



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

Appeal Number: OA/03356/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 8 April 2014**

**Determination
Promulgated
On 11th April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER, PAKISTAN

Appellant

and

FOZIA SAEED

Respondent

For the Appellant: Mr A Mullen, Senior Home Office Presenting Officer
For the Respondent: Ms S Khalid, of Ethnic Minorities Law Centre, Glasgow

No anonymity order requested or made

DETERMINATION AND REASONS

- 1) This determination refers to parties as they were in the First-tier Tribunal.
- 2) The appellant is a citizen of Pakistan, born on 6 February 1976. The sponsor, her husband, is a UK citizen. He has three children from his first marriage. Following the death of his first wife, he married the sponsor. They also have three children. All six children are UK citizens and now live with the sponsor in Glasgow.

- 3) By notice dated 6 December 2012 the Entry Clearance Officer refused the appellant's application for entry clearance because the documentation provided did not support the sponsor's claimed earnings, in the way required by the Rules.
- 4) The appellant appealed to the First-tier Tribunal, specifying grounds under the Rules and under Article 8 of ECHR. Judge McGrade allowed the appeal by determination promulgated on 7 January 2014, saying at paragraph 14:

... the appellant has a genuine and subsisting parental relationship with Areeha Saeed, a child who is under the age of 18 years, is a British citizen and is in the UK. Areeha Saeed [one of the children of the sponsor's first marriage] lived with the appellant in Pakistan between October 2002 and September 2011 ... it would be not be reasonable to expect the child to leave the UK as she was awaiting cardiac surgery, which was likely to be performed in the near future, and was in the event performed in April 2013. In those circumstances, I am satisfied that the exception [paragraph EX.1 of Appendix FM] applies.

- 5) The Entry Clearance Officer sought permission to appeal to the Upper Tribunal on the grounds that the judge erred by granting the application on the basis of the pending cardiac surgery, when that had taken place in April 2013, before the hearing date of 19 December 2013.
- 6) First-tier Tribunal Judge Pedro granted permission on 27 January 2014, observing that the judge appeared to have misdirected himself by applying paragraph EX.1 of Appendix FM to an entry clearance case.
- 7) In her very useful and fair submissions, Ms Khalid conceded that the judge erred in thinking that paragraph EX.1 of Appendix FM could apply to an entry clearance case, because it is restricted to in-country applications; that there was a lack of logic in allowing the appeal on the basis of a child awaiting surgery, when that had been performed months before the hearing; and that a fresh decision was required. She relied on the circumstances relevant to Article 8, which had been argued on a wide basis in the FtT. There is no doubt that there are genuine and subsisting relationships among the appellant, the sponsor, their three children and the appellant's three step-children. The sponsor works full time as a taxi driver. Ms Khalid argued that the family life interests and in particular the best interests of all six children (two of whom have ongoing medical conditions) amounted to a strong case for the appellant being permitted entry to the UK, notwithstanding failure to show compliance with the Rules in the application leading to these proceedings.
- 8) Those were well made points, but the difficulty is this. The shortfall in the documentation regarding the sponsor's income arose for very specific reasons. Income had to be averaged over two tax years (not two accounting periods), and post-decision income could not be relied upon. In a fresh application, it appears likely (while no future application is a foregone conclusion) that the financial requirements can be satisfied, and that there are no other reasons for which the application might fail under the Rules. There is in general no right to insist on entering the UK without

applying under the Rules, when it appears that a route is available within the Rules.

- 9) It is perhaps unfortunate that the entry of the appellant to the UK may have been delayed through these proceedings, but the remedy is and was in her own hands.
- 10) The determination of the First-tier Tribunal errs in law, and is **set aside**. The appellant's appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

A handwritten signature in black ink, appearing to read "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial "H".

10 April 2014
Judge of the Upper Tribunal