



IAC-AH-SC-V1

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

Appeal Number: IA/35093/2014

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 11 August 2015**

**Decision & Reasons Promulgated  
On 17 December 2015**

**Before**

**UPPER TRIBUNAL JUDGE CLIVE LANE**

**Between**

**BRETT ZANE RICE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**DECISION AND REASONS**

1. The respondent, Brett Zane Rice, was born on 5 September 1986 and is a male citizen of South Africa. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant applied for further leave to remain in the United Kingdom on the basis of his family life in this country. His application was considered under Appendix FM and paragraph 276ADE of HC 395 (as amended) but refused by the respondent in a decision dated 15 May 2014. The appellant appealed to the First-tier Tribunal (Judge Mensah) which, in a decision promulgated on 9 December 2014, allowed the appeal on human rights grounds (Article 8 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appeal before the First-tier Tribunal turned upon the income of the appellant. The appellant had entered the United Kingdom on 14 December 2012 so failed to meet the residence requirements of paragraph 276ADE. The appellant had an income which the parties agreed fell short of the financial minimum threshold required by the Immigration Rules. However, the judge found that the appellant's tips from his employment (which amounted to £27,661.15 from 26 September 2013 – 10 April 2014) should be added to his salary and, in consequence, though that additional income had not been evidenced as required under the Immigration Rules, the public interest requiring the appellant's removal was diminished to such an extent that it was no longer proportionate for the appellant to be removed and his appeal should, in consequence, be allowed under Article 8 ECHR.
3. The grounds of appeal challenge those findings. They do so on the basis that the principles in *Patel* [2013] UKSC 72 (that a "near miss" was to no avail) and also *Nagre* [2013] EWHC 720 indicated that requiring the appellant and his partner to live abroad in order to continue their family life was not an unjustifiably harsh consequence of the immigration decision under appeal.
4. The judge found that there were exceptional circumstances on the facts of this particular case. The very ground upon the Secretary of State attacks the judge's reasoning (namely, that "tips by their very nature were prone to fluctuate and could not be guaranteed and therefore could not be considered as income for the purposes of Appendix FM") is the same basis upon which the judge allowed the appeal. Unusually in a case of this sort, the judge found that the tips were not subject to significant fluctuation; indeed, she recorded that the Presenting Officer had "very fairly pointed out that HMRC had been sufficiently satisfied the tips were predictable income that they intended to assess the tips for the purposes of the appellant's tax code for the next financial year." [9].
5. It was the very predictability of the tip income which led the judge to find the case to be exceptional. The grounds of appeal of the Secretary of State fail to acknowledge that fact. It was the judge's finding that the tips did make this a "near miss" case but rather a "hit" case (in which the appellant could show that he met the income requirement) albeit one which could not succeed because the evidence of the actual income of the appellant could not be evidenced in the required way under the Rules. The judge clearly considered that, if HMRC was prepared to take the tip income into account in assessing the appellant's future income, then she should do so in making her proportionality assessment. I consider that that was a decision for the judge herself to make; another judge might have reached a different outcome, but that is not the point. On the particular facts of this case (I stress that there is no general principle in operation here), it was open to Judge Mensah to find that the predictability of the tip income rendered the facts of this appellant exceptional. In balancing the interference with the appellant's family life which would be caused by his removal against the public interest concerned with that removal, it was open to the judge to find that the public interest was reduced because the appellant would earn not just sufficient income to prevent him needing to seek access to public funds, but an income in excess of the minimum required under the Immigration Rules. The

Upper Tribunal should hesitate before interring with the judgment of the First-tier Tribunal which has been supported by clear and cogent reasoning. In this particular instance and for the reasons given above, I find that I should not interfere with the First-tier Tribunal's decision. Accordingly, the appeal is dismissed.

**Notice of Decision**

The appeal is dismissed.

No anonymity direction is made.

Signed

Date 22 September 2015

Upper Tribunal Judge Clive Lane