



**The Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/29850/2014**

THE IMMIGRATION ACTS

**Heard at Manchester
On May 29, 2015**

**Decision and Reasons
Promulgated
On June 01, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MUHAMMAD SHAHID JAVED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant Mr Thornhill (Solicitor)
Respondent Ms Harrison (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan. He entered the United Kingdom on November 18, 2007 with a visit visa valid until May 14, 2008. The appellant became an overstayer after that date. The appellant and his wife, Julie Anne Allen, met towards the end of 2007/beginning of 2008 and on January 25, 2009 they underwent an Islamic wedding ceremony. They later regularised their marriage with a formal ceremony on January 27, 2011.

2. On November 6, 2008 the appellant submitted an application for discretionary leave to remain. This was refused on April 18, 2009 with no right of appeal because he was here unlawfully as an overstayer.
3. On February 24, 2011 he submitted an Article 8 application but this was refused on March 24, 2011. On May 12, 2011 he requested a reconsideration of this application and on July 1, 2014 the respondent refused his application to remain on the basis removal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998 and directions were given for his removal under section 10 of the Immigration and Asylum Act 1999.
4. The appellant appealed that decision on July 18, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
5. The matter came before Judge of the First-tier Tribunal Dickinson on October 2, 2014 and in a decision promulgated on October 13, 2014 he dismissed the appellant's appeal finding there were no insurmountable obstacles that brought the appellant within Section EX.1 of the Appendix FM. The FtTJ considered the appellant's claim under Article 8 ECHR but found the interference with his family life was proportionate.
6. The appellant lodged grounds of appeal on October 16, 2014 submitting the FtTJ had erred in his approach to both issues and on November 24, 2014 Judge of the First-tier Tribunal Shimmin gave permission to appeal.
7. The matter initially came before me on April 7, 2015 and having heard submissions I issued a decision on April 11, 2015 refusing the appellant's appeal under the Immigration Rules but finding the FtTJ had erred in his approach to Article 8 ECHR because in considering Article 8 he had not had any regard to the appellant's partner's medical condition and in particular whether that would make it unduly harsh for her to relocate to Pakistan with the appellant.
8. The respondent filed an additional bundle on May 7, 2015 that included the following documents:
 - a. Application form dated December 13, 2006
 - b. Refusal letter dated 28.12.2006
 - c. Notice of Appeal received April 2, 2007
 - d. ECM Review letter dated February 28, 2007
 - e. Evidence submitted in that appeal.
 - f. Determination of Immigration Judge Hall in the appeal of Muhammad Javed, date of birth March 3, 1977.
 - g. Application for discretionary leave and letter from legal advisors in support dated November 6, 2008.
 - h. Refusal letter dated April 18, 2009

9. Mr Thornhill had lodged three additional pieces of evidence namely a letter from the appellant's partner's doctor dated May 14, 2015, photographs of the family house and conditions and a statement signed by the appellant that addressed the earlier visa application dated December 13, 2006.
10. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

PRELIMINARY ISSUE

11. Mr Harrison agreed that all of the documents concerning the 2006 application did not relate to this appellant and no reliance was therefore placed on them.
12. It was accepted the appellant could not satisfy the Immigration Rules and in particular Section EX.1 of Appendix FM.
13. It was agreed that the appellant and Ms Allen would be called to give oral evidence.

EVIDENCE

14. The appellant adopted his statements dated September 17, 2014 and May 28, 2015. He confirmed the photographs, now adduced, were of his family home in Pakistan and that the people photographed therein were his sister-in-law and her children. The property was owned by his father and was a six-bedroom property with electric albeit the supply was intermittent. Currently living in that property were his parents, his brother, sister-in-law and their five children, all of whom were under the age of ten years. The property was basic and was unsuitable for his wife because of its remoteness and lack of facilities.
15. Under cross-examination he accepted there was nothing preventing him living elsewhere in Pakistan save his only skill/trade was as a tractor driver and farmer. He stated that there was an ongoing murder investigation as evidenced by the police report dated April 22, 2008 and this would prevent him returning although he later accepted in answer to questions put to him by myself that the alleged incident was reported on January 26, 2008 which was when he was in the United Kingdom. His only other concern was a fear of terrorism but he was unable to expand on that under questioning and it transpired that he was referring to general crime. As far as his wife was concerned he indicated that he helped her in the night with her tablets and attended to the hoovering and cooking of meals and taking her, on occasions, to the toilet. He was concerned that if they had to go and live in a city in Pakistan his wife would know no one and would have no one to turn to when he was at work.
16. Ms Allen adopted her witness statement dated September 17, 2014 and gave oral evidence. She confirmed she had impaired mobility and if she

had to go to her husband's home in Pakistan she would be unable cook for herself or use the toilet facilities because of her disabilities.

17. Under cross-examination she stated that she did not take any specific medication for what her doctor referred to as her mental state but she did take the medication referred to in the doctor's report. She received higher rate DLA and owned her own home and accepted there was nothing to prevent her husband returning to apply to enter as a spouse save she wanted him to stay here and she had serious concerns that if he returned the authorities would prevent him leaving. She agreed that she knew his status was precarious and that they had been together since late 2007/early 2008 but believed that because they had been allowed to marry everything was okay.
18. In answer to questions posed by myself she confirmed she spoke some Urdu but would be unable to hold a proper conversation.

SUBMISSIONS

19. Mr Harrison relied on the refusal letter dated June 28, 2014. He accepted the appellant enjoyed a genuine and subsisting relationship but this was entered into at a time when the appellant's status was precarious and was liable to be removed at any time. Ms Allen was fully aware of the situation but they chose to marry in spite of this knowledge. Mr Harrison submitted the appellant and Ms Allen should have considered the implications of the appellant's position and the fact they would have to live in Pakistan either permanently or on a temporary basis. If the appellant's home village was unsuitable then it was open to them to live in the city where work would be available. Alternatively, Ms Allen could remain here whilst the appellant returned to Pakistan and submitted an entry clearance application. Whilst Ms Allen had medical issues there was nothing before the Tribunal that suggested she would be unable to live in a city if she was unable to live in the appellant's home village. The decision to refuse the appeal under Article 8 was proportionate.
20. Mr Thornhill submitted there are competing interest namely immigration control and the personal facts of the case. Whilst the appellant's immigration status was precarious the Tribunal had to recognise it was dealing with real people and real emotions. The Court of Appeal in Agyarko [2015] EWCA Civ 440 indicated that a case could be exceptional even if there were no insurmountable obstacles and he invited me to have regard to the fact Ms Allen could not live in the appellant's village due to her personal circumstances and to require her to live elsewhere was disproportionate because of her condition and the fact she would have no one to help her when her husband was at work. The medical evidence was persuasive and tips the scales in the appellant's favour. I was invited to allow the appeal.

FINDINGS AND ANALYSIS OF EVIDENCE

21. I am only dealing with the Article 8 aspect of this claim. I previously found that the decision taken under the Immigration Rules was correct and in considering this appeal my starting point is that the appellant does not meet the Rules and there were no insurmountable obstacles preventing family or private life continuing in Pakistan.
22. In considering the facts of this case I have followed the approach set out in Razgar [2004] UKHL 00027 and by agreement the first four questions posed by Lord Bingham are answered in the affirmative. The issue is one of proportionality.
23. I found there had been an error in law because the FtTJ did not have regard to Ms Allen's medical circumstances and whilst I upheld the FtTJ's decision there were no insurmountable obstacles the Court of Appeal has reminded us in Agyarko that in considering Article 8 appeals there is a gap between Section EX.1 of Appendix FM and what Article 8 might require in some cases. However, Sales LJ went on to say,

“... In relation to precarious family life cases, as I observed in *Nagre* at para. [43], the gap between section EX.1 and the requirements of Article 8 is likely to be small.”
24. Section 117B of the 2002 Act sets out in statute those matters a Tribunal must have regard to when considering proportionality.
 - (1) The maintenance of effective immigration controls is in the public interest.
 - (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (4) Little weight should be given to—
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.'

25. The appellant's immigration history is poor. He came to the United Kingdom as a visitor but failed to leave the United Kingdom when his visa expired. His visa expired on May 14, 2008 and he took no steps to regularise his stay until November 6, 2008. He submitted an application on form FLR(O) but there was no reference to his relationship in either the document or the covering letter provided by his legal advisors. His application was refused without a right of appeal because he was here illegally but in any event I find no merit in his claim that he would be at risk from the authorities. The police document produced refers to an incident reported on January 26, 2008 but he had evidence to show he had been in the United Kingdom since November 18, 2007. Having been refused a right of appeal he did nothing to regularise his stay until he submitted an application on February 24, 2011-almost two years after his last application had been refused on April 18, 2009.
26. According to the evidence presented to me they had been in a relationship since late 2007/early 2008. They entered into a an Islamic marriage in January 2009 and I therefore find that their family life has effectively been created at a time when he was here unlawfully (Section 117B(4)(b) of the 2002 Act). I was invited by Mr Harrison to find that the appellant's family life was created when his status was precarious. Mr Mr Thornhill accepted their family life was created whilst his immigration status was precarious and of course Sales LJ does refer to the term "precarious family life cases".
27. Section 117B(5) only applies to private life but this does not mean the appellant's family life cannot be said to have been created while his immigration status was precarious.
28. However, in considering the maintenance of effective immigration control is in the public interest I have to have regard to not only these factors but also:
 - a. The appellant was able to conduct the hearing in English and would therefore be less of a burden on the State and would be better able to integrate into society.
 - b. He has never worked here and Ms Allen is reliant on benefits due to her medical circumstances.
 - c. He has no skills and whether he would be well-placed to obtain work in the United Kingdom is questionable.
 - d. There is nothing physically preventing either Ms Allen or the appellant living in Pakistan.
29. The medical evidence is not as persuasive as Mr Thornhill invited me to find. The first letter (page 23) is dated September 11, 2014 and simply states Ms Allen suffers from ongoing "chronic medical problems" requiring

regular surveillance and review both in hospital and at the surgery. Her complaints are listed in the letter. There is no letter from a consultant or from a hospital. The second letter dated May 14, 2015 confirms her ongoing medical problems as fibromyalgia, osteoarthritis and raised body mass. She takes various types of painkillers and amitriptyline. The doctor referred to her current medical and mental state but did not expand on the latter. Under cross-examination Ms Allen indicated she had good and bad days and when she had bad days she became depressed-this may explain the prescribing of amitriptyline. The medical report tells me about Ms Allen's ailments but the doctor provides no evidence that he has any insight into medical opportunities in Pakistan and he failed to consider the possibility of relocation to another part of Pakistan where there would be hospitals etc.

30. The rural conditions would be challenging for Ms Allen but I also have to consider the possibility of them living elsewhere. The appellant is fit and well and whilst he has no specific skills it was not disputed by Mr Thornhill that he would be able to find some work. Whether that would mean the appellant and Ms Allen had a comfortable life is another issue and not the test I am considering.
31. Both representative agreed that this case was about proportionality and having considered all of the available evidence I find as follows:
 - a. The parties are in a genuine and subsisting relationship but this relationship was formed and continues to be enjoyed whilst the appellant is here unlawfully.
 - b. The appellant's immigration status is and has been precarious from the day he arrived here. He came as a student and has been subject to removal at any time. The only thing preventing his removal has been his ongoing appeal. Any family or private life has been formed whilst his immigration status was precarious.
 - c. Both parties entered into their relationship in the knowledge he was here unlawfully and his immigration status was precarious.
 - d. The appellant speaks English and Ms Allen speaks a little Urdu. The appellant would be able to integrate in the United Kingdom and by implication would be less of a burden on taxpayers. Ms Allen has demonstrated she would be able to speak Urdu but it would take some time before she would be able to hold a proper conversation with someone (like her husband is able to in English).
 - e. The appellant has no skills or job experience and finding work in the competitive UK market may place an undue burden on the taxpayer especially as Ms Allen is reliant on disability benefits herself.
 - f. Ms Allen has medical problems which would make living in the appellant's village difficult. However, she has had these problems for

sometime and was aware of the appellant's immigration status when she began their relationship Internal relocation to another part of Pakistan remains an option for them albeit Ms Allen does not want to live in Pakistan at this time.

32. I have to have regard to all of the above factors and I remind the parties that statute states, "The maintenance of effective immigration controls is in the public interest."

33. Sales LJ made clear in Agyarko that-

"Thus it is possible that a case might be found to be exceptional for the purposes of the relevant test under Article 8 in relation to precarious family life even where there are no insurmountable obstacles to continuing family life overseas. This means that there is a gap between section EX.1 of Appendix FM and what Article 8 might require in some cases: see *Nagre*, paras. [41]-[48]. But this does not mean that the issue whether there are or are not insurmountable obstacles to relocation drops out of the picture where there is reliance on Article 8. It is a material factor to be taken into account: see *Nagre*, paras. [41] and [47]; *Rodrigues da Silva and Hoogkamer v Netherlands*, para. [39]; and *Jeunesse v Netherlands*, paras. [107] and [117]. In relation to precarious family life cases, as I observed in *Nagre* at para. [43], the gap between section EX.1 and the requirements of Article 8 is likely to be small."

34. There were no insurmountable obstacles under as defined by Section EX.2 of Appendix FM and I have to have regard to that fact but this is a precarious family life case where the appellant has been here unlawfully and the gap between Section EX.1 and the requirements of Article 8 are small.

35. Mr Harrison has submitted that the appellant can return to Pakistan (with or without Ms Allen) and make an application for entry clearance. He would not have to meet the financial requirements and Ms Allen owns her accommodation. However, Sales LJ made clear at paragraph [31] of Agyarko that-

"It is possible to envisage a *Chikwamba* type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion"

36. None of the evidence placed before me amounts to exceptional circumstances having regard to the full facts of the case.

37. In those circumstances and having considered all of the above factors I find it would not be disproportionate to require the appellant to leave the United Kingdom and the appellant's appeal therefore fails.

DECISION

38. There was a material error in respect of the Article 8 ECHR decision for the reasons previously found and I have remade that decision and I dismiss the appeal under Article 8 ECHR. I have previously upheld the dismissal of the appellant's appeal under the Immigration Rules.

Signed:

Dated: **5 August y**

Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no fee award for the reasons given by the FtTJ.

Signed:

Dated: **5 August y**

Deputy Upper Tribunal Judge Alis