



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

Appeal Number: OA/16375/2011

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 27 August 2015**

**Decision Promulgated
On 2 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**NAZIA ARSHAD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Amjad Malik Solicitors who did not attend

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of Upper Tribunal Judge Roberts and First-tier Tribunal Judge Pickup promulgated on 25 July 2014 which dismissed the Appellant's appeal against a refusal of entry clearance application made on 10 March 2011 as the spouse of Arshad Mahmood a British citizen. .

Background

3. The Appellant was born on 25 December 1980 and is a national of Pakistan.
4. There is a lengthy and complex history to this case.
5. The Appellant married Mr Mahmood in 2005 in Pakistan. She came to the United Kingdom on 20.1.2007 with limited leave as a spouse and that leave was extended until 27.4.2012.
6. In October 2010 she returned to Pakistan with Mr Mahmood where her relationship with him broke down and he returned alone to the United Kingdom.
7. The Appellant claims that she gave birth to Mr Mahmood's child , a daughter, on 24 . 4.2011. Mr Mahmood does not accept paternity of the child. He also asserts that their marriage has broken down irretrievably and in due course he would divorce her.
8. On 10.3.2011 the Appellant made an application for entry clearance as a returning resident and as Mr Mahmoods spouse on the basis they would reconcile. The application was refused on 14.6.2011 .The refusal letter gave a number of reasons:
 - (a) The Appellant did not qualify as a returning resident as she did not have indefinite leave to remain.
 - (b) In relation to paragraph 284 the ECO was not satisfied that the marriage was subsisting.
9. The appeal came before First-tier Tribunal Judge Ince and he dismissed the appeal. On 17 January 2013 that decision was set aside on the basis that there was an error of law. The matter was remitted to the First-tier for rehearing at a date to be fixed after 6 months to allow negotiations to continue as to the marriage, possible divorce and paternity.
10. On 16 January 2014 her Honour Judge Penna sitting in the County court dismissed the application for a parentage order under the Family Law Act on the basis that the Appellant and her child were habitually resident in Pakistan and not domiciled in the United Kingdom.

The Judge's Decision

11. The rehearing therefore came before Upper Tribunal Judge Roberts and First-tier Tribunal Judge Pickup,, Judge Pickup writing the decision. First-tier Tribunal Judge Pickup ("the Judge") dismissed the appeal against the Respondent's decision. The Judges found :
 - (a) Mr Mahmood refused to attend court in answer to a witness summons.
 - (b) The Tribunal was therefore left with Mr Mahmood's accounts in his affidavit of 14.11.2011 and his letter of 24.4.2014 to the Tribunal which had been seen by counsel (paragraph 15) that he did not accept paternity of the child.

- (c) It was accepted that the Appellant could not succeed under the Rules either as a returning resident or spouse.
- (d) Although sympathetic to the Appellant 's predicament they found that the Appellant could not succeed under Article 8 outside the Rules(paragraph 24-38)
- (e) The tribunal took into account that the marriage between the Appellant and her husband had broken down and this was the basis on which she had previously been granted leave.
- (f) They could not make a finding that the Appellant's child born in April 2011 was the child of Mr Mahmood as although they remained married throughout he denied paternity and there was no satisfactory evidence of paternity. (paragraph 26)
- (g) They considered the alternative situation if the Appellant's child was a British citizen (paragraph 28)
- (h) They found that there was no family life between the Appellant and mr Mahmood or with her brother Mr Ahmed.
- (i) They considered whether even if they accepted that there was family life capable of supporting the application there were sufficiently compelling circumstances so as to justify the grant of leave under Article 8 outside the Rules on the basis that the decision to refuse entry clearance is unjustifiably harsh by reference to caselaw.
- (j) They reminded themselves that the Appellant could not meet Appendix FM or paragraph 276ADE.
- (k) They took into account that the Appellant had a stillborn baby buried in the Uk whose grave she wished to visit but found that she would be able to do that with entry clearance as a visitor.
- (l) The applied the guidance in Razgar and found the decision was proportionate (paragraph 38).

12. Grounds of appeal were lodged arguing :

- (a) The Tribunal took into account a letter received by the Tribunal on 24.4.2014 which neither the Appellant nor her representatives had seen and taking it into account was a procedural irregularity.
- (b) The tribunal gave undue weight to the affidavit of 14.12.2011 and the letter of 24 April 2014: given his failure to attend court in response to a summons no weight should have been given to his letter and affidavit.
- (c) The tribunal failed to consider the presumption of legitimacy when considering the paternity and nationality of the child.
- (d) The assessment of proportionality and exceptional circumstances was flawed.

- (e) The tribunal should have allowed the appeal as this would have allowed paternity and British Citizenship to be established.
13. On 23 October 2014 Upper Tribunal Judge Renton refused permission to appeal. The application was renewed on 29 October 2014.
 14. On 19 February 2015 Upper Tribunal Judge Macleman stated that it would have been an error for the panel to base its decision on a letter received from a third party and not communicated to the parties but the grounds were 'seriously misleading' in that paragraph 15 states that the Appellant's counsel received and considered a copy of the letter. However permission was granted on the basis of the third ground as he suggested that the question of which legal system governed the paternity question was enough to call for debate.
 15. The Appellant did not attend the appeal and those representing her indicated that they wished the matter decided on the basis of the papers submitted which included a skeleton argument.
 16. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Respondent that:
 - (a) He challenged the merit of grounds which were deceptive and misleading.
 - (b) To assert that no weight can be placed on a document in the absence of oral evidence was not sustainable: the matter of the weight to attach to such evidence was a matter for the judge.
 - (c) This court's function was to deal with Immigration cases not settle paternity issues.
 - (d) The Appellant did not need to be in the United Kingdom to resolve her marriage and the paternity of her child as court hearings can be conducted from abroad.
 - (e) The matter had come before the family Court and they had refused to make an order of paternity and it was not a matter for this court to resolve.
 - (f) To suggest that the Appellant had been abandoned in Pakistan was also misleading as the Appellant was a Pakistani national living with her family.

Finding on Material Error

17. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.
18. This was a rehearing of an appeal against a refusal of entry clearance by the Appellant whose marriage to a British citizen had broken down while she was living in Pakistan. While there she had given birth to a child whose paternity was denied by her husband.
19. The grounds and skeleton argument appear to accept that the Appellant could not meet the requirements of the Immigration Rules either as a returning resident or as a spouse and could only ever succeed on the basis of Article 8 outside the Rules.

20. I find that the suggestion that there was an procedural irregularity in the Judges taking into account the contents of a letter dated 24 April 2014 from Mr Mahmood when the Appellant and her Representatives had not seen it or been given an opportunity to be heard in relation to the letter was indeed 'seriously misleading'. The decision makes clear at paragraph 15 that Ms Patel, counsel who represented the Appellant, both saw and considered the letter in issue. She had the opportunity to make an application for an adjournment and did not do so. She had the opportunity to make submissions to the Judges about the contents of the letter and the weight that should be attached to it.
21. The argument that too much weight was given to the affidavit and letter which were not supported by oral evidence has not merit: it is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a evidence unless irrationality is alleged.
22. In relation to the argument that the Tribunal failed to give proper consideration to the presumption of legitimacy I note firstly that while arguments were advanced before the Judge as to the presumption of legitimacy in British Law there was no attempt to argue that the same applied to a child born and habitually resident in Pakistan as the result of a marriage in Pakistan. I am also satisfied firstly that the court had noted in setting out the undisputed facts of the case that a specialist Tribunal had already been asked to make a declaration for parentage but refused to do so on the basis that the Appellant and her child were habitually resident in Pakistan and not domiciled in the United Kingdom and the application was dismissed.(paragraph 14) In the absence of clear evidence it was open to the Judges to conclude that this tribunal was not the place for the issue to be resolved.
23. I am satisfied moreover that the Tribunal considered the matter both from the perspective that the child was not the child of a British citizen (paragraph 27) and that she was (paragraph 28-29) and concluded that neither was a reason for 'pursuing paternity proceedings against Mr Mahmood through' the back door' of immigration control.' This was a finding open to them.
24. In relation to the assessment of proportionality I am satisfied that the Judges applied the correct test in considering whether there were compelling circumstances and that test was endorsed more recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. "
25. Those who represent the Appellant are unable to point to any factor that the Judges ignored in their detailed analysis of the Appellant's circumstances and thus I am

satisfied that the grounds are simply an attempt to challenge the weight attributed the various arguments placed before them in relation to the proportionality assessment. They argue in the grounds that it is 'in the interests of justice to allow the appeal, which would then allow paternity and thus British Citizenship to be established.' The tribunal took this argument into account and dismissed it as a compelling reason for a grant of leave outside the Rules(paragraph 29)

26. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.*"
27. I was therefore satisfied that the Tribunal's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

28. **I therefore found that no errors of law have been established and that the Judges determination should stand.**

DECISION

29. **The appeal is dismissed.**

Signed

Date 31.8.2015

Deputy Upper Tribunal Judge Birrell