UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: OA/04744/2014**

THE IMMIGRATION ACTS

Heard at: Field House **Decision and Reasons Promulgated on**
On: 2 March 2015 **On 17 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR JAGTAR SINGH
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant:	**Ms A Holmes, Senior Home Office Presenting Officer**
For the Respondent:	**Ms F Shaw, Counsel instructed by Alpha Business and Legal Consultants**

DETERMINATION AND REASONS

1. I shall refer to the appellant as "the entry clearance officer" and the respondent as "the claimant." The entry clearance officer appeals against the decision of the First-tier Tribunal promulgated on 19 November 2014.
2. The claimant is a citizen of India, aged 34, and was sponsored by his wife, aged 30, who was living in the UK since 2 May 2008 and has become a permanent resident since October 2012.

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3. The appeal against the decision by the entry clearance officer on 11 March 2014 to refuse the claimant entry clearance under the Immigration Rules, was dismissed by the First-tier tribunal panel under the rules but allowed under the Human Rights Convention.

4. The First-tier Tribunal concluded that the claimant failed to comply at the time of the application with E-ECP 3.1 in that he did not provide the required documentation to the entry clearance officer [14(iii)]. The decision was accordingly in accordance with the law.

5. The panel however allowed the appeal under the Human Rights Convention, taking into account the unchallenged evidence of the sponsor that she had recently given birth to a son, the child of the claimant. The panel had regard to decisions such as Beoku-Betts [2008] UKHL 39 and ZH (Tanzania) v SSHD [2011] UKSC 4. It was noted that the claimant had not seen his new baby son. Nor had the child seen his father and should not be prevented or unnecessarily delayed from meeting him and establishing a relationship with him. It was not in the best interests of the child for the claimant to be denied entry clearance to the UK.

6. The Tribunal considered s.117A-D under the Nationality, Immigration and Asylum Act 2002 as amended by the introduction of a new Part 5A.

7. The sponsor earned an annual income in excess of £19,000. Although the sponsor had not satisfied 'that particular requirement of the Rules' - the specified evidence in Appendix FM-SE of the Rules - taken as a whole however, it was disproportionate to refuse the claimant entry clearance to the UK [27-28].

8. The entry clearance officer's application for permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Cruthers on 8 January 2015. It was arguable that the Tribunal did not adequately consider the possibility of the sponsor relocating to India to live with the claimant there. Further, it was arguable that the Tribunal did not adequately consider the possibility of a fresh application supported by documentation that did meet the requirements of the rules.

9. Ms Holmes submitted that the panel failed to consider whether there were any obstacles to family life continuing in India. That was nowhere mentioned in the proportionality assessment. Husbands and wives had the right to respect for their family life even if they had not yet established a home together. The Convention does not give them the right to choose where that home shall be.

10. It was only peripherally alluded to at paragraph 26 of the determination where the Tribunal noted that it could not be reasonable for the claimant's wife to leave the UK as she has lived here for six years, has employment and at the time of application was pregnant. The panel 'understood' that she had recently given birth.

11. The mandatory specified evidence had not been provided, even at the date of hearing. Although the panel referred to s.117B(1) of the 2002 Act, namely that the maintenance of effective immigration control is in the public interest, the Tribunal did not grapple with the importance of that interest. There was not a disproportionate interference in the circumstances as the claimant could re-apply if and when the requirements of the rule were met. That had not even been considered.

12. On behalf of the claimant, Ms Shaw submitted that the Court has considered proportionality from paragraphs 19-28. The child's best interests were taken into account.

13. During the course of her submissions, she noted that an application could perhaps be made under Appendix FM E-ECPT.2.1-4.2.

14. However, the child has been growing up without the benefit of the father's presence. The father has not even met the child.

15. She also relied on the Rule 24 response, including the reference by the panel to Chikwamba v SSHD [2008] UKHL 40. Policies that involve people cannot be, and should not be, allowed to become rigid, inflexible rules (Lord Scott, paragraph 20).

16. Moreover, regard must be had to the effect on other family members - in this case the husband of the sponsor, who has a right to respect for their family life being taken into account.

17. A fresh application would lead to a further breach of the UK's obligations under the Human Rights Convention. In this case, there was a UK born child, who is a family member for the purpose of the Convention.

18. In reply, Ms Holmes submitted that the best interests of the child constituted a primary consideration but not a decisive one.

Assessment

19. As part of the application for permission to appeal, the entry clearance officer submitted that the mandatory specified evidence in Appendix FM-SE of the Immigration Rules had not been provided, "even at the date of hearing (accepted by the appellant at paragraph 13(iii)". That is an overstatement however as it was in fact accepted that although the claimant had not not provided all the required documentation, much of it was present in the bundles.

20. The Tribunal properly directed itself in relation to the assessment pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009. In particular, the Tribunal had regard to the statements of Lady Hale, referring to the fact that the best interests of the child must be a primary consideration which can be outweighed by the cumulative effect of other considerations. Lady Hale also referred to Lord Hope's statement and that of Lord Kerr in ZH (Tanzania) that it is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interest of the child clearly favours a certain course, that course should be followed unless countervailing reasons of considerable force displace them [23].

21. I find that the Tribunal did not properly take into account and consider section 117B(1) of the 2002 Act, namely that the maintenance of effective immigration control is in the public interest. The panel set out the provisions of s117B, including s.117B(1) of the 2002 Act, but gave no consideration at all to that sub paragraph, only considering s.117B(2), s117B(3) and s117B(6). However, the Tribunal is required to have regard to each of the public interest considerations which were applicable in this case.

22. I have had regard to the Upper Tribunal's decision in Hameed (Appendix FM-Financial Year) [2014] UKUT 00266 (IAC). There, the panel, including the vice-President, noted that the effect of the First-tier Tribunal's adverse decision was simply that the appellant in that case had to re-apply if and when the requirements of the rules can be met. They found that this could not be a disproportionate interference [6]. The grounds in that case refer generally to Article 8. That case did not involve any considerations relating to the best interests of a child.

23. The panel in the present appeal, however, has not considered any other permissible responses. There was no proper consideration given as to whether there were any obstacles to family life being continued in India, even in the short term. Nor did it consider whether it would have been a proportionate response to dismiss the appeal allowing the claimant to submit a fresh application, which included the necessary missing evidence as specified in the rules.

24. In the circumstances, I find that the First-tier Tribunal has made a material error of law in failing to give adequate effect to s.117B(1) of the 2002 Act.

25. In the circumstances, I set aside the determination and re-make it.

26. In re-making the decision, I have regard to the evidence before the First-tier Tribunal.

27. The claimant failed to meet the relevant provisions of paragraph FM-SE and had not provided all the specified evidence, even at the date of decision. That evidence however was required to be provided as at the date of application.

28. In considering the Article 8 claim I bear in mind the need to have regard to the interests of the child as a primary consideration. I have considered those interests including the fact that the child has not yet 'seen' his father and that a further delay might ensue.

29. I find that the interests of the child are however outweighed by the cumulative effect of other considerations. In particular, the immigration rules are stringent with regard to the need to provide the necessary specified evidence as at the date of application. In this case, that clearly did not happen. Moreover, even at the date of hearing, not all the evidence had been provided.

30. Ms Shaw did not submit that the specified evidence which was absent from the application and the appeal would be difficult to obtain.

31. In giving effect to the public interest consideration in s.117B(1), I find that notwithstanding a short delay, it is appropriate to require the claimant to reapply if and when the requirements of the rules can be met.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set it aside, I re-make the decision dismissing the claimant's appeal.

No anonymity direction is made.

Signed Date 10 April 2015

Deputy Upper Tribunal Judge Mailer