Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40353/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 13th November 2015	**On 7th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR WAQAS SIDDIQUE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPATMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr David Mills, (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Pirotta, promulgated on 12th March 2015, following a hearing at Birmingham Sheldon Court on 12th February 2015. In the determination, the Judge allowed the appeal of Mr Waqas Siddique, whereupon the Secretary of State subsequently applied for, and

was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 29th March 1987. He appealed against the decision of the Respondent Secretary of State dated 26th August 2014, refusing the Appellant's application to remain in the UK as the spouse of a person present and settled in the UK, namely, of Ms Siyka Khan, under paragraph R-LTRP of Appendix FM.

The Appellant's Claim

3. The Appellant is a 27 year old Pakistani national who entered the UK on 4th September 2012 with a Tier 4 (General) visa valid until 10th January 2014. He then applied to remain as a spouse of a British citizen, Ms Siyka Khan, on 11th December 2013. He was unable to meet the income threshold requirement, and accordingly, his application was put on hold until the Court of Appeal decision. The Appellant had submitted documents from the Sponsor's employers for three months and then additional documents to the effect that his Sponsor wife had an annual income of £18,600 and payslips from November 2013 to February 2014.

The Judge's Findings

4. The Judge held that the imposition of the £18,600 financial requirement by the Secretary of State was upheld by the Court of Appeal in the case of **MM**. The Secretary of State had argued that the Appellant could not succeed because he had submitted evidence that his sponsoring wife earned £4,633 prior to the date of the application, and she had not been in employment for six months or more or earned the equivalent rate required for twelve months prior to the date of the application. However, the Appellant and the Sponsor now had a child and the Judge held that it would be unreasonable to expect the child to leave the United Kingdom to live with the Appellant and his wife in Pakistan, in circumstances where both the child and the sponsoring wife were British citizens. The Judge had regard to FM-R-LTRP.1.1(d). The Judge held that it was not reasonable to expect the Appellant to return to Pakistan to make an entry clearance application. It was further held that this would breach the Article 8 rights of all the parties involved, namely, the Appellant, his sponsoring wife, and their child, in circumstances where they had a genuine and subsisting family life.

Grounds of Application

5. The grounds of application state that the Judge's decision amounts to an error of law for three reasons. First, the Judge gave inadequate reasons at paragraph 15 that the financial requirements were met in compliance with Appendix FM-SE. Second, the Judge had acknowledged at paragraph 17 that the Sponsor failed to provide any evidence regarding the financial circumstances. Third, the Judge failed to acknowledge that the Court of Appeal had in **MM (Lebanon) v SSHD [2014] EWCA**

Civ 985 confirmed that the imposition of the financial threshold requirement was not a disproportionate interference with the family life.

6. On 10th June 2015, permission to appeal was granted on the grounds that, although the Judge concluded that the Appellant's child and wife were British citizens, she failed to consider or assess the relevant evidence and to give adequate reasons for finding that it would be reasonable for the child to live with the Appellant in Pakistan. In fact, the Judge appears to have not found that the financial requirements were met upon production of the specified evidence by the Appellant.

Submissions

7. At the hearing before me, Mr Mills, appearing on behalf of the Secretary of State, relied upon the grounds of application. He submitted that there were three reasons why the decision was unsustainable made by the Immigration Judge. First, the requirements of Appendix FM-SE were not met. Second, the Judge had recognised that the Sponsor had failed to provide evidence of financial circumstances. Third, because of **MM (Lebanon)** plainly held that an interference by way of the imposition of the financial requirement was not disproportionate to the rights of the parties concerned. Mr Mills went on to explain that the Judge appears to have been swayed by the fact that a child had been born but there was no presumption that where there is a child there is a disproportionate interference with that child's family life by requiring the Appellant to return back home to make an application for entry clearance. Facts have been found to that effect. There was no such finding by the Judge. Indeed, the child was very young, being born only in May 2014, and was aged only about 7 or 8 months at the date of the hearing. The case of **ZH (Tanzania)** makes it quite clear that there is no trump card in relation to the child being a British citizen or having rights of residence.

8. For her part, Ms Siyka Khan submitted that she was a British citizen and was asthmatic. Her child was also asthmatic. She had gone to Pakistan the first time and had to return because of the seriousness of her asthmatic attacks. All her family were in the UK. Her parents were in this country, her friends, and all her siblings, and she could not realistically go to Pakistan.

Error of Law

9. I am satisfied that the making of the decision by the Judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the decision makes no reference to the Supreme Court judgment in **Zoumbas [2013] UKSC 74**, which makes it quite clear that where the children are particularly young (and they were much older in that case than they are in the instant case), they can reasonably be expected to have their "best interests" served perfectly adequately, if they accompany one parent or the other to the country abroad for an application to be made from there. The Supreme Court makes it quite clear that there is no presumption that the existence of young children necessarily makes the removal of a parent disproportionate.

10. Second, this was a case where the Appellant could not show that his sponsoring wife was able to earn £18,600 in the preceding six months or twelve months prior to the application. In fact, the contrary appears to have been the case.

11. Third, the determination simply assumes that it would be unreasonable to expect the family to relocate to another country without making findings of fact to that effect. If it is the case that Ms Siyka Khan, is asthmatic, and so was their child, then clear findings have to be made in relation to these matters. This is not least because there are plenty of people with asthmatic conditions in the country like Pakistan and there is treatment available for this condition. This was a case where the child was particularly young being some eight months at the date of the hearing, and is still young, and it simply cannot be assumed, that there are insurmountable obstacles or that it is unreasonable to expect the Appellant to return back to Pakistan.

12. Under Practice Statement 7.2 the Upper Tribunal may remit the case to the First-tier Tribunal where,

> "the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal" (see paragraph 7.2(b)).

In my view, this is such a case.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law, such that it falls to be set aside. I set aside the decision of the original Immigration Judge. I remake the decision as follows. This appeal of the Secretary of State is allowed and this matter is remitted back to the First-tier Tribunal at Sheldon Court, Birmingham, to be heard by a Judge other than Judge Pirotta, at the next available date.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 30th November 2015