



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10097/2015

THE IMMIGRATION ACTS

Heard at Stoke
On 11 March 2016

Decision & Reasons Promulgated
On 20 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

Mr SASIKUMAR SELVARAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman, Counsel instructed by Sterling and Co Solicitors
For the Respondent: Mr Harrison, Senior Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Osborne dated 4 January 2016. The appeal relates to a decision by Designated Judge of the First-tier Tribunal S J Pacey promulgated on 20 August 2015. The Judge dismissed the appeal against the Respondent's decision refusing his application for variation of leave on the basis of family life with his wife.
2. The background to the Respondent's decision dated 5 March 2015 was that the Appellant's wife's income, said to be £23,905, was not proved in accordance with the requirements of the Immigration Rules. Additionally it was said that the as there were no British children then there were no insurmountable obstacles to the relationship continuing from India or by the Appellant seeking

to re-enter the United Kingdom by making an application for entry clearance whilst his wife, his sponsor, remained in the United Kingdom.

3. Ms Norman said that the grounds of appeal which had been relied upon were broad ranging but there were material errors of law in respect of Article 8 of the European Convention on Human Rights and in respect of section 117 of the Nationality Immigration and Asylum Act 2002. She said that she had spoken to Mr Harrison and there was not a huge difference between them.
4. Ms Norman said that the Appellant's wife did meet the requirements to prove her £23,000 income. The issue was whether cash payments could be accepted. This was referred to at paragraph 13 of the Judge's decision. The concession that the income threshold requirements were not met then was wrongly made. All of the documents were there. It was therefore asserted that the income from Subway should have been taken into account.
5. It was submitted that therefore because the Income Threshold requirement was met then there was no need to go on to proportionality. In any event the issues of immigration control and the economic well-being of the country had been conflated.
6. The second matter related to paragraph 16 of the Judge's decision where he had applied the wrong test. The Judge said, "would face very significant obstacles to integration" but that relates to Paragraph 276ADE whereas EX1 asks are there insurmountable obstacles. It is a holistic test. It was submitted this was a material error of law.
7. In relation to paragraph 17 of the Judge's decision and the reference to s117 NIAA 2002, there was no consideration that the income threshold had been met. Little weight was given to private life and that was entirely wrong.
8. Mr Harrison in his reply said that he was grateful to Ms Norman for her clear explanation of the Appellant's grounds of appeal. He said that he was content to rely on the Rule 24 Reply which addressed the issues. The Rule 24 Reply said that the Judge's decision ought to be upheld. It was agreed that the evidential requirements of Appendix FM-SE could not be met. The Judge had also undertaken a **Razgar** balancing exercise. In so far as the Appellant having to make an application for entry clearance is concerned, there was extensive references to passages in the Upper Tribunal's decision in **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM-Chikwamba-temporary separation-proportionality)** IJr [2015] UKUT 00189 (IAC). It was said that a pregnancy of three weeks cannot amount to exceptional circumstances.
9. I had reserved my decision.

10. It is the withdrawal of the concession in respect of Appendix FM and the financial requirements that affects this case. There was no opposition to the withdrawal of that concession and I see no basis to interfere in the discussions that Ms Norman and Mr Harrison had about that.
11. If Ms Norman is right that the Appellant's wife did meet the evidential requirements in respect of her claimed £23,950 income then that significantly affects the outcome which ought to have resulted. I do not have sufficient information before me to come to a concluded view as to whether or not the evidential requirements were met.
12. The basis upon which the appeal is put before me is that if the evidential requirements were met then this would have affected not only the Immigration Rules aspect of the appeal, but also the way in which Article 8 and section 117 NIAA would be considered. That is because there would be no issue in respect of the income aspects and thereby the economic well-being of the country.
13. Therefore it is not only the issue of the Appellant's wife's three week pregnancy that now features at the centre of this appeal. I agree with the Rule 24 in that respect which states that a pregnancy of three weeks cannot be an exceptional reason for the purposes of **R (on the application of) Agyarko v Secretary of State for the Home Department** [2015] EWCA Civ 400 and **SS (Congo) v Secretary of State for the Home Department** [2015] EWCA Civ 387. The lens through which the Judge was making his assessment though was based on an apparently incorrect concession in respect of the Appellant's wife's earnings and whether the cash payments from her employment could or could not be taken into account for the purposes of the requirements of Appendix FM-SE.
14. Therefore in view of the concession and in view of the approach of the parties before me in respect of that concession, I find there is a material error of law. I therefore allow the appeal in respect of both the Immigration Rules and Article 8. The matter is remitted for rehearing before the First-tier Tribunal.

Notice of Decision

The decision of the First tier Tribunal Judge involved the making of a material error of law.

The Appellant's appeal is remitted to be reheard at the First Tier Tribunal.

An anonymity direction is not made.

Signed

Date: 11 April 2016

Deputy Upper Tribunal Judge Mahmood