Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13149/2017**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 30 July 2019	**On 8 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SOMIA ISHTIAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iyaz of Law Tec Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Andrew promulgated on 29 October 2018, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 3 March 1994 and is a national of Pakistan. On 13 October 2017 the respondent refused the appellant's for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Andrew ("the Judge") dismissed the appeal on article 8 ECHR grounds. Grounds of appeal were lodged and on 4 February 2019 Upper Tribunal Judge Martin granted permission to appeal stating *inter alia*

> 2. In a short decision and reasons the First-tier Tribunal Judge appears to accept that the appellant's application for further leave to remain as a spouse was refused solely because it was made three weeks after the expiry of her leave. The Judge appears to have accepted the explanation for that.
>
> 3. It is arguable that the Judge has failed to engage with article 8, not conducted a balancing exercise and failed to engage with s.117B of the Immigration and Asylum Act 2002.

The Hearing

5. For the appellant, Mr Iyaz moved the grounds of appeal. He told me that the Judge's article 8 assessment is flawed. He told me that the decision does not contain a balancing exercise. At [7] of the decision, the Judge finds that article 8 family life exists for the appellant. He told me that the Judge's decision is made entirely on the ability of the appellant to apply for entry clearance from Pakistan. He told me that the Judge did not weigh the impact of the respondent's decision against article 8 family and private life so that the requisite balancing exercise has not been carried out.

6. For the respondent, Mr Mills told me that the decision does not contain an error of law. He told me that it is not disputed that the appellant cannot meet the requirements of the immigration rules. He argued that the appellant would have to establish unjustifiably harsh consequences arising from the respondent's decision. He told me that (to succeed) the appellant does not establish that there are unjustifiably harsh consequences, and so cannot establish that the decision is a disproportionate interference with article 8 rights. He asked me to dismiss the appeal and allow the decision to stand.

Analysis

7. In the reasons for refusal letter the respondent finds that the appellant meets all of the suitability and eligibility requirements of the rules apart from E-LTRP 2.2. The appellant cannot meet that because her leave to remain in the UK expired on 5 February 2017, and her application for further leave to remain was not made until 11 March 2017. The only reason that application was refused is that the appellant submitted her application 34 days late.

8. At [7] of the decision, the Judge finds that article 8 family and private life exist. At [8], the Judge finds that the appellant cannot meet the requirements of the immigration rules because she submitted her application after the previous grant of leave to remain expired. Between [9] and [12] the Judge finds that the appellant can return to Pakistan & make a successful application for entry clearance from there.

9. The Judge gives no consideration to the impact of the respondent's decision on the appellant's established article 8 rights. No meaningful balancing exercise was carried out. The Judge does not explain how she reaches the conclusion at the final sentence of [12] of the decision. The Judge does not take guidance from section 117B of the 2002 Act. In the first sentence of [12] of the decision, the Judge searches for exceptional circumstances as a threshold before considering article 8 grounds outside the immigration rules.

10. In R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children**.** However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

11. In Agyarko [2017] UKSC 10 Lord Reed said again that if 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 and that point was illustrated by Chikwamba.

12. The Judge's decision is tainted by material error of law. The Judge races to conclusions without carrying out a properly considered balancing exercise. The Judge simply decides that the appellant can go to Pakistan to make an application for entry clearance from there, and does not explain why the journey to Pakistan, why an uncertain future & temporary separation, outweighs the right to respect for both family and private life.

13. The decision contains a material error of law I set it aside. There is sufficient information available for me to substitute my own decision.

The Facts

14. The appellant is a Pakistani national born on 03/03/1994. On 15/04/2011 she married the sponsor in Pakistan. The sponsor is a British citizen.

15. The appellant entered the UK on 20/05/2014 as the wife of a person present and settled in the UK. She has lived with her husband since then. The appellant's parents and siblings remain in Pakistan

16. The appellant's leave to remain expired on 05/02/2017. It was not until 34 days later (on 11 March 2017) that she submitted her application for leave to remain in the UK. The appellant meets all of the substantive requirements of the immigration rules, but her application was refused because she submitted the application after leave to remain had expired.

My Decision

17. Article 8 family life exists for the appellant because she lives with her husband. The appellant has been in the UK since 2014. Her home is in the UK. Private life within the meaning of article 8 exists for the appellant in the UK. It is not disputed that the appellant's application would have been successful if she had submitted it on time.

18. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deportation case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…" In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

19. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with
(iii) If so, was the interference in accordance with the law
(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

20. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

21. (a) The only part of appendix FM that the appellant cannot meet is E-LTRP.2.2, and that is because the appellant submitted her application after the previous grant of leave to remain had expired. The respondent's position is that if the appellant returns to Pakistan she can successfully make an application for entry clearance to be reunited with her husband in the UK.

(b) On the facts as I find them to be, the appellant has a genuine and subsisting relationship with her British Citizen husband. Article 8 family life exists for the appellant. On the facts as I find them to be the appellant could meet the requirements of the immigration rules if she returns to Pakistan and makes an application from there.

22. The respondent's position is that all article 8 ECHR considerations are embraced by the Immigration Rules. The fact that I find that the appellant can meet the requirements of the immigration rules indicates that the respondent has a willingness to grant leave to remain to this appellant. The respondent's decision must therefore be a disproportionate breach of the right to respect for family life. The respondent's own rules indicate that the decision is a disproportionate interference with the right to respect for family life.

23. Family life within the meaning of article 8 is established for the appellant. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control. On the facts as I find them to be the appellant can meet the requirements of the immigration rules, so that granting leave to remain creates no conflict with the public interest in effective immigration control.

24. The respondent says that the appellant can return to Pakistan and make an application for leave to enter from there. In R (on the

application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) it was held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. Where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

25. The refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life. The respondent's own rules indicate that the decision is a disproportionate interference with the right to respect for family life.

26. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) it was held that the decision in Shamin Box [2002] UKIAT 02212 is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. At paragraph 9 it was said that where the ground of appeal is limited to human rights " *Clearly there can be no question of entertaining an appeal on grounds alleging that the decision was not in accordance with the law or the immigration rules. These are not permissible grounds. However if ...the claimant has shown that refusing him entry ... does interfere with his ...family life then it will be necessary to assess the evidence to see if the claimant meets the substance of the rules. This is because... the ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance*".

27. Even when I give little weight to the relationship between the appellant and her husband, the relationship still carries sufficient weight because the appellant can meet each substantive part of the immigration rules.

28. I find that this appeal succeeds on article 8 ECHR grounds.

Decision

The decision of the First-tier Tribunal promulgated on 29 October 2018 is tainted by material errors of law and is set aside.

I substitute my own decision

The appeal is allowed on article 8 ECHR grounds.

Signed Date: 5 August 2019

Deputy Upper Tribunal Judge Doyle