



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02721/2016  
HU/02724/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20<sup>th</sup> of December 2017

Decision & Reasons Promulgated  
On 9<sup>th</sup> January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SHABIR VAYAMBATHODI - 1<sup>st</sup> Appellant  
SS - 2<sup>nd</sup> Appellant

(ANONYMITY ORDERS NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

**Representation:**

For the Appellants: Miss J Heybroek of Counsel  
For the Respondent: Mr S Kotas, Home Office Presenting Officer

**DECISION AND REASONS**

**The Proceedings**

1. The Appellants are both citizens of India. The first Appellant who was born on 8<sup>th</sup> of June 1984 and who I shall refer to as the Appellant is the father of the 2<sup>nd</sup> Appellant who was born on 11<sup>th</sup> of April 2014. They appealed against decisions of the Respondent dated 14<sup>th</sup> of January 2016 to refuse them entry clearance as a partner in the case of the Appellant and as a child in the case of the 2<sup>nd</sup> Appellant under Appendix FM of the Immigration Rules. Their appeals were allowed by Judge of the First-tier Tribunal Majid sitting at Taylor House on 22<sup>nd</sup> of May 2017. The

Respondent appeals with leave against that decision and for the reasons which I have set out below I have set that decision aside. Thus, although the matter comes before me initially as an appeal by the Respondent, for the sake of convenience I continue to refer to the parties as they were known at first instance.

2. The Appellant wished to join his wife Shymamol Puthiyodathel who had been granted permanent residence in the United Kingdom ("the Sponsor"). The 2<sup>nd</sup> Appellant was the couple's child and was applying to enter at the same time as his father. The application was refused by the Respondent on the grounds that the Sponsor could not demonstrate that she met the income threshold derived from her employment with Olive Business Services. It was a near miss, the Sponsor had to show an annual income before tax of at least £22,400 allowing for the Appellant and the couple's child. The Respondent refused the application on the basis that the Sponsor's income amounted to £22,285.71p just under £115 short of the limit. The Respondent also took issue with the payslips from Olive Business Services which showed 3 months in 2015 all as tax period 6. The bank statements produced by the Sponsor were said not to be in an acceptable format.
3. The grounds of appeal against the Respondent's decision argued that the relevant six-month period ran from June to November (inclusive) 2015 because the applications for entry clearance were submitted on 7<sup>th</sup> of December 2015 and therefore the earnings in May 2015 were irrelevant. This calculation produced an income of £12,000 which doubled produced an annual income of £24,000, which exceeded the requirements. The Respondent, it was argued, should have used discretion to investigate the problem of the bank statements. The reference to tax period 6 was a minor clerical error which had been overlooked by the Sponsor's employer. There was a mistake in the refusal of the 2<sup>nd</sup> Appellant which referred to another individual as the 2<sup>nd</sup> Appellant's mother.
4. The Judge allowed the appeal in the First-tier noting the Sponsor's evidence at [6] that she earned at least £24,000 per annum and therefore met the financial threshold. The difficulty in this case is that the Judge did not go on to make a finding on whether that was indeed the case. Had he done so and given a finding on this core issue, with adequate reasons the appeal may well have stopped there subject to an Article 8 assessment. Unfortunately, despite the fact that the Judge spent 3 pages under the heading "The Relevant Law" he did not come to grips with this issue. At [16] the Judge stated: "a review of all the evidence adduced by the Appellant convinces me that the appeal should be allowed". That conclusion needed to be explained. The Judge said that he would not spend time giving reasons for matters he deemed to be marginal. It is not clear from the determination whether he regarded the Sponsor's earnings as marginal. If he did that was clearly an error.
5. The Respondent appealed against the Judge's decision arguing that the First-tier had made no findings on the relevant passage in the notice of refusal which was then cited in the grounds. The Respondent had simply no idea why he had lost the appeal. The Judge had also made a number of political statements in the

determination which quite apart from their irrelevance to the issues in the case, concerned the Respondent as to whether the Judge had approached the case with an open mind.

6. Permission to appeal was refused by Judge of the First-tier Tribunal Grimmett on 26<sup>th</sup> of July 2017. She conceded that the decision was very difficult to follow and had failed to consider any specified evidence but as the appeal was on human rights grounds and the Sponsor appeared to have been earning £24,000 at the time of decision she felt it would not be proportionate to keep the family apart.
7. The Respondent renewed his request for permission to appeal and Upper Tribunal Judge Kamara granted permission on 25<sup>th</sup> of September 2017 stating it was arguable that the Judge had failed to adequately address the issues identified by the Respondent in the refusal of entry clearance or give adequate reasons for allowing the appeal.
8. When the matter came on before me on 20<sup>th</sup> of December 2017 to determine whether there was a material error of law in the decision, it was conceded by counsel that the determination of the First-tier was inadequate in certain respects although the principle of the appeal was not conceded. I indicated I found a material error of law in the determination and set it aside. There was no objection by counsel or the Presenting Officer to the matter being remitted back to the First-tier to be reheard.

### **Findings**

9. The issues in the case were; (i) whether the Sponsor could meet the financial requirements and (ii) since the appeal was on Article 8 grounds only, whether the decision represented a disproportionate interference with the family life of the Appellant, Sponsor and their child. On the Respondent's case, this was a "near miss" under the Immigration Rules and there were no exceptional circumstances to allow this appeal outside the Rules. On the Appellant's case, the financial requirements were met and the interference with family life was disproportionate.
10. The refusal of permission to appeal by the First-tier Judge assumed that the financial requirements were met but it is not at all clear that that was a finding made by the First-tier Judge. It needs to be made alongside a careful assessment of Article 8. Before deciding to remit this case back to the First-tier I considered whether it was appropriate for me to proceed to remake the decision on the appeal having established that there was a material error of law in the decision of the First-tier Tribunal by reason of the factors I set out at [4] above. I considered that that was not appropriate in this case since no facts had been found and the Article 8 assessment had not been properly carried out or at all. In those circumstances and in accordance with the Senior President's Practice Direction I remit this appeal back to the First-tier Tribunal to be heard at Taylor House by any Immigration Judge (save Dr Majid). It would be of assistance to the Judge who will be hearing this appeal de novo to be given a clear statement of what the Sponsor's earnings were in the

period running up to the application and full details of the Article 8 claim in this case.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of a material error of law and I have set it aside. I remit this case back to the First-tier Tribunal to be heard by any Judge of the First-tier Tribunal de novo.

I make no anonymity orders as there is no public policy reason for so doing. No anonymity orders were made at first instance.

Signed this 5th of January 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

As the decision has been set aside so has the fee award and this matter will need to be dealt with by the Judge who re-hears this appeal de novo in the First-tier.

Signed this 5<sup>th</sup> of January 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge