**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/06563/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 8 December 2017**

**Decision & Reasons Promulgated**
**On 16 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**ENTRY CLEARANCE OFFICER – ISLAMABAD**

Appellant

**and**

**SHAHBAZ HUSSAIN**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr C Avery, a Senior Home Office Presenting Officer
For the Respondent: Ms Mehnaz Akhtar, the sponsor

**DECISION AND REASONS**

1. The Entry Clearance Officer, Islamabad appeals against a decision of Judge of First-tier Tribunal Herbert who, in a determination promulgated on 20 March 2017, allowed the appeal of Mr Mehnaz Akhtar against a decision of the Entry Clearance Officer to refuse him a visa to enable him to enter Britain to live with his spouse.

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2. Although the Entry Clearance Officer is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the First-tier. Similarly I will refer to Mr Shahbaz Hussain as the appellant.

3. The appellant was born in October 1994. In 2009 he married his first wife in Norway living with her there until in July 2012. He applied for separation from his first wife. The decree was granted by the Norwegian authorities on 10 August 2012. On 13 September 2012 the appellant received a custodial sentence of 40 days after he had been convicted of domestic violence against his estranged wife. He was deported from Norway on 22 June 2013, being excluded from the Schengen area for a period of five years. He was divorced in August that year. In November 2013 he was introduced to the sponsor whom he married on 11 April 2014 and thereafter he made the application to enter Britain on a spouse visa. His application was refused as it was considered that his exclusion from Britain was conducive to the public good and furthermore that the financial requirements of the Rules were not met despite there being evidence that the sponsor had in her account the sum of £65,000.

2. The appellant's appeal was heard by Judge Herbert on 7 March 2017. In his determination he stated that he accepted that the marriage was genuine and that he was satisfied that by July 2015 and the date of the Entry Clearance Manager's decision there were sufficient funds showing that the appellant had satisfied the minimum requirements both in relation to the sponsor's income and in relation to her savings. He stated that "it is clearly established solely in relation to the P60 for the year ending 5 April 2016 in any event and the supporting documentation".

3. In paragraph 30 he wrote:-

> "30. Finally turning to the matter of the appellant's previous conviction, I am satisfied that this was a sentence of less than twelve months' imprisonment being some 40 days and having regard to the Immigration Rules, I am satisfied that given the limited scope of the conviction, the current reaction of the victim supporting the appellant's application and the fact that they have an ongoing positive relationship for the purposes of the best interests of their child, that there is overwhelming evidence that the appellant is able to meet the criteria under paragraph S-EC- .1.4.(c) of Appendix FM as I am not satisfied this exclusion from the United Kingdom is conducive to the public good."

4. He then went on to state that he was satisfied that the appellant has not committed any further offences since that committed in Norway and, having referred to the test in **<u>Razgar</u> [2004] UKHL 27** he stated that the appellant had established a significant private and family life with his wife and that grave consequences would flow from the decision and that private and family life would be significantly undermined if the entry clearance refusal were to be maintained.

5. He stated that the appellant's presence in the United Kingdom will facilitate his future contact with his son in Norway which is in that child's best interest and is in accordance with the duties for the respondent under Section 55 of the Borders, Citizenship and Immigration Act 2009.

6. He stated that he considered that the appellant's reconciliation with his ex-wife was perfectly genuine and stated that "there is not a propensity to be violent to women generally and therefore this offence whilst serious falls at the lower end of such cases of domestic violence".

7. He has stated that he found a discretion in any event under the Immigration Rules in paragraph S-EC.1.4 and that that discretion ought to be exercised in favour of the appellant "as his exclusion would be disproportionate to the criminal offence for which he was convicted and his exclusion from the Schengen area to which the United Kingdom is not party in any event".

8. The judge therefore allowed the appeal on both immigration and human rights grounds.

9. The grounds of appeal, on which Mr Avery relied stated that the appellant had been convicted of a domestic violence offence which resulted in a 40 day custodial sentence and therefore clearly fell for refusal under S-EC.1.4(c) of Appendix FM. It was not, it was argued, open to the judge to find that the exclusion from the United Kingdom of the appellant was conducive to the public good.

10. With respect to his findings on the sponsor's financial situation it was argued that it was unclear how he reached the conclusion that the appellant met the requirement of the Rules as the evidence on which the judge appeared to rely did not relate the situation pertaining at, or in the relevant period before, the decision of the Entry Clearance Officer.

11. The grounds stated that whether or not that the issue of whether or not the appellant was genuine with regard to the relationship was strongly questioned by his being motivated by a desire to relocate from Pakistan.

12. It was stated that the judge's findings on Article 8 were undermined by his errors with respect to the Rules but were otherwise entirely inadequate. It was not only inappropriate to consider that his entry to the UK would facilitate closer ties to the son in Norway given that the Norwegian authorities removed him but also factually inaccurate as it appears that he is still subject to a Schengen visa ban.

13. Mr Avery having relied on those grounds.

14. At the beginning of the hearing I read to the sponsor, who speaks good English, the terms of Section S-EC.1.4. of Appendix FM. It reads as follows:-

"S-EC-.1.4.

The exclusion of the applicant from the United Kingdom is conducive to the public good because they have:

...

(c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than twelve months, unless a period of five years has passed since the end of the sentence.

Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention Protocol relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."

15. The sponsor stated that the appellant was a changed man and that they had a close family life and that she had borne their child. She said that she could not live in Pakistan as, in effect, she had lived all her life here.

**Discussion**

16. I consider that there are material errors of law in the determination of the Immigration Judge. He has clearly misunderstood the terms of Section S-EC.1.4. which makes it mandatory to refuse an application where an offence has been committed and five years had not passed. While it is correct that the Rule refers to a decision being contrary to the Human Rights Convention it does state that it would only be in exceptional circumstances that the public interest in maintaining a refusal would be outweighed by compelling factors. There are clearly no such compelling factors here. Nothing has been put forward to indicate that the sponsor could not live with the appellant in Pakistan. She commented that she would be unable to work there and it appears from the application form that the appellant is not working. There is no reason is given as to why he is not working in Pakistan. The appellant clearly therefore does not qualify for entry under the immigration rules.

17. This was a marriage entered in to at a time when the appellant had been deported from Norway and there was no indication that he would be granted entry into Britain. The reality is that there is nothing exceptional or compelling in this case. Indeed the reality is that the judge has not made that finding. Moreover, he makes no mention of the appellant's child here and merely refers to his first child but what he states with regard to that child's interests clearly did not take into account the fact that the appellant would not be able to travel to Norway as he is excluded from the Schengen area and indeed has been deported from that country. It is clearly the case that the judge erred in law in invoking Section 55 of the Borders, Citizenship and Immigration Act 2009 with regard to the child of a Norwegian and a Pakistani neither of whom live in Britain when the child does not live here. I consider that the

decision of the judge on human rights grounds disclosed a clear error of law and for the reasons I have given that he had also erred in allowing the appeal on immigration Rules. I therefore set aside the determination of the Immigration Judge in its entirety.

18. I have considered whether or not it would be appropriate to remit this appeal for a further decision on human rights grounds. The reality, however, is that before the judge and the Entry Clearance Officer there was insufficient evidence to show that the financial requirements of the Rules were met and given the terms of Section SC.1.4. and the fact that five years had not past when the decision was made and there is no further evidence been put forward before me as to any exceptional or compelling circumstances that could prevent the sponsor living in Pakistan with her husband, there would be no point in doing so. For the above reasons I remake the decision and dismiss this appeal not only because the exclusion of the appellant from the United Kingdom is conducive to the public good under the provisions of Section S-EC.1.4(c) but also because the financial requirements of the Rules have not been met – the appellant would have had to have had the money in her account for the requisite period before the application and indeed would have to show how she came by that substantial sum. I would add that there is no indication that the appellant could meet the English language requirements of the Rules. As I have said there are no exceptional compelling factors in this case and for these reasons I dismiss this appeal on both immigration and human rights grounds.

**Notice of Decision**

The decision of the judge in the First-tier is set aside.

This appeal is dismissed on immigration grounds.

This appeal is also dismissed on human rights grounds.

No anonymity direction is made.

Signed Date: 12 January 2018

Deputy Upper Tribunal Judge McGeachy