Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: HU/18409/2019 (V)**

THE IMMIGRATION ACTS

Heard at Manchester CJC
On the 6th October 2021

Decision & Reasons Promulgated
On the 11th November 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KHAQAN AKBAR

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS (V)

For the appellant: Mr C Bates, Senior Presenting Officer

For the Respondent: Ms L Appiah of Counsel, instructed by Inayat Solicitors

This has been a hybrid remote hearing which has been consented to by the parties. The form of remote hearing was video by Teams (V), with the appellant and sponsor attending the hearing in person and the representatives attending remotely. At the conclusion of the hearing, I reserved my decision and reasons, which I now give. The order made is described at the end of these reasons.

1. For the purpose of this decision and in order to avoid confusion, I have referred below to the parties as they were at the First-tier Tribunal appeal hearing.

2. The appellant is a Pakistani national with date of birth given as 15.1.85.

3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 26.3.21 (Judge

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Williams), allowing the appellant's appeal against the decision of the Secretary of State, dated 25.1.19, to refuse his application for leave to remain in the UK on the basis of family life with his partner, Ms T Chana, a national of India with settled status in the UK.

4. Judge Williams concluded that there were insurmountable obstacles to family life continuing in Pakistan and/or that the decision produced unjustifiably harsh consequences and was, therefore, disproportionate.

5. The grounds as drafted argue that the First-tier Tribunal failed to provide adequate reasons for findings on material matters. The appellant could meet neither the financial income threshold nor the English language requirements of Appendix FM. It is submitted that the judge failed to give adequate regard to the fact that the appellant entered the UK on a visit visa in 2012 and overstayed without any lawful basis. It follows that little weight should have been accorded to any relationship formed when his immigration status was unlawful and the parties to the relationship were fully aware that in the circumstances persistence of family life was precarious. The judge failed to consider whether it would be reasonable to expect the appellant to return to Pakistan and make his application for entry clearance from there. It is argued in the alternative, that the appellant can return to Pakistan with the sponsor and there would not be insurmountable obstacles to continuing family life there.

6. Permission to appeal was refused by the First-tier Tribunal on 15.5.21. However, it appears from the wording of that decision that the judge intended to grant rather than refuse permission. When the application was renewed to the Upper Tribunal, Upper Tribunal Judge Mandalia granted permission on 25.6.21, considering it arguable that on any view the appellant could not satisfy the requirements of the Immigration Rules. "At paragraph [12] of the decision, Judge Williams noted the appellant did not meet the English language requirement and the immigration status requirement. For present purposes, it is at least arguable that Judge Williams erred in allowing the appeal for the reason advanced in the grounds."

7. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions of both representatives and the grounds of application for permission to appeal to the Upper Tribunal.

8. Under Appendix FM the appellant could not meet the eligibility requirements of E-LTRP 2.1 to 2.2 because he entered as a visitor with leave expiring on 9.2.13 and had been in the UK over 6 years without valid leave. Neither did he meet the English language requirements of E-LTRP 4.1 to 4.2, the explanation for which is not clear. Neither did he meet the eligibility financial requirements of E-LTRP 3.1 to 3.4 to demonstrate an annual income of at least £18,600, although Judge

Williams found that on the evidence before the Tribunal that threshold would have been surpassed on a theoretical fresh application.

9. The judge concluded that EX1 applied and in the alternative that under GEN 3.2 that the refusal to grant leave would result in unjustifiably harsh consequences for the appellant or his partner, or both. As this was a human rights appeal, the judge then went on to consider the matter under the Razgar stepped approach to article 8 ECHR, purporting to balance those factors for and against the appellant in the proportionality balancing exercise.

10. The judge purported to provide extensive reasons, citing country background information, as well as the evidence of the appellant and his partner, for finding that there would be insurmountable obstacles to family life continuing in Pakistan, based on the background of the appellant and his partner and likely hostility to their relationship in Pakistan. However, as Mr Bates highlighted in his submissions, there were a number of difficulties with the judge's treatment of the country background information. For example, the excerpts highlighted by the judge related to Pakistani women at risk from their own families in Pakistan. Other reports dealt with risk to Pakistani men in love-matches with Pakistani women. Mr Bates suggested that the reports were taken out of context and did not address the situation of the Pakistani appellant and the Indian sponsor. Furthermore, the judge did not address whether the couple could continue family life in India.

11. References in the decision to risk because the sponsor was previously divorced did not explain how those in Pakistan would know that the sponsor had been divorced or how, given that she was now married, this would become public knowledge or otherwise translated into risk for her or the appellant, particularly when they had been married under Islamic law. Mr Bates also submitted that the judge had taken a one-sided view of the appellant's circumstances and failed to consider what resources the couple might have on return to Pakistan. The grounds argue that the appellant could return to Pakistan with the sponsor, and it is contended that the factors considered by the judge do not amount to insurmountable obstacles, as the sponsor would be with her husband and not necessarily required to work, and they may find alternative accommodation if not able to stay with the appellant's family. Similarly, the judge's conclusion at [19] that the couple would have to live in poverty and the sponsor be unemployed is inadequately reasoned and made without consideration of the couple's resources.

12. I agree that the judge's treatment of the couple's circumstances at [16] and [17] of the decision unreasonably elevated challenges or difficulties into insurmountable obstacles. For example, whilst the appellant's return might exacerbate his mental health issues of depression, there was no evidential foundation that this would be the consequence of return. Furthermore, the judge failed to acknowledge that

mental health treatment is available in Pakistan. The judge appeared also to regard the fact that they are undergoing IVF treatment in the UK as likely to cause very serious hardship, again without acknowledging, as the refusal decision points out, that fertility treatment is also available in Pakistan. Similarly, "difficulties settling elsewhere" if his wife's "status" were to be discovered were also elevated to insurmountable obstacles to relocation. The judge also appears to consider that the loss of employment and accommodation in relocation to Pakistan amounted to very serious hardship, when there was no evidence that the appellant would be unable to find employment. As Mr Bates also pointed out, the circumstances of leaving accommodation and employment in the UK might apply to the majority of leave to remain applications.

13. After carefully considering the decision in the light of submissions from both representatives, I agree with the submission that the decision is unbalanced and provides insufficient cogent reasoning for the conclusions reached. These multiple concerns as to the judge's treatment of the issue of insurmountable obstacles or unjustifiably harsh consequences necessarily carry forward to the article 8 proportionality assessment, which it is clear from [33] of the decision the judge considered to be finely balanced and that balance was only just tipped in the appellant's favour.

14. As noted above, the grounds argue that the judge failed to give adequate regard to the fact that the appellant had overstayed and that, accordingly, little weight should be afforded to any relationship formed during this time. The judge did acknowledge the s117B considerations at [29] of the decision, noting that the appellant's immigration status has always been precarious and that his wife knew about his lack of status when entering into their relationship. However, I am satisfied from a reading of the decision as a whole that the judge failed to give any or any adequate weight to this important consideration.

15. The grounds also argue that the judge failed to adequately consider whether it would be unreasonable for the appellant to return to Pakistan and make an application for entry clearance from there, which would result in only a temporary separation. There was no reason given as to why the appellant had not taken the English language test. Contrary to the grounds, at [31] the judge did consider the Chikwamba/Chen scenario but concluded that a temporary separation would be disproportionate "as it would cause distress and unhappiness to the couple for no good reason – particularly as the application is likely to be successful as all the elements of the Immigration Rules, save his English test (which, taking into account his current knowledge/length of time in the UK, he could pass) would be met…" At [32] the judge added that "family life will be effectively seriously ruptured – due to the significant delay that would be involved in the appellant leaving the UK to make a fresh application (which in my judgement would be likely to be successful in any event) taking into account

the additional factor of Covid 19. Such a delay would needlessly cause distress and anxiety to the couple and put in jeopardy their financial security and health". At [31] the judge concluded that the appellant would pass the English language test, but it is far from clear on what evidence that view was taken and without an English language test it is difficult to conclude that entry clearance would be granted. In the circumstances, whilst the appellant may be able to meet the entry clearance requirements, it remains far from clear on the evidence before the Tribunal that he would necessarily do so. This is not, in fact, a Chikwamba/Chen situation where there was no question, but that entry clearance would be granted and therefore requiring return a pointless exercise.

16. I am satisfied that in reaching the conclusions set out above, the judge adopted an unduly generous or one-sided view of the appellant's immigration history, giving inadequate consideration to the public interest in enforcing immigration control and effectively taking no account of the 'little weight' requirement of the s117B statutory requirement in respect of the appellant's relationship with his partner, so that the reasoning is inadequate and the decision irrational. I agree with the respondent's submission that the reasoning is unbalanced and biased towards the appellant. For example, although accepting at [28] of the decision that pursuant to AM (Malawi) no positive right to a grant of leave arises from the strength of financial resources or fluency in English, and purporting to give no weight to them, the judge proceeded to effectively give significant weight to both these factors at [30] to [32] of the decision.

17. In the circumstances, the various concerns identified above render the decision flawed and in error of law.

18. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

19. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

The appeal of the Secretary of State to the Upper Tribunal is allowed.

I set aside the decision of the First-tier Tribunal.

I remit the remaking of the appeal to the First-tier Tribunal to be decided afresh with no findings preserved.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 6 October 2021