



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/42297/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 July 2014

Determination Promulgated  
On 21 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WALEED ABRAR  
(NO ANONYMITY ORDER MADE)

Respondent/Claimant

**Representation:**

For the Secretary of State:

Ms A Holmes, Specialist Appeals Team

For the Respondent/Claimant:

Mr Atif Wattoo, Solicitor, Sky Solicitors Limited

**DETERMINATION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal under the Rules and under Article 8 ECHR against the decision by the Secretary of State to refuse his application for leave to remain as the partner of a British national, who was under the age of 18 at the date

of his application. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The claimant is a national of Pakistan, whose date of birth is 4 April 1986. On 31 January 2011 he was granted limited leave to enter the United Kingdom as a student. His leave in this capacity expired on 30 November 2012. On 27 November 2012 he applied for an extension of stay, using a form FLR(O), version 07/2012. He was asked in which category he was applying, and he indicated he was applying for a reason not covered by other application forms. In a covering letter dated 27 November 2012 he said he was applying for leave to remain on the basis of family life with his British wife, Ms Jade Kurtiss. They had contracted an Islamic marriage on 15 November 2012 at a mosque, and their marriage had been solemnised at Hounslow Register Office on 17 November 2012 in the presence of their family members. He first met his wife around 14 November 2011 when they were working at the same workplace, namely Asda. They had got engaged on 27 August 2012 with the blessing of their families. They have been living together since 1 September 2012. As they had been together about three months, inevitably they had built up a very strong relationship with one another as a married couple.
3. The claimant referred to **Chickwamba v SSHD [2008]** for the proposition that only in a small number of cases involving family life would it be proportionate to return an applicant to make an entry clearance application from abroad.
4. Under the heading of Family Life, the claimant said he was sorry for his criminal conviction, namely drink driving. Since meeting Jade, he had improved. If he was removed from the United Kingdom now it would be too stressful and daunting to even reconsider readapting to a lifestyle in Pakistan, as his wife would be unable to return with him. She had never been to Pakistan, and furthermore her life was here, where she had a job and family.
5. The claimant's letter ended with a discussion of **MF (Article 8 - new rules) Nigeria [2012] UKUT 00393 (IAC)**. The claimant relied on the fact that the Upper Tribunal held in **MF** that the new Immigration Rules did not constitute a complete code for assessing human rights, and he indicated that his Article 8 claim should be allowed on exceptional circumstances outside the new Rules.

### **The Reasons for Refusal**

6. On 30 September 2013 the Secretary of State gave her reasons for refusing the claimant's application for leave to remain in the United Kingdom based on his relationship with Jade Kurtiss. The application had been considered under the partner route in Appendix FM. He stated that his partner's date of birth was 18 January 1995. At the time of his application, his partner was 17 years and 10 months old. To qualify for leave under Section D-LTRP his partner had to be over the age of 18. He therefore failed to fulfil the requirements of E-LTRP.1.4 of Appendix FM of the Rules. As his application fell for refusal under the eligibility requirements of the Rules, he could not benefit from the exemption criteria set out at EX.1.

7. A decision had also been made on exceptional circumstances. It had been considered whether his application raised or contained any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the ECHR, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Rules. It had been decided that it did not. His application for leave to remain in the United Kingdom was therefore refused.

### **The Grounds of Appeal to the First-tier Tribunal**

8. The grounds of appeal to the First-tier Tribunal contained extensive citation of authority. It was argued that the appellant's Article 8 claim was not properly considered under the new Rules, and not considered at all under Article 8 outside the Rules. The appellant had been in the UK for over two and a half years, and had a very strong family life in the UK.
9. The hearing of the appeal was fixed for 17 January 2014 at Hatton Cross. On 13 January 2014 there was received at Hatton Cross an indexed and paginated bundle compiled by Sky Solicitors Limited on 9 January 2014, and apparently posted on that day to the First-tier Tribunal and to the Presenting Officers' Unit in Feltham. The bundle contained a statement of additional grounds by the appellant signed on 8 January 2014. He said he was making a statement of additional grounds as a one-stop notice in accordance with Section 120 of the Nationality, Immigration and Asylum Act 2002. He intended to apply for and was entitled for leave to remain in the United Kingdom under Appendix FM of the Rules under the partner route. He met the eligibility criteria in Appendix FM, including the requirement that both he and his wife were over 18 years old. He also met the financial requirements. He and his wife had a combined specified gross annual income of at least £18,600; and he had successfully completed his entry level in ESOL International (Speaking and Listening) (Entry 1) A1 of the CFR with distinction in October 2013.
10. He understood the Tribunal was under a statutory obligation to act as a primary decision maker to consider and determine the contents of his statement as a fresh application. So he invited the Tribunal to exercise this function, and to allow his appeal.

### **The Hearing before, and the Decision of, the First-tier Tribunal**

11. The appellant's appeal was heard by Judge Khawar sitting at Hatton Cross on 17 January 2014. Mr Randahwa, Home Office Presenting Officer, appeared on behalf of the Secretary of State, and Mr Rana, Counsel instructed by Sky Solicitors Limited appeared on behalf of the claimant (although the judge got the representation the wrong way round in his subsequent determination).
12. The judge received oral evidence from the claimant and the sponsor, and found that they had given a truthful account of events as set out in their witness statements (paragraph 16).

13. In his closing submissions on behalf of the Secretary of State, the Presenting Officer submitted that the decision appealed against was in accordance with the Rule and in accordance with the law. The claimant had failed to make a further application under the Rules which he would have been entitled to do under Section 3 of the Immigration Act 1971. He submitted that the claimant should return to Pakistan in order to make an appropriate entry clearance application under the Rules.
14. On behalf of the claimant, Mr Rana relied on the majority decision of the Court of Appeal in **AS (Afghanistan) v SSHD [2009] EWCA Civ 1076** in support of the proposition that the claimant was entitled to a decision by the Tribunal as to whether he now satisfied all the requirements of Appendix FM.
15. Judge Khawar ruled in the claimant's favour. He found as follows at paragraph 22:

"Accordingly, on the basis of the evidence before me and the law, as set out herein above, I am satisfied that the [claimant] meets the requirements of Appendix FM of the Immigration Rules and is entitled to succeed in this appeal. While I accept that at the date of his application the [SSHD's] decision was in accordance with the Immigration Rules, plainly as the sponsor has attained the age of 18 years and in view of the [claimant's] further grounds of appeal pursuant to the Section 120 notice, the [SSHD's] decision now is no longer in accordance with the Immigration Rules. The [claimant's] statement of additional grounds was served on the respondent on 9 January 2014. The hearing of this appeal was on 17 January 2014. Therefore the [claimant] submitted his statement of additional grounds in good time, permitting the [SSHD] to consider the same."

16. As the Secretary of State's decision was no longer in accordance with the law, the judge found that the claimant was also entitled to succeed under Article 8 of the ECHR as developed in the common law.

### **The Grant of Permission to Appeal**

17. On 17 May 2014 First-tier Tribunal Judge McDade granted permission to appeal for the following reasons:

"The grounds of application for permission to appeal assert, inter alia, that the judge has not considered the requirement that in order to find in an appellant's favour under Article 8 there needs to be compelling circumstances. It is arguable these have not been addressed in the judge's determination. There is an arguable error of law."

### **The Hearing in the Upper Tribunal**

18. At the hearing before me, I received submissions from Ms Holmes and Mr Wattoo as to whether the decision of the First-tier Tribunal did, or did not, contain a material error of law. Having ruled in the Secretary of State's favour on this question (for

reasons which are set out below), I invited submissions from both parties as to how the decision should be remade.

### **Reasons for Finding an Error of Law**

19. In defence of the line taken by the judge, Mr Wattoo relies on four authorities. In **EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013**, the Tribunal held that a decision on a matter under the Rules is a decision on the detailed eligibility of an individual by reference to the particular requirements of the Rule in question in the context of the application that that person has made (paragraph 6). It was thus not open to an appellant to argue simply that, on the date of the hearing, he met the requirements of the Rules. He could only succeed if he showed that the decision that was made was one which was not in accordance with the Rules. Section 85(4) allowed him to show that by reference to evidence of matters postdating the decision itself, and it might well be that the effect of that was that the question for the Tribunal in an in-country case was whether the decision could be justified as a correct one at the date of the hearing. But that did not mean that the Tribunal was the primary decision maker. The Tribunal's task remained that of hearing appeals against decisions actually made:

“The correct interpretation of S85(4) is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing; he can succeed only by showing that he would be granted leave if he made, on the date of the hearing, the same application as that which resulted in the decision under appeal. The subsection does not permit an appellant to change his case under the Immigration Rules for being allowed to remain in the United Kingdom. (That is, of course, without prejudice to the fact that S84(1) may allow the appeal to succeed on different grounds entirely.)”

20. In **AS (Afghanistan) [2009] EWCA Civ 1076** the majority of the Court of Appeal approved a “wider interpretation” of the scope of the statutory “one-stop” procedure governed by Section 120 of the Nationality, Immigration and Asylum Act 2002; and Sullivan LJ observed in passing at paragraph [114] that the Tribunal's approach in **EA** was too restrictive. The AIT had not considered how Section 85(2) should be interpreted so as to be coherent, and work in harmony with Sections 96 and 120, bearing in mind the statutory purpose underlying those provisions.
21. In **AQ (Pakistan) [2011] EWCA Civ 833**, Pill LJ, giving the leading judgment of the court, held at paragraph [37] that Section 120 was not intended, and nor did it have the effect, of allowing a fresh application to be made to the Tribunal under the Rules, relying on events since the Secretary of State's decision.
22. Sullivan LJ agreed at paragraph [41]. He said that in **AS** the court was not concerned with decisions made by the respondent under the points-based system of determining applications for leave to remain. In such cases there is a “fixed historic timeline”. The effective operation of a points-based system required the points to be accumulated at the date of the Secretary of State's decision.

23. Lord Carnwath reviewed the law on this topic in **Patel & Others v Secretary of State for the Home Department [2013] UKSC 72** at paragraphs [34] onwards.
24. He observed at paragraph [42] that the broader approach of the majority in the Court of Appeal in **AS** seemed to have accorded with the reading of those responsible within the Home Office for advice to Immigration Officers. The Immigration Directorate's Instructions, issued in September 2006, noted it was not possible under Section 3C to make a second application, but continued:

"On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new ... if an application is varied post-decision, it will be open to the applicant to submit further grounds to be considered at appeal ... once an application has been decided it ceases to be an application and there is no longer any application to vary under Section 3C(5). So any new information will fall to be dealt with during the course of the appeal rather than as a variation of the original application."
25. Lord Carnwath concluded at paragraph [44] that although the arguments were finely balanced, he preferred the approach of the majority in **AS**.
26. In the light of these authorities, the judge was undoubtedly right to entertain the claimant's additional ground of appeal contained in his Section 120 notice of additional grounds. But the judge erred in law in allowing the appeal under the Rules. Appendix FM is a complete code (see inter alia **MF** in the Court of Appeal), and the claimant's original application for leave to remain on the basis of family life with his new wife was always doomed to fail under Appendix FM. For a mandatory eligibility requirement was not met, namely that the partner should be at least 18 years of age at the date of application. Although the Section 120 notice of additional grounds was put forward as a fresh application, it could not be treated as such as it was made after the refusal decision. It only had the status of an additional ground of appeal. So the Section 120 notice of additional grounds could not be relied upon as constituting compliance with the requirement that the applicant's partner should at least be the age of 18 "at the date of application".
27. At paragraph 20 of his determination, the judge characterised the Secretary of State's stance as verging on the perverse. But on analysis there was nothing perverse in the Secretary of State's stance. The claimant had applied for leave to remain outside the Rules, no doubt recognising that he could not bring himself within the scope of Appendix FM or Rule 276ADE. In accordance with paragraphs A277C to A280 of the Rules, the Secretary of State rightly considered and rejected the application under Appendix FM of the Rules, before going on to consider whether there were exceptional circumstances for granting the claimant relief outside the Rules. The judge should have adopted a similar approach, and asked himself the questions posed by the Tribunal in **Gulshan**.
28. Accordingly, the decision of the First-tier Tribunal was vitiated by a material error of law such that it should be set aside and remade.

### **The Remaking of the Decision**

29. The **Chikwamba** argument advanced by the claimant in his application for leave to remain outside the Rules was extremely weak at the time that he raised it. He had entered the United Kingdom relatively recently for a temporary purpose; and he had got married to a British national spouse in circumstances where both of them must have known there was no guarantee that they would be able to carry on family life in the country of their choice. Moreover, prima facie it was not harsh to require the appellant to return to Pakistan to apply for entry clearance as a partner, when the eligibility requirements were met. This was only going to involve a temporary separation.
30. However, with the passage of time the **Chikwamba** argument has inevitably gained greater traction. The eligibility requirements are now capable of being met, and the disruption and inconvenience consequential upon the claimant having to return now to Pakistan to regularise his status would be significant. Both the claimant and the sponsor are working, and it might take months for the entry clearance application to be processed.
31. Faced with a stark choice between, on the one hand, requiring the claimant to return to Pakistan to seek entry clearance, and on the other hand granting the claimant Article 8 relief, it is understandable that the judge below strongly inclined to the latter course, having concluded on the evidence submitted that the claimant would be bound to succeed in an entry clearance application.
32. However, the judge overlooked the existence of a middle way. While I am sympathetic to the **Chikwamba** argument, I do not consider that the effect of the refusal decision is to require the claimant to return to Pakistan in order to seek entry clearance. The claimant has the option of making an in-country application as the partner of a British national which complies with the requirements of Appendix FM and Appendix FM-SE. Provided that he makes this application within 28 days of the date when his appeal rights are deemed to be exhausted, he will not be treated as an overstayer. Moreover, Appendix FM specifically provides that he is eligible to make such an application.

### **Decision**

The decision of the First-tier Tribunal allowing the claimant's appeal under the Rules and under Article 8 of the ECHR contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed on all grounds raised.

Signed

Date

Deputy Upper Tribunal Judge Monson