Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07605/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 10 January 2019	**On 20 February 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE KAMARA

Between

MUSHTIAQ AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Toal, instructed by The Legal Rights Partnership
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. He appealed to the First-tier Tribunal against the decision of the Secretary of State of 22 June 2017 refusing his application for leave to remain.

2. The appellant entered the United Kingdom on 30 September 2010 as a student with valid leave until 18 January 2013. He was granted extensions to his leave to 14 May 2014 and again until 23 May 2015. He married his wife on 24 May 2013. On 3

October 2014 he was served with a notice of removal from the United Kingdom. On 4 August 2014 his leave was cancelled by the respondent on the basis that he had fraudulently obtained the TOEIC certificate through the use of a proxy test taker. He made an application for leave to remain on the basis of family and private life on 19 June 2015. That application was refused on 30 October 2015. He made a further application for leave to remain on 13 January 2006, again on the basis of family and private life, and this application was refused on 24 September 2016. The refusal decision was certified but subsequent judicial review proceedings were compromised and thereafter the decision under challenge was made following the respondent's agreement to make a fresh decision.

3. In the decision under challenge the respondent found that the appellant had failed to meet the suitability requirements of S-LTR in paragraph R-LTRP.1.1.(d)(i) on the basis of fraudulently obtaining a TOEIC certificate and as a consequence using deception in his applications of 17 December 2012 and 13 November 2013. As he failed to meet the suitability requirements he could not benefit from the criteria set out at EX.1 and he did not qualify for leave under the 10-year partner route. Nor could he succeed under the ten year private life route as he did not meet the suitability requirements of the Rules. It was not accepted that there would be very significant obstacles to his integration into Pakistan if he were required to leave the United Kingdom and his application therefore was unsuccessful under the 10-year private life route.

4. The judge considered the evidence about the TOEIC test and concluded that the Secretary of State had not shown that the appellant had used a proxy to take the test and therefore he was not a person who needed to be removed from the United Kingdom and met the suitability criteria at S-LTR.1.6. The judge considered that there were not insurmountable obstacles to the appellant returning to live in Pakistan. Both he and his wife knew when their relationship began that he did not have indefinite leave to remain. He had not produced evidence to show that he had integrated into life in the United Kingdom. He had not made a private life in the United Kingdom of any significance. It was concluded that he could return to Pakistan and reapply under the Rules, noting that his wife earned over the £18,600 threshold.

5. At a hearing on 21 September 2018 Upper Tribunal Judge Allen found a material error of law in the judge's decision in that she failed to factor in her evaluation of proportionality her conclusion that, contrary to the Secretary of State's decision, the applicant was not guilty of fraud in relation to the English language test taken and the implications of that for his leave as a consequence should have been taken into account. The matter was therefore listed for rehearing before the Upper Tribunal on the point.

6. Mr Toal adopted his skeleton argument and developed the points made in it. He argued first that bearing in mind that the appellant had leave to remain to 23 May 2015, had that leave not been invalidated by the decision of 4 August 2014

concerning the TOEIC test, he would have been able to meet the requirements of the Rules on 23 May 2015 and that was the latest date on which he could have applied within time. The likelihood was that if he had made an Appendix FM application on or before that date it would have been refused with regard to the financial requirements of the Rules, as it was accepted that those requirements were not met at that time. There was no suggestion that he would have failed on any other basis. However, by 21 October 2015 his wife had been earning for the previous six months in excess of £18,600 a year. The detail of the earnings and jobs were set out in the skeleton argument, and in any event Mr Duffy did not dispute the evidence as to the couple's financial circumstances.

7. A possible scenario was that if the appellant had applied for leave to remain on 23 May 2015 and there had been no decision by 1 October 2015 he could have varied his application for leave to remain with the evidence of his wife's earnings and, if so, by the time of the decision after 10 October 2015 the likelihood was that it would have been found that the requirements of the Rules were met.

8. An alternative scenario to the leave to remain application being refused on the basis that the financial requirements were not met was that he would have had a right of appeal as it was a human rights claim as he had made an application as a spouse, and it was inconceivable that the appeal would have been heard before 1 October 2015. The question for the First-tier Judge then would have been with regard to the Rules, whether the appellant met the Rules at the date of hearing, not at the time of application or decision. This was not a case of a decision under the Immigration Rules where a requirement of the Rules had to be met at the date of application or the date of decision. The date of hearing would have been the appropriate date. On the basis of the evidence that would have been before the judge at the hearing it was highly likely that by the time of the appeal hearing the appellant would have been able to show that he met the requirements of the Immigration Rules and could succeed on Article 8 grounds. There would have been no need to show insurmountable obstacles to integration into Pakistan as that was only necessary if the appellant did not meet immigration status or financial requirements. The fact of his deprivation of a successful leave to remain application in the appeal because of the erroneous deception decision was an exceptional circumstance and therefore it would be a breach of his Article 8 rights to remove him.

9. The other basis of the case was that as of today the appellant met all the requirements of the Rules for a successful entry clearance as a partner under Appendix FM. The suitability requirements were satisfied as he had not cheated in the English language test. He was married to a British citizen. The real issue was the financial requirements issue. It was set out at paragraph 9 of Mr Toal's skeleton how this would be done on the basis of his wife's work where it could be seen that she was earning over £22,000 a year.

10. Reference was made to what had been said at paragraph 51 of the judgment of the Supreme Court in Agyarko [2017] 1 WLR 823 that in the case of an applicant even if

residing in the United Kingdom unlawfully who was otherwise certain to be granted leave to enter at least if an application was made from outside the United Kingdom there might be no public interest in his or her removal, citing the decision of the House of Lords in Chikwamba [2008] UKHL 40. Hence, on the evidence before the Tribunal it was fairly certain that the appellant would succeed in an entry clearance application and thus there was no public interest against the accepted interference with his Article 8 rights which were established by the judge's findings that his removal from the United Kingdom would engage Article 8. The history of his immigration status was relevant to exceptional circumstances. It should be found that removal would be in breach of his Article 8 rights.

11. In his submissions Mr Duffy argued that the difficulty with the submission that an October 2015 application would meet the financial requirements was that it left out the requirements of Appendix FM-SE which made it necessary for financial details from six months before the application to be provided. As a consequence, the appellant would never have been able to meet the requirements of the Rules, as in the six months period before the expiry of leave his wife was not earning enough money. So it was a question of whether it would be disproportionate for a person not meeting the requirements of the Rules to return to their country. It was clear from what had been said by the High Court in Nagre [2013] EWHC 720 (Admin), that there was a very small opportunity only in the case of a person who could not show insurmountable obstacles to meet the requirements of EX.1.(b) in establishing disproportionality. There was a very small class of cases where they could succeed outside the Rules where there were not insurmountable obstacles. There needed to be another reason why the appellant and his spouse could not relocate to Nigeria. A person could not choose whether they would exercise their Article 8 rights. So the first basis of Mr Toal's argument could not succeed.

12. With regard to the Agyarko point, it was necessary to consider what had been said in Chikwamba. The historical context was relevant. Chikwamba had found that it was not appropriate to say that a person who cannot meet the requirements of the Rules should apply for entry clearance and not jump the queue. The facts of Chikwamba were that the appellant's partner could not go to Zimbabwe with her as he was a refugee from Zimbabwe. That was the purpose of EX.1. If the current scheme of the Rules had existed at that time then the matter would have fallen under EX.1 but here the respondent was not asking the appellant to go and apply for entry clearance but was saying that they could both go and live in Pakistan as there were no insurmountable obstacles to doing so. The Chikwamba point did not bite. An entry clearance application could be made. There was no purpose to the Rule if the person did not meet its requirements at the time and could still succeed. There were no compelling factors outside the Rules which went against removal. EX.1 could not be met and that was the fall-back position. The appeal should be dismissed.

13. By way of reply Mr Toal argued with regard to the latter point that paragraph 51 of Agyarko expressed the principle very broadly and was not confined to cases of insurmountable obstacles to family life elsewhere. Chikwamba was cited as an

example but not an exhaustion of the possible scope of what was being said. In any event Chikwamba was expressed in broad terms and was not confined to the facts of that case and insurmountable obstacles and it was a question of why a person was required to make an entry clearance application if they met the requirements of the Rules. As regards the other point, the Tribunal had jurisdiction to look at pre-application evidence and if not, as Mr Duffy argued, it would be inconsistent with what had been said in Huang [2007] 2 AC 167 at paragraph 13 with regard to the nature of the appellate jurisdiction.

14. We reserved our determination.

15. It is clear that the appellant's leave was due to expire on 23 May 2015. He accepts that he would not have been able to satisfy the financial requirements of the Rules had he made an application before that date as at that point his wife's earnings were £16,674.48 per annum. It is likely therefore, as Mr Toal accepts, that an application for leave to remain would probably have been refused at that point. However, it appears that by 1 October 2015 he would have been able to satisfy the financial requirements of the Rules. Mr Toal's argument that as a consequence, if by that time the Secretary of State had not determined his application for leave to remain, he would have been able to vary the application, or if the application had been refused he would have been able to rely on his ability on or after 1 October 2015 to satisfy the financial requirements, is confronted by Mr Duffy's argument that Appendix AM-SE requires payslips covering a period of six months prior to the date of the application. One can see this requirement set out at Appendix FM-SE paragraph 2 which requires payslips covering a period of six months prior to the date of application. (Paragraph 9, for which there is a saving in paragraph 2, is not applicable to the circumstances of this case).

16. It must be right to argue as Mr Duffy does that as a consequence the appellant would not have been able to satisfy the requirements of the Rules whenever a decision was made on his application since his wife was not earning at the requisite level such as to enable her to provide payslips covering a period of six months prior to the date of application which at its latest would have had to have been 23 May 2015. However, he would have been able by 1 October 2015 to vary the application vis-à-vis the financial requirement in accordance with section 3C(5) of the Immigration Act 1971. That presupposes that a decision would not have made on the application before that date and upon that it is quite impossible to say what the position would have been. But it would appear that by the beginning of December 2015 the six months' requirement would have been satisfied.

17. So in order to have been able to satisfy the requirements of the Rules the appellant would have had to make his application on or before 23 May 2015, at a time when his wife's earnings were nearly £2,000 per annum short of the requirement set out in E-ECP.3.1 and would have to had to vary it at the point at which it could be shown that she had been earning at the requisite level for at least six months. And that would not have been possible if the respondent had made a decision on the application for

leave to remain before he had the opportunity to vary it. It must therefore be a matter of conjecture as to whether or not this would have been possible.

18. As regards the alternative point made by Mr Toal that by the time of the hearing, which would certainly have taken place some time later, the requirements of the Rules would have been satisfied by then, the difficulty with this submission is that the requirement of the Rules is with regard to the need to show payslips covering a period of six months prior to the date of application at the requisite date, and that could not be cured by the fact that earnings had been at the appropriate level subsequent to that time. The key issue is the question of whether or not the requisite level of earnings had been earned by the appellant's wife in the six month period before the date of variation of the application and that could not be cured in the Tribunal.

19. It is therefore as we say, a matter of conjecture as to whether or not the requirements of the Rules that had been met in that regard. We will return to this point shortly.

20. The alternative basis upon which the claim is put is that the requirements of the Rules would now be met and as a consequence if the appellant were to make an application for entry clearance he would succeed as he does not fall foul of the suitability requirements, it is accepted that he is married to a British citizen who is in the United Kingdom with whom he intends to continue living and her income is at least £18,600. In this regard Mr Toal, as noted above, places reliance on what was said by the Supreme Court in Agyarko. With regard to the point made by Mr Duffy in respect of Chikwamba and Agyarko, we consider that what was said at paragraph 51 in Agyarko is broader than the argument made by Mr Duffy. The decision in Chikwamba itself is, as Mr Toal argues, broader than the facts of that case, and the wording of paragraph 51 in Agyarko makes it sufficiently clear that, as it was put there, an applicant, even if residing in the United Kingdom unlawfully, was otherwise certain to be granted leave to enter at least if an application were made from outside the United Kingdom that there might be no public interest in his or her removal. It is not necessary for there to be insurmountable obstacles to the relationship continuing outside the United Kingdom for this principle to bite.

21. Bringing these matters together, we consider that there are difficulties with the first argument made by Mr Toal given the uncertainty as to when a decision by the Secretary of State would have been made on any putative varied application. But we do see force in the alternative argument. The appellant, through no fault of his own, had his leave curtailed on the basis of a decision about the TOEIC test which was subsequently shown to be wrong. That has had an adverse effect on him in the manner in which he sets out in his witness statement. We can see no reason and none has been put forward as to why he would not succeed in an entry clearance application on the basis of the matters summarised at paragraph 16 of Mr Toal's skeleton argument. In the particular circumstances of the case, although he might not have succeeded in a variation application given the uncertainties we have set out

above, we consider that there is no public interest in his removal from the United Kingdom and as a consequence his appeal is allowed under Article 8.

No anonymity direction is made.

Signed Date 24 January 2019

Upper Tribunal Judge Allen