IAC-BFD- MD

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14055/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6th October 2015	**On 26th October 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MRS SHAISTA PARVEEN KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr Aftab Ahmed Khan, the Sponsor

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer (ECO). However, for the purposes of this decision, I shall refer to the ECO as the Respondent and Mrs Khan as the Appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The Appellant is a citizen of Pakistan born 18th December 1986. She applied for entry clearance to the United Kingdom to join her husband (the sponsor) who is a British citizen, under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules. Her application was refused on 7th August 2014, on the grounds that she did not meet the financial eligibility requirement under the Rules. This was on account of the fact that she had not provided all of the specified documents required under Appendix FM-SE.

3. The Appellant appealed that decision and her appeal came before the First-tier Tribunal on 14th May 2015. In a decision promulgated on 2nd June 2015, the First-tier Tribunal dismissed her appeal under the Immigration rules but allowed it on human rights grounds, under Article 8 ECHR private/family life. Judge Cox heard oral evidence from the sponsor, and considered the documentary evidence before him. He made a finding that he was satisfied that the documentary evidence demonstrated that the sponsor had a stable income, as an ice-cream vendor, of at least £12,000 per annum. The difficulty arose, he noted, in respect of the specified evidence demonstrating an additional source of income to meet the shortfall from the sponsor's self-employment as an ice-cream vendor. The sponsor claimed in evidence that he had a source of additional income, to his main income, from rental property receipts. This came to over £6,800 per annum. The Judge found however that he could not be satisfied that the documents produced to support this claim showed the additional income amounted to £6,800 per annum. Accordingly he could not be satisfied that the Appellant was able to show by way of specified evidence, that her husband had a gross annual income of at least £18,600. The Judge found therefore that the appeal failed under the Immigration Rules.

4. He then went on to consider Article 8 ECHR and decided to allow the appeal on private/family life basis.

5. In his reasons for do so the Judge went through the eligibility requirements under the Rules and said the following;

> "However, the difficulty for the Sponsor is that his self-employment income is not sufficient to meet the financial eligibility requirements of the rules and that it is only since March 2015 that his bank statements will show the whole of his rental income being deposited into his account. As such, the Appellant will have to wait a further year before she can re-apply. Accordingly, the effect of the Respondent's decision is that the family unit will remain separated for the immediate future and at least for another year.
>
> The Sponsor is a British Citizen, who has strong ties to the UK. He has an established business and owns a number of properties. Understandably, he wants to spend as much time as possible with the Appellant and since his marriage he has been back to Pakistan every year to be with the Appellant. He told me that if stays for 3 months between November and February, but pointed out that, if he remained in the UK, he would be able to earn additional income. These factors weigh in the Appellant and the Sponsor's favour.
>
> In my view a further factor that weighs in the Appellant's favour, is the delay in making a decision. The Appellant paid a fee of over £1,000. This is not an insignificant

> sum of money and, I believe she was entitled to expect that a decision will be made within a reasonable period of time. However, the Respondent took over a year to make a final decision and I am satisfied that a delay of this magnitude falls outside an acceptable standard of service.
>
> In any event, the most compelling features of this case are that the Appellant miscarried in 2014 prior to the ECO's decision, that she is now pregnant again and is due to give birth in August. Although she became pregnant during the Sponsor's most recent trip to Pakistan, which post dates the ECO's decision, in my view I am entitled to take this factor into account, as it was reasonably foreseeable that she would become pregnant again. Especially as they are a young couple, who wish to have a family."

6. The ECO sought permission to appeal the FtT's decision to the Upper Tribunal. Permission was granted on the grounds that it was arguable that the Judge had engaged in an erroneous consideration of what amounted to exceptional circumstances; had misapplied [38] of *SSHD v SS(Congo) and Others* [2015] EWCA Civ 387 in his consideration; had failed to make a finding on whether the Appellant and her sponsor could enjoy family life outside the UK.

Appeal Hearing and Submissions

7. The appeal came before me on 6th October 2015. I heard submissions from Mr Diwnycz on behalf of the ECO and after explaining the procedure to the sponsor, who attended on behalf of the Appellant, I heard brief evidence and submissions from him.

8. Mr Diwnycz submitted that in order to allow the appeal under Article 8, the Judge had to show that there existed not only compelling features in the Appellant's case, but compelling features not dealt with under the Rules. There was nothing in this appeal which could be described as compelling and everything had been considered under the Rules. He submitted that the Judge had fallen into material error. The decision was unsustainable and should be remade dismissing the Appellant's appeal.

9. The sponsor gave evidence that his wife has now given birth to their child. (The pregnancy relating to this child was mentioned in [37] of Judge Cox's decision). The sponsor said that his baby girl was born in August. He had not yet seen his child because he was awaiting the Tribunal hearing and because he had to work in the UK to earn income, so that he can bring his family over here. He said that the strain of living apart from his wife and child was hard to bear. He is understandably anxious to see his new baby.

Consideration/Findings

10. I am satisfied that the FtT erred in finding that firstly delay on behalf of the Respondent and second the fact that the Appellant miscarried, amounted to exceptional circumstances such as to warrant straying outside the Immigration Rules. The Judge further erred in not giving sufficient weight to the distinction between in-country and overseas cases. These errors are material ones and for the following reasons I find the decision must be set aside and remade.

11. The argument on behalf of the Appellant was that her circumstances at the date of decision were sufficiently exceptional and compelling that it was open to the Tribunal to exercise discretion and allow her appeal on Article 8 grounds.The exceptional circumstances put forward amounted to;

    - Delay by the Respondent
    - Miscarriage plus new pregnancy.

12. The Judge said at [36],

    > "In my view a further factor that weighs in the Appellant's favour, is the delay in making a decision. The Appellant paid a fee of over £1,000. This is not an insignificant sum of money and, I believe she was entitled to expect that a decision will be made within a reasonable period of time. However, the Respondent took over a year to make a final decision and I am satisfied that a delay of this magnitude falls outside an acceptable standard of service."

    A delay of over a year in making the decision whilst regrettable, hardly constitutes sufficient reasons for concluding as the Judge did that it was a delay of 'such magnitude' that it fell outside an acceptable standard of service. The Judge was no doubt aware, as was the Appellant, along with many other applicants, the reason for the decision being delayed. There is correspondence contained in the file from the Respondent explaining the reason for the delay which was that the law needed to be clarified on the Rules themselves. It is hard to see therefore the reasoning process by which the Judge draws the conclusion that he does that the respondent has given an unacceptable standard of service by a delay of such magnitude.

13. It is equally hard to see how the Judge arrived at the conclusion he did at [37], that the most compelling features of this case are that the Appellant miscarried in 2014 but that she is now pregnant again and due to give birth in August. (2015)

14. Having acknowledged the fact that the Appellant's pregnancy post-dated the ECO's decision the Judge says;

    > "… I am entitled to take this factor into account (the pregnancy), as it was reasonably foreseeable that she would become pregnant again."

15. I find no justification for that conclusion. The Judge would be well aware that in entry clearance cases the relevant date for consideration of any matter is the date of decision which in this appeal is August 2014, *AS (Somalia) and another v SSHD* [2009] UK HL.

16. The Appellant by the date of hearing before the FtT, happily was pregnant once more, but is it hard to see how the ECO, in August 2014, could reasonably foresee that the Appellant would be pregnant at some indeterminate date in the future.

17. In short there is nothing that I can see which justifies the Judge's decision to stray outside the Immigration Rules. The circumstances relating to this Appellant's application were all matters addressed within the Rules. Article 8 cannot simply be

used to circumvent the Rules, nor to give relief in a near miss situation. The appropriate course of action and one which remains open to the Appellant is to make a fresh application for entry clearance. She will of course have to satisfy the Respondent that she is able to meet all the requirements of the Rules including the evidential and financial requirements at that time.

18. For these reasons I find that the Judge erred in law and that his decision has to be set aside and remade with the original appeal being dismissed under the Immigration Rules and on Article 8 grounds.

Decision

19. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and to that extent the appeal made by the ECO is allowed. I remake the decision and substitute a decision dismissing Mrs Shaista Parveen Khan's appeal on all grounds.

No anonymity direction is made.

Signature **Dated**
Mrs C Roberts
Judge of the Upper Tribunal

The First-tier Tribunal made no fee award. That decision stands.

Signature **Dated**
Mrs C Roberts
Judge of the Upper Tribunal