Consideration**

19. I noted that Ms Munira had failed to address specifically the issues relevant to the points raised by the application for and the grant of permission to appeal or the wording of the First-tier Tribunal decision. Her submissions had failed to take account of the fact that Section 55 of the 2009 Act had not been engaged because the child was not yet born.
20. In any event, even on her reasoning that Section 55 was engaged, she had failed to address the Tribunal of the relevant jurisprudence in *MM (Uganda) v SSHD [2016] EWCA Civ.50* which had been affirmed, albeit reluctantly, in *R (MA (Pakistan)) and Others v Upper Tribunal [2016] EWCA Civ.705*. *MM (Uganda)* had been handed down a week before the hearing in the First-tier Tribunal. *R (MA (Pakistan))* and *R (Agyarko)* are both declaratory of the law as it always had been so are applicable to the consideration of this appeal even if they post-date the hearing or promulgation of the decision of the First-tier Tribunal.
21. I decided that the Judge's decision contained material errors of law such that it could not stand and should be set aside in its entirety and the appeal remitted for hearing afresh in the First-tier Tribunal, having regard to Section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 and

paragraph 7.2 of the Senior President's Practice Statement of 10 February 2010 (as amended). I set out below my reasons.

22. As mentioned in the grant of permission, the Judge relied on out of date old case law. No mention was made case law current at the date of the hearing and, in particular *SS (Congo) v SSHD [2015] EWCA Civ.387* and *R (Agyarko) v SSHD [2015] EWCA Civ.440*.
23. Section 117A(2) of the 2002 Act imposes a mandatory requirement on the Tribunal to consider the public interest and the factors mentioned in Section 117B. The Judge failed to consider the factors and failed expressly to mention of the public interest. The consequence is that his proportionality assessment is unsafe. For these reasons the decision cannot stand and is set aside. None of the findings of fact are retained.
24. The situation of the Applicant in relation to the Immigration Rules will be radically different after the birth of his child and the First-tier Tribunal will have to take this into account at any re-hearing. The Applicant should consider taking advice immediately following the birth of his child whether immediately to notify the SSHD.

### **Anonymity**

25. There was no request for an anonymity direction and having heard the appeal I find that none is warranted.

### **SUMMARY OF DECISION**

**The decision of the First-tier Tribunal contained material errors of law and is set aside in its entirety. The appeal is remitted to the First-tier Tribunal for hearing afresh before a Judge other than Judge Stewart.**

**Anonymity direction not made.**

Signed/Official Crest  
2017

Date 25. ix.

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal