



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/12977/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 October 2014**

**Determination Promulgated  
On 11 November 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

**Between**

**MRS NABEELA BEGUM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Unrepresented

For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan and her date of birth is 2 January 1975. On 29 January 2014 she made an application to vary her leave on the basis of her relationship with a British citizen, Mr Gulfraz Kayani. The appellant had entered the UK as a spouse on 23 December 2011.
2. The appellant entered the UK as a spouse on 23 December 2011. She made an application for leave to remain on 29 January 2014. This application was refused by the Secretary of State in a decision of 28 February 2014. The application was refused under paragraph 284(ix)(a) of

the Immigration Rules because the appellant did not have the necessary English language qualification. The application was considered under Appendix FM and the decision-maker decided that the appellant could relocate to Pakistan with her family and that there were no insurmountable obstacles to this. It was also refused on the basis of private life under 276ADE of the Immigration Rules.

3. The appellant appealed against the decision of the Secretary of State and her appeal was dismissed (having been determined on the papers at the appellant's request) by First-tier Tribunal Judge Ross in a decision that was promulgated on 11 July 2014.
4. Permission to appeal was granted on 3 September 2014 by Judge of the First-tier Tribunal Davies. Thus the matter came before me.
5. The grounds seeking leave to appeal are lengthy and unclear. However, after distillation, they argue that; the Judge erred in dismissing the appeal under the Immigration Rules; that the appellant had a legitimate expectation that her appeal would succeed and that the Judge erred in concluding that the application was based on the appellant's child when it was actually based on the appellant being a spouse of a British citizen. 6.  
It is argued that the appellant's application is not subject to Appendix FM and that the Judge did not appreciate that the appellant had spent more than two years with her husband and child in the UK. The Judge did not attach any weight to Section 55 of the BCIA 2009. The Judge did not give any weight to the failure of the Secretary of State to allow the appellant the opportunity to produce the correct English language certificate. The Judge erred in that he did not consider Article 8 outside of the Rules.
6. Mr Wilding argued that there was no error of law and he questioned the decision to grant permission. Permission was granted on a different basis entirely by Judge Davies on 3 September 2014. It appears to me that Judge Davies did not engage with the grounds seeking permission. He granted the application because in his view there was an arguable error of law on the basis that Judge Ross made no reference in his determination to either the burden or standard of proof that is upon the appellant.
7. The appellant did not attend the hearing before the First-tier Tribunal having requested that the matter be determined on the papers. She did not attend the hearing before me. She submitted further evidence which was received by the Tribunal on 28 October 2014 with a covering letter that is dated 24 October 2014.
- 8 Judge Ross made the following findings:

6. Unfortunately the appellant has failed to comply with this condition because she has still only provided a certificate at level B1 dated 14 January 2014, and furthermore as was stated in the

refusal this provider is not approved by the Secretary of State. Accordingly the appellant cannot succeed under the rules.

7. The appellant also claims that she should succeed under article 8. Since her application was after 9 July 2012 it is subject to the introduction of Appendix FM of the Immigration rules in relation to family life, and paragraph 276 ADE. in relation to private life.
8. The requirements in relation to partners are set out at paragraph R-LTRP, which states that the appellant must meet the suitability requirements and the eligibility requirements of paragraph EX1. There is no suggestion that the appellant does not meet the suitability requirements. In relation to the relationship requirements the appellant must show that her partner is a British citizen in the UK the relationship between her and her partner must be genuine and subsisting and they must intend to live together permanently in the UK. Evidence must be provided which shows that since entry clearance was granted the applicant and her partner have lived together in the UK. There are also financial requirements to be met, and again the appellant must have passed the same language requirement as in the Immigration Rules.
9. It follows that since the appellant has not complied with the English language test requirement she cannot succeed under Appendix FM. The refusal letter is silent on the other requirements.
10. In relation to an application for leave based on the appellant's child, these are considered at paragraph E-TTRPT, and can be summarised as follows: the child must be under the age of 18 at the date of the application, living in the UK and is either a British citizen or settled in the UK or has lived in the UK continuously for at least seven years immediately preceding the date of the application and paragraph EX1 applies which states that the paragraph applies if in addition it would not be reasonable to expect the child to leave the UK or there are insurmountable obstacles to family life with the partner in question continuing outside the UK.
11. The appellant has not appeared to give evidence, and neither have the members of her family. The child in question has not lived in the UK for seven years, indeed I have not seen any evidence that the child is living in the UK. The appellant and her family have given no evidence as to why they cannot return to Pakistan and live there, or why it would be unreasonable to expect them to do so or that there are insurmountable obstacles which prevent them from continuing their relationship in Pakistan.

12. In relation to their private life, the appellant has not lived in the UK for 20 years, and it cannot be said that she has no social cultural or family ties to Pakistan since she has lived in Pakistan for all of her life, and speaks the language. She therefore cannot succeed under the private life provisions either.
13. The case of **Gulshan (Article 8 - new rules - correct approach) 2013 UK UT00640** makes it clear that the tribunal has no power to avoid waive or circumvent the immigration rules by in effect applying the law as it stood before the introduction of the new rules, unless there are exceptional circumstances, this would be the case where the consequences of refusal would be so unduly harsh that they would amount to a disproportionate failure by the state to respect private or family life.
14. The appellant has failed to produce any evidence to show that the circumstances in this case are exceptional, and therefore I consider that her article 8 claim must fail."

### **Conclusions**

9. I have taken into account the appellant's skeleton argument in the bundle that has been served with the covering letter of 24 October 2014.
10. The appellant could not meet the English language requirements of the Immigration Rules and thus the Judge had to dismiss her appeal under paragraph 284. The application was dated 29 January 2014 but the transitional provisions applied (see Part 8 A280 of the Rules). In these circumstances it is arguable that Appendix FM did not apply. However, this is not a material error of law.
11. There is a witness statement from the appellant, but there is scant evidence relating to her family and private life here. She did not take the opportunity of providing full and detailed witness statements in support of her appeal and she requested that the matter be determined on the papers. The Judge found that there was no evidence that the appellant's child (Muhammad Saqib Gulfraz, a citizen of Pakistan) was in the UK and no evidence why the family cannot return there together. The child had not been in the UK for seven years. Although the Judge found that there would be no insurmountable obstacles to relocation he also found that it would not be unreasonable to expect the family to return to Pakistan. He took into account that the appellant's husband is a British citizen. However, there was no evidence from him relating to his life here and the evidence from the appellant on the issue was skeletal. All the issues relevant to Article 8 (outside the rules) were considered by the Judge.
12. There was no discrete finding in relation to the best interests of the child, but this does not amount to a material error of law. It was the appellant's case that her son had been here since 2011, but the Judge was not even

satisfied that he was here in the UK. The child of the appellant will be 18 in December 2015 and there was no evidence from him relating to his life here or that in Pakistan (prior to coming to the UK). With the appellant's bundle submitted for the hearing before me there is a residence permit relating to her son confirming that he has settlement here. This was not before the First-tier Tribunal and in any event there is still no evidence from him or from his parents about his best interest other than general uncorroborated assertions in the appellant's witness statements.

13. If I were to set aside the decision and remake it under Article 8 outside the Rules I would have to do so through the prism of Section 117B of the 2002 Act I would go on to dismiss the appeal in the absence of evidence relating to the quality of the appellant's family's private and family life here or evidence of the difficulties the family would face should they be returned to Pakistan. The appellant's statement of 24 October 2014 does not add anything to the statement before Judge Ross.
14. In my view the Judge did not make a material error of law and the decision to dismiss the appeal under the Immigration Rules and Article 8 stands.

Signed: Joanna McWilliam  
2014

Date 8 November

Deputy Upper Tribunal Judge McWilliam