



IAC-AH-SAR-V1

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

Appeal Number: OA/14960/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 7 December 2015**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

**MARYAM FATIMA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Mr Hussain, instructed by Duncan Lewis & Co

DECISION AND REASONS

1. I shall 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, Maryam Fatima, was born on 9 March 1994 and is a female citizen of Pakistan. She applied to come to the United Kingdom to join her husband (the sponsor). That application was refused on 28 October 2014. She appealed to the First-tier Tribunal (Judge Caswell) which, in a decision promulgated on 2 July 2015, allowed the appeal on Article 8 ECHR grounds. The respondent now appeals, with permission, to the Upper Tribunal.

2. Both parties agreed that the appellant could not succeed under the Immigration Rules. The deposits in the sponsor's bank account did not match his stated earnings as disclosed in his wage slips. At [17], the judge considered Article 8 ECHR:

"This is of course an entry clearance case, and the applicability of Article 8 outside the rules is not as strongly endorsed as in an in-country appeal (see *SS (Congo)* for instance). However, there is a very young child here who is a British national, and I accept that there is a bond between father and daughter, which was formed when he was there for her birth and spent several months with her as a newborn. The photographs demonstrate the closeness of the family group, and the sponsor was eloquent about the pain he feels at being separated from his daughter. Given these matters, I find that there are here circumstances which merit consideration of the appeal on general Article 8 grounds outside the Rules."

3. She went on to consider the familiar five stage "test" contained in *Razgar 2004 UKHL 27*. She noted, in particular, that the child of the appellant and sponsor is British. The child was living with the appellant in Pakistan at the time of the hearing and continues to do so. The judge observed that the sponsor would have to give up work if he moved to Pakistan and that the family could then have no chance of meeting the financial requirements of the Immigration Rules. The judge properly considered the public interest [21]. She found that the sponsor actually earned an income in excess of the levels required by the Immigration Rules and observed there would

"... not be any extra drain on public resources if the appellant and [the child] joined the sponsor here. The sponsor is entitled to have his wife here under the Rules if the criteria is met and [the child] is a British citizen entitled to the benefits of being in the UK in her own right."

She noted that the ECO's own case was that separation would be limited in duration as the appellant could apply again and this time meet the requirements. However, the judge was concerned not to "fragment" the bond which had been formed between the sponsor and the child. At the time of the hearing before the judge, the child of the appellant and sponsor was only 5 months old.

4. The grounds of appeal assert that there were no insurmountable obstacles preventing the sponsor from living with his family in Pakistan. The grounds record (as did the judge at [17]) the judgment of the Court of Appeal in *SS (Congo)* [2015] EWCA Civ 387; "the requirements upon the state in regard to Article 8 are less stringent in a leave to enter application and family life can be enjoyed elsewhere" [Grounds of appeal, 4]. The grounds criticise the judge for not making any discrete finding that there were exceptional circumstances in the case such as to engage Article 8.
5. I find that the grounds are unpersuasive. It is not for the judge to search through the facts in order to find exceptional circumstances. What the judge has said at [17] (see above) is, in my opinion, adequate to bring Article 8 ECHR into play in this appeal. Having correctly found that Article

8 was engaged, the judge has properly worked her way through the *Razgar* stages and has (crucially) paid proper attention to the public interest concerned with upholding the decision of the ECO. Given that the sponsor's failure to show that the sums which he was earning were evidenced in his bank statements whilst he otherwise persuaded the judge that he was earning in excess of the minimum sum required by the Immigration Rules, the remarks of the Court of Appeal in *SS (Congo)* are pertinent:

"55. In our judgment, the true position lies between these submissions. Contrary to the argument of the respondents, that fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261, especially at [21]-[26].

56. However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.

6. In my opinion, the judge has identified "individual interests at stake covered by Article 8" and also "compelling circumstances" particularly in relation to the nationality of the child, her continued absence abroad and, importantly, her separation from her father. Any "Near miss" elements in this case are relevant in the way identified by the Court of Appeal in *SS Congo* [56]. The judge has made the specific finding that the family will have sufficient funds to avoid being a drain on public resources, a factor which clearly diminishes the particular public interest concerned with the appellant's exclusion from the country. This is a case, to use the words of the Court of Appeal, "where the gap between the applicant's position and the requirements of the Rules" is not great. It is possible that another Tribunal would have reached a different decision but that is not the point. The outcome in the appeal which was reached by Judge Caswell is not perverse on the facts and the route which she has taken to that outcome

are sound in law and practice. In the circumstances, the appeal is dismissed.

Notice of Decision

7. This appeal is dismissed.

No anonymity direction is made.

Signed

Date 1 January 2016

Upper Tribunal Judge Clive Lane