Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU031042016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 May 2017	**On 5 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ZULFIQAR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Sharma instructed by Malik Law Chambers
For the Respondent: Mrs Z. Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. This is a resumed appeal following a hearing on 20 March 2017 following which in a decision and reasons promulgated on 31 March 2017, I found a material error of law and directed that it be re-heard by the Upper Tribunal, limited to the issue of

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whether the Appellant is able to meet the requirements of the Rules and/or Article 8 outside the Rules. A copy of that decision is appended.

2. In his submissions Mr Sharma stated that the Appellant is someone who for technical reasons falls outside the Rules having arrived with entry clearance as a spouse. His application for further leave as a spouse was refused solely on the basis that he did not have an English language certificate from an approved provider and his passport was retained by the Home Office. He then made a fresh application but this was also refused because by that time he did not fall under the transitional provisions for an extension of leave pursuant to paragraph 281 of the Rules. Mr Sharma sought to rely on the evidence that had previously been submitted to the First-tier Tribunal that the Appellant was earning in excess of the financial requirement, approximately £22,000 a year. He had always had leave and his family life and marriage had been developed in the context of the fact that he was lawfully present and that leave was with a view to settlement. On that basis, his status could be considered less precarious than somebody with leave without a view to settlement. He submitted that were the Appellant to make an application for entry clearance this is an Appellant that would succeed. However he submitted that the jurisprudence indicated that the onus is upon the Respondent to justify his removal. He submitted that the Appellant has no adverse immigration history, he would not be subject to any form of re-entry ban and thus there was no legitimate justification for him to be required to leave the United Kingdom in order to apply for entry clearance. Mr Sharma also sought to rely on the judgment of the Supreme Court in MM (Lebanon) [2017] UKSC 10, as to the distinction between rules of principle and those of technicality. Mr Sharma confirmed that the Appellant had for some time now been in possession of an English language certificate from an approved provider and that there was nothing that would be achieved by his removal and that there were compelling reasons justifying a grant of leave outside the Immigration Rules with reference to Article 8.

3. In her submissions, Ms Ahmed sought to rely on the decision of the Upper Tribunal Judge Gill in Chen [2015] 1 JR UKUT 00189 (IAC) with regard to the Chikwamba principle. Ms Ahmed submitted that, in order to ascertain whether or not entry clearance from abroad would be granted, it was necessary to have recent evidence of the ability to meet the financial requirements. Whilst the P60 dated April 2015 at page 62 of the Appellant's bundle did satisfy the financial requirements of the Rules this was not up to date. She submitted that there would be no significant interference with the Appellant's family life arising from his removal given that there were no medical issues or specific dependency and no children which would make such interference disproportionate. She submitted that both the Appellant and his wife have cultural ties to Pakistan and that considered in totality the Appellant was unable to succeed.

4. In relation to the question of proportionality and Article 8 outside the Rules she submitted in light of the decision in SS (Congo) [2015] EWCA Civ 387 that there were no compelling circumstances, but she accepted that proportionality needed to be assessed on the basis that there was family life between the Appellant and his

spouse. She submitted, however, in light of the public interest considerations at Section 117B of the NIAA 2002 and the fact that the Appellant and his spouse have cultural ties to Pakistan and have lived there, that removal would be proportionate. She sought to rely on [49] and [51] and [42] to [48] of the decision in Agyarko [2017] UKSC 11. She submitted there were no insurmountable obstacles and that the appeal should be dismissed.

5. In his response Mr Sharma submitted that there were compelling reasons albeit in light of the judgments in Singh & Khalid [2015] EWCA Civ 74 and Caroopen & Myrie [2016] EWCA Civ 1307 that the question was not so much whether there are compelling reasons but whether there is an Article 8 claim. He submitted that the Rules had been met in the past. Mr Sharma sought to rely on [51] of Agyarko (op cit) and submitted that the Appellant was in a very different situation as he is not a person who has not had status in the United Kingdom and could be distinguished on that basis. He further submitted that any lawfully derived income can be taken into account when assessing the ability to meet the financial requirements of the Rules. However the Appellant's ability to satisfy the Rules might be jeopardised by his removal as he would be unlikely to keep his job and thus then may be in a position not to meet the Rules given that his wife is on a lower income. However Mr Sharma asked that I note that in the Supreme Court decision in MM (Lebanon) [2017] UKSC 10 their Lordships had found that the guidance was unlawful and contrary to Article 8 on this issue and he asked that the appeal be allowed.

Notice of Decision

6. I have taken careful note of the submissions of both parties. I accept that this is a case where the Appellant entered the United Kingdom lawfully on 3 October 2012 with entry clearance as a spouse for two years. His application for an extension of that leave was refused on the basis that the English language certificate provided had not been issued by an institution on the Respondent's approved list of providers. That was the sole reason for refusing that application. The Appellant then made a further application. By the time that this was made and refused the transitional provisions of the Immigration Rules no longer applied to him and it was accepted by both parties that despite having been granted leave under paragraph 284 of the Immigration Rules he did not succeed under the new more onerous requirements of Appendix FM, in particular the fact that he had not previously been granted leave as a partner under Appendix FM.

7. In the First tier Tribunal, Judge Burns made the following findings in relation to section 117B of the NIAA 2002:

"48(2) *It is in the public interest that persons who seek to enter or remain in the United Kingdom are able to speak English. I find that Mr Ahmed can speak some English as he has now obtained an English language certificate (page 3, paragraph 10).*

(3) *It is in the public interest that persons who seek to remain are financially independent. I accept Mr Ahmed's evidence that he has not been reliant on*

public funds and that he has been able to maintain and accommodate himself which is evident from his payslips in the bundle and a copy of his bank statements.

(4)-(5) *Mr Ahmed's relationship with Mrs Azam was formed when he was in the United Kingdom lawfully and similarly his private life in the United Kingdom has been built up whilst he was here lawfully.*

(1) *The maintenance of effective immigration controls is in the public interest*."

In light of the Judge's findings, which have not been challenged, the public interest in these particular circumstances would indicate that it would be proportionate for the Appellant to remain in the United Kingdom.

8. I further agree with Mr Sharma that in light of the jurisprudence the onus is on the Secretary of State to justify removal from the United Kingdom in order for an entry clearance application to be made. On the particular facts of this case, given that the Appellant has been lawfully residing since October 2012, he is working and supporting himself and his wife from his earnings, he speaks English and importantly he has been lawfully resident during that period. I further take into account the fact that his initial English language certificate was from a provider that had not been approved by the Respondent. Were that not the case he would have been granted an extension of leave as a spouse and subsequently there is a reasonable expectation he would have been granted indefinite leave to remain. I find that the decision in Chen [2015] 1 JR UKUT 00189 (IAC) is distinguishable given that the Applicant in that case was an overstayer.

9. For these reasons, I find it would not be proportionate to expect the Appellant to be obliged to return to Pakistan simply in order to make a new entry clearance application, given that he has previously made such an application which was granted, as a result of which he entered the United Kingdom. I accept Mr Sharma's submission that there is nothing to be gained from requiring him to do that and nothing to be achieved by his removal, which I find is not required in light of the findings of the First tier Tribunal as to the section 117B public interest considerations. There are no adverse factors in this case that require consideration and that might have led to a different outcome.

Notice of Decision

10. The appeal is allowed on human rights grounds.

11. No anonymity direction is made.

Signed: *Rebecca Chapman* Date: 1 June 2017

Deputy Upper Tribunal Judge Chapman

ANNEX

IAC-AH-VP/DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03104/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 March 2017

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ZULFIQAR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel, instructed by Malik Law Chambers
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 14 March 1986. He first entered the United Kingdom on 3 October 2012 with entry clearance as the spouse of Mrs Nasrat Azam until 24 December 2014. On 19 December 2014 he made an in-time application to extend his leave to remain. This application was refused on 30 January 2015 pursuant to paragraph 284(ix)(a) on the basis that the English language test certificate he had provided had not been issued by an institution on the Respondent's approved list of providers. He appealed that decision and his appeal was dismissed by First-tier Tribunal Judge Brookfield in a decision promulgated on 29 April 2014 following an appeal on the papers. The Appellant then made a further application which was also refused on 21 January 2016. He appealed against this decision and his appeal came before Judge of the First-tier Tribunal Burns for hearing on 22 September 2016. In a decision dated 12 October 2016 the judge dismissed the appeal. It was conceded on behalf of the Respondent that the Appellant has a family life with his wife in the United Kingdom but the judge found that the Appellant and his wife were both born in Pakistan, were from the same area and still had family members there and had spent the majority of their lives in Pakistan. The judge at [42] found that there would not be insurmountable obstacles to them returning to Pakistan and in respect of consideration of Article 8 outside the Rules, the judge considered Section 117B of the NIAA 2002, noted at [48](2) that the Appellant can speak some English and has now obtained an English language certificate and at [48](3), he accepted the Appellant's evidence he has not been reliant on public funds and has been able to maintain and accommodate himself which was evident from his pay slips and a copy of his bank statements and in respect of Section 117B(4) and (5) his relationship with his wife was formed when he was in the United Kingdom lawfully and similarly in respect of his private life. However, at [49] the judge goes on to find that the Respondent's decision to refuse his application for further leave to remain is proportionate.

2. An application was made in time for permission to appeal to the Upper Tribunal on 21 October 2016. The grounds in support of the application firstly asserted that the judge failed to determine the appeal in respect of paragraph 287 of the Immigration Rules on the basis that the Appellant had been admitted pursuant to paragraph 284 of the Rules and had completed two years leave as a spouse of a person present and settled in the United Kingdom and it was submitted that the requirements of paragraph 287 were met. In the alternative, ground 2 submitted that the appeal should have been successful under paragraph 284 of the Rules in light of the decision in R (on the application of Bhudia v Secretary of State for the Home Department IJR [2016] UKUT 00025 (IAC). It was thirdly submitted that the judge had erred in his understanding of compelling circumstances, his assessment of the proportionality of removal of the Appellant and that he failed to make proper findings when considering the case in its entirety in respect of Section 117B of NIAA 2002.

3. Permission to appeal was granted on 11 January 2017 by First-tier Tribunal Judge Shimmin on the basis that the grounds disclosed arguable material errors of law in a decision.

Hearing

4. The Respondent provided a skeleton argument and a substantial bundle of evidence including the previous decision of Judge Brookfield and the Respondent's Rule 24 response. There was a substantial bundle of evidence from the Appellant of 147 pages on file and Mr Sharma handed up copies of the recent judgments in R on the application of MM Lebanon and Others v Secretary of State for the Home Department [2017] UKSC 10 and R on the application of Agyarko v Secretary of State for the Home Department [2017] UKSC 11.

5. Mr Sharma on behalf of the Appellant stated that, on reflection and having considered the decision of First-tier Tribunal Judge Brookfield, there was no longer any substance in grounds 1 and 2. Mr Sharma submitted that, once it was accepted by the Tribunal that the Appellant could not succeed under the Immigration Rules, the judge should have considered Article 8 outside the Rules and he sought to rely on the recent judgment of their Lordships in R on the application of MM Lebanon and Others v Secretary of State for the Home Department [2017] UKSC 10 at 67 which provides:

> *"Although Miss Giovannetti made some attempt to defend the statement, we remain unconvinced that its approach could be reconciled with the correct legal analysis, as now accepted by her: that is, that the rules are only the starting point for consideration under the Convention. But for the Government's altered stance, the rules, read with the grounds of compatibility statement would have faced a serious challenge on grounds of error of law. However, the change in the Government's stance means that the error is of historical interest rather than current relevance, so long as the rules are capable of being operated in a manner consistent with the Convention. Regardless of what was said in the statement, the rules themselves have always made clear that they left open the possibility of separate consideration under article 8".*

And at 76:

> *"As Lord Reed explains (Agyarko, para 47), this approach is consistent with the margin of appreciation permitted by the Strasbourg court on an 'intensely political' issue, such as immigration control. However, this important principle should not be taken too far. Not everything in the rules need to be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set out by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (Hesham Ali, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather*

than principle; and as such matters on which the tribunal ay more readily draw on its own experience and expertise."

6. Mr Sharma submitted that there is no principled reason why the Appellant should be refused leave and that in essence his application failed because of a technicality in that he did not have the correct English language certificate issued by an approved provider at the time he made the application. However, he now has the correct English language certificate: D48. He is also accommodated and maintained in the UK, arguably earning above the threshold set by Appendix FM-SE, therefore the requirements of the current Rules were met.

7. Mr Sharma further sought to rely on the decision of their Lordships in R on the application of Agyarko v Secretary of State for the Home Department [2017] UKSC 11. At [51] and [52] which provides as follows:

> "51. *Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department.*
>
> 52. *It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish – or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase – if there is a protracted delay in the enforcement of immigration control cf. EB (Kosovo) [2008] UKHL 41 at (15 and 37) and the judgment of the European Court in Jeunesse."*

Mr Sharma submitted that the judge should have considered these points in light of the evidence before him and his failure to do so constituted a material error of law.

8. On behalf of the Respondent, Ms Ahmad sought to rely upon the skeleton argument drafted by her colleague Ms Isherwood in respect of grounds 1 and 2. In respect of ground 3, she submitted that Judge Burns had made a full assessment of Article 8 outside the Rules. He made findings of fact at [38] and Appendix FM at [42] and Section 117B of NIAA 2002 at [46]. She submitted the judge was correct in finding that the Appellant did not come within the transitional provisions of the Immigration Rules and that the Appellant was familiar with the culture of Pakistan and had the ability and skills to work there. The judge also at [41] considered the position of the Appellant's wife.

9. In respect of the consideration of Article 8 outside the Rules, she submitted there were no arguments that the Appellant met the requirements of Appendix FM and the judge had given full reasons for his findings. His consideration might be brief but the judge did consider all the points and found at [52] that there were no very significant obstacles or insurmountable obstacles.

10. In respect of the judgment of the Supreme Court in Agyarko [2017] UKSC 11, Ms Ahmad submitted the starting point was the decision of the Upper Tribunal 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) and there was no evidence that it would be a disproportionate interference for the Appellant to be removed to Pakistan.

11. In response, Mr Sharma reminded me that the sponsor had become settled in the United Kingdom in 2009 and had been granted British citizenship in 2012 and that this was a matter considered to be relevant by the Supreme Court in their decision in respect of the sponsor in SS (Congo) as part of the cases grouped with MM (Lebanon) v Secretary of State for the Home Department (2017) UKSC 10. He submitted that the learned judge's starting point when considering the application outside the Rules would be the House of Lords decision in Chikwamba [2008] UKHL 40 and this test was met and there was no requirement for the appellant and the sponsor to have children in order to qualify under this principle.

Decision

12. I find that First-tier Tribunal Judge Burns erred materially in law in his consideration of Article 8 outside the Immigration Rules, for the reasons set out in the third ground of appeal. In particular, whilst at [48] the judge considered the application of section 117B of the NIAA 2002 and made findings favourable to the appellant based on the fact that he has at all times resided lawfully in the United Kingdom and has built up his family and private life whilst here lawfully; is not reliant on public funds and speaks English, there is no clear analysis as to why that does not then avail the appellant and there is no or no proper or adequate reasoning for the judge's conclusion at [49] that: *"I find the respondent's decision to refuse Mr Ahmed's application for further leave to remain in proportionate in all the circumstances."*

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman 30 March 2017

DIRECTIONS

13. I adjourn the appeal to be listed before me in order to remake the decision. I make the following directions:

    (a) Any further evidence upon which either party wishes to rely to be submitted five working days prior to the resumed hearing.

    (b) The appeal be listed for one hour.

    (c) The appeal be confined to submissions only, therefore no interpreter will be booked. If the appellant's representatives wish to call the appellant or the sponsor to give evidence and require an interpreter they should contact the Upper Tribunal to this effect.

    (d) The issues are to be confined to:

    (i) whether the appellant is able to meet the requirements of Appendix FM and Appendix FM-SE; and

    (ii) Article 8 of the ECHR.

14. No anonymity direction is made.

Signed: Rebecca Chapman Date: 30 March 2017

Deputy Upper Tribunal Judge Chapman