Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09570/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2015	**On 18 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ENTRY CLEARANCE OFFICER,
ISLAMABAD

Appellant

and

MUHAMMAD HUMAIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Ms Z Azam, sponsor

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Bell promulgated on 23 June 2015 in which he allowed the appeal of Mr Muhammad Humair, a citizen of Pakistan, born on 20 June 1988.

2. Although before me the Entry Clearance Officer is the appellant and Mr Humair is the respondent, for the sake of consistency with the decision of the First-tier Tribunal I shall refer to Mr Humair as the Appellant and the Entry Clearance Officer as the Respondent.

3. The Appellant made an application for entry clearance as the spouse of Ms Zainab Azam ('the sponsor'). The application was made on 18 December 2013.

4. The application was initially refused by way of a Notice of Immigration Decision dated 11 July 2014. It appears that the delay between the application and the decision was in some part because of the ongoing litigation in respect of amendments made to the Immigration Rules with regard to financial requirements for partners and spouses applying for entry clearance, such litigation culminating in the decision of **MM (Lebanon) and Others [2014] EWCA Civ 985**. Indeed when the decision of 11 July 2014 was made a number of reasons for refusing the application were advanced before the decision maker turned his or her mind to the issue of the financial requirements. In that regard, although a preliminary observation was made to the effect that the requirements of the Rules were not met, the Notice of Immigration Decision includes the following;

> "*However, no final determination has been made at this stage as to whether you meet the income threshold and/or related evidential requirements. This is because the courts have not yet decided the outcome of the Secretary of State's appeal in a legal challenge to the income threshold requirement. More information about this is set out on the Home Office website.*
> *If you appeal against this refusal decision, a final determination as to whether you meet the income threshold and/or related evidential requirements under the Rules may be made at a later stage. In making any such determination account will be taken of any further information or documents regarding the income threshold and/or related evidential requirements which you enclosed with your appeal.*"

5. A second decision was made in due course on 7 January 2015. I pause to note that in the decision of the First-tier Tribunal Judge these two decisions are referred to at paragraphs 4 and 5, and the Judge appears to have been mistaken as to the date of the second decision which was 7 January 2015 and not 11 July 2014 as appears at paragraph 5 of the decision. Be that as it may nothing for present purposes turns on what appears to be no more than a slip.

6. The later decision of January 2015 took account of various documents and information sent on behalf of the Appellant concerning the sponsor's employment in the United Kingdom, particularly seeking to address some of the issues raised in the first decision. The decision-maker of 7 January 2015 states "*You have since demonstrated that your application met the non-income threshold requirements which that refusal notice gave as the reasons for refusal.*" Accordingly the only outstanding issue as of 7 January 2015 was in relation to the financial requirements of the Rules.

7. It is not immediately apparent that any indication was given to the Appellant prior to the decision of 7 January 2015 that a new decision was about to be taken, and to that end it is not immediately apparent that any updating financial information was provided. Accordingly it appears that the decision of 7 January 2015 addresses the

documents that were submitted with the application made on 18 December 2013, i.e. a full year prior to the actual decision.

8. The findings of the First-tier Tribunal Judge in respect of the Immigration Rules identify that in general terms the sponsor was earning at a rate consistent with the requirements of the Immigration Rules, but that her income dipped in the months of July and August 2013 because she took time off work in order to be delivered of twins. It is a startling feature of this case that the time taken off work was no more than three weeks, and the sponsor has commented today that one of the reasons for this was that she was conscious of the need to try and ensure that she could meet the financial requirements in order to be able to sponsor her husband.

9. It may well be the case - and I say this in circumstances where the First-tier Tribunal Judge does not appear to have been attuned to this issue or otherwise to have taken it into account - that had the earnings up to the date of decision been examined the Appellant would have had little difficulty in meeting the requirements of the Immigration Rules by reference to his wife's employment. Indeed, the sponsor has confirmed today that after returning to work following her confinement with her twins she continued in the same employment until March 2014 whereupon she switched without any gaps to better paid employment with a different employer. In other words, if the Appellant had been put on notice that a new decision was to be made in January 2015 and given the opportunity to submit up-to-date financial evidence, such evidence would likely have met both the evidential requirements and the quantum requirements of the Rules.

10. Be that as it may, the First-tier Tribunal Judge considered the case, directing herself to the relevant Immigration Rules and - for the reasons already hinted at in what I have said above - came to the conclusion that because of the drop in income in July and August 2013 the Appellant was not able to demonstrate that the Rules were satisfied. In this context it is of course to be recalled that the appellate evaluation of the entry clearance application must be done by reference to the circumstances pertaining at the date of the Respondent's decision, and also insofar as there were evidential requirements there are also limitations on the acceptance into evidence before the First-tier Tribunal of materials that post-date the Appellant's application.

11. It is moot perhaps as to whether or not that principle applies in circumstances where, as here, the initial refusal expressly indicated that further documents might be taken into account if it became necessary to look at the financial requirements of the Rules again. Those matters are in any event pertinent to, and relevant to, a consideration of the case under Article 8.

12. The Judge having found against the Appellant under the Immigration Rules went on to consider Article 8 from paragraph 28 onwards of the decision. The Judge indicated that it was appropriate to consider Article 8 because of the circumstances surrounding the drop in income in these terms:

> "*Most importantly the only reason the sponsor was unable to meet the financial threshold was because her wages were reduced in July and August 2013 because she took three weeks off when she had her twins. The Immigration Rules do not provide for any flexibility over the financial threshold for such exceptional circumstances.*"

13. When I first read that passage my initial reaction was that there was not anything particularly exceptional about being a working woman who takes leave from work because of a pregnancy or a confinement. However, on reflection it seems to me what is contemplated as exceptional is that the time taken off was so very brief. Having said that I recognise that there is no particular test of exceptionality to which it is necessary for me to have regard.

14. Be that as it may, the judge went on to consider Article 8 and at paragraphs 30 to 32 deals with the first four **Razgar** questions in an uncontroversial manner. The fifth **Razgar** question – proportionality - is then addressed at paragraphs 34 to 36 in the following terms, bearing in mind what has already been said by the Judge at paragraph 29 (quoted above):

> "*34. The sponsor was working in a permanent job which paid her £18,684 per annum and this is above the required threshold. The only reason the sponsor was not able to demonstrate the required level of funds in the 6 month period prior to the application being submitted was because she took a short period of time off work immediately before and after having her twin babies. This reduces the weight that I would otherwise attach to Section 117B(3) because had she not taken the time off following childbirth she would have met the threshold set by the State to meet the 'financial independence' criteria.*
>
> *35. The sponsor has 3 young children and is having to bring them up alone in the UK as well as working full time. They are all British citizens and it is in their best interests for them to be brought up by both parents. I am unable to agree with the ECM that it can be considered reasonable for children who are British citizens to be required to leave their country of nationality and birth and all the advantages that living in the UK bring them, to live abroad in order to have a relationship with their father at this important time in their lives.*
>
> *36. Taking into account all the above and in particular the reasons for the sponsor's reduced income in August and September 2013 and the best interests of the children which are a primary consideration [**ZH (Tanzania)**] I am satisfied that the decision to refuse the appellant entry clearance as a partner constitutes a disproportionate interference with the family life of the appellant, sponsor and the 3 children.*"

15. The basis of the Judge's decision, it seems to me, is clear enough on its face. The Judge considered that there was a significant level of earnings being brought into the household by the sponsor; family life existed; British citizen children were involved; the public interest considerations were met to a certain extent by reason of the sponsor's financial circumstances; and on overall balance - including the best interests of the children - refusal of entry clearance constituted a disproportionate interference with the mutual family life of the Appellant, his wife and their children.

16. The Respondent sought permission to appeal to this Tribunal which was granted on 22 September 2015 by First-tier Tribunal Judge Page. The Respondent's grounds initially are set out on the basis of a 'reasons' challenge and it is pleaded that the First-tier Tribunal Judge failed to provide adequate reasons for his findings in respect of proportionality. The grounds otherwise make reference to applicable case law, suggest that there is inadequate reasoning in respect of the issue of exceptional circumstances, and the Judge failed properly to consider that family life might continue through visits. It is also pleaded that the Judge had failed properly to consider the importance of the maintenance of effective immigration control and the economic wellbeing of the UK.

17. Ms Everett relies upon those grounds, but accepts that the reasoning of the Judge is itself intelligible: it is not her contention that it is anything other than clear as to the basis upon which the Judge considered the appeal should be allowed. Rather it is submitted that the reasons identified by the Judge were not sufficient to warrant the outcome of the appeal, and in this context Ms Everett suggests that there is an appearance of the Judge applying an impermissible 'near-miss' approach, in particular with reference to the income.

18. During the course of submissions Ms Everett at one point suggested that the proper remedy for the Appellant having been refused entry clearance would have been to reapply at a point at which the sponsor had resumed work for a six month period such that the required supporting evidence of six months' income meeting or exceeding the threshold under the Rules could then be provided.

19. It was at that juncture in the submission that we as it were collectively fell upon the circumstance of the delay between the application and the decision, and the further delay between the initial decision and the second decision. In that period necessarily the sponsor would have hit a point where she had been consistently earning for more than six months after the period of the drop in her earnings, such that she would have met the requirement of the Rules. Ms Azam herself made the observation that in circumstances where her husband had an outstanding application and in due course an appeal the possibility of 'throwing that away' to start a new application did not seem to be a very obvious or sensible option either to her or the Appellant.

20. On balance, in my judgement the reasons of the First-tier Tribunal Judge are just about adequate. It seems to me that the challenge of the Respondent is primarily one of disagreement with the outcome of this appeal. In any event, if it were otherwise I would not be minded now to interfere with the overall conclusion of the First-tier Tribunal Judge for the reason explored above - by the date of each of the Respondent's decisions the sponsor would have been earning at a level that would meet the requirements of the Immigration Rules, and there was ultimately no other matter that was held against her or the Appellant in the application.

21. Necessarily the Appellant could not have succeeded under the Immigration Rules on appeal because of the evidential requirements in that regard. However it seems to me that when looking at a decision allowed on the basis of Article 8 it would be unrealistic and frankly wrong now to deprive the Appellant, the sponsor and their children of the benefit of that decision, in circumstances where on the face of it at the time of both decisions they were in a position to meet the requirements of the Immigration Rules and in particular as I have observed previously there does not seem to have been any obvious indication or warning that the second decision would be taken and therefore no invitation or opportunity to submit up-to-date financial evidence in that regard.

Notice of Decision

22. The decision of the First-tier Tribunal contained no material error of law and stands.

23. No anonymity direction is made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed Date: 15 January 2016
Deputy Upper Tribunal Judge I A Lewis