



IAC-AH-VP-V1

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

Appeal Number: IA/48850/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 October 2015**

**Determination & Reasons Promulgated  
On 20 November 2015**

**Before**

**UPPER TRIBUNAL JUDGE GOLDSTEIN**

**Between**

**MUHAMMAD SIDDIQUE BUTT  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms S Naik, Counsel instructed by M & K Solicitors  
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This is an appeal by the Appellant a citizen of Pakistan born on 12 January 1963 against the decision of First-tier Tribunal Judge Row who, following a hearing in Birmingham on 6 March 2015 and in a determination promulgated on 10 March 2015, dismissed his appeal against the decision of the Respondent dated 26 November 2014 to refuse to grant to him leave to remain in the United Kingdom and for his removal by way of directions under Section 47 of the Immigration, Asylum and Nationality

Act 2006. The appeal was dismissed both under the Immigration Rules and on human rights (Article 8 of the ECHR) grounds.

2. The brief immigration history of the Appellant, is that he was granted entry clearance as a visitor valid from 3 January 2013 to 3 January 2015. The Appellant's last point of entry was 28 June 2014. He applied on 19 August 2014 for a variation of his leave to enter and it was that application which was refused by the Respondent in her decision of 26 November 2014.
3. The Respondent concluded that the Appellant could not benefit from the criteria set out at EX.1 and that the Appellant failed to meet the requirements of paragraph 276ADE of the Immigration Rules. Having proceeded to consider his claim under Article 8 and as to whether the Appellant's particular circumstances constituted exceptional circumstances consistent with his right to respect for private and family life that might warrant consideration of a grant of leave to remain outside the Rules, the Respondent took account of the need to safeguard and promote the welfare of children in accordance with her duties under Section 55 of the Borders, Citizenship and Immigration Act 2009.
4. In that regard it was noted that the Appellant entered the United Kingdom on 28 June 2014. He had a parental relationship with a child who was a British citizen and it was concluded the Respondent would not be denying the child's rights of being an EU or a British citizen, as it had been deemed as reasonable to expect the child to remain with the other parent in this country. It was thus considered to be proportionate to the legitimate aim of maintaining effective immigration control and it was decided that the grant of leave outside the Rules to the Appellant, was thus not appropriate.
5. In dismissing the appeal, the First-tier Tribunal Judge noted inter alia, that three of the Appellant's children were adults. The youngest was 12 and it was accepted he was fond of his father, a feeling that was mutual and that if his father had to leave the United Kingdom he would miss him. The Judge continued:

"On the other hand, the family life of the Appellant's family has been by choice conducted for 26 years on the basis that for much of the time the Appellant was in Pakistan and his family was in the United Kingdom. That would certainly be the position of the last five years. It was a choice which had suited the family at the time".
6. The Judge noted that in December 2014 the Appellant bought a fish and chip shop in Watford in his wife's name. £30,000 was paid towards the cost of the business and there was still a further £25,000 owing. The Appellant's wife ran the business with help of an employee and her two eldest children and worked long hours. All the children lived at home. The two eldest were at university.
7. The Judge noted that it was contended that if the Appellant had to return to Pakistan even for a few months whilst he made an application for leave to enter as a spouse (and no doubt as a parent) it would cause emotional hardship to himself and his family, particularly for the 12 year old who was close to him. It would also cause

financial hardship to the family, as the Appellant's wife would not be able to run the fish and chip shop business on her own, in that without the Appellant's help in the home, the business might in consequence fail. It would thus be a disproportionate interference with the Appellant's private and family life.

8. Insofar as the business was concerned and at paragraph 19 of his determination the Judge noted:

"... It was bought in December 2014 and had been run for three months. It was bought at a time when the Appellant and his wife knew that his immigration status was precarious. He had arrived on a visa and was awaiting the result of this appeal. They were fully aware of the potential risks when they bought the business and must have considered how they would manage it if the Appellant had to return to Pakistan".

9. The Judge continued at paragraph 20:

"In any event I do not find that the difficulties are as great as they make out, particularly if separation is for a relatively short period. The two eldest children are at home and work in the business. The third eldest is at home. All three of them might be expected to help out with childcare for the 12 year old."

10. It would be as well for the sake of completeness to set out below the Judge's further findings over paragraphs 21 to 28 as follows:

21. In assessing the public interest question I am obliged to take into account those matters set out in Section 117B of the Immigration Act 2014. The first of these is that the maintenance of effective immigration controls is in the public interest. The Appellant has made no attempt to comply with the provisions of the Immigration Rules. He simply sold up in Pakistan, arrived in the United Kingdom and sought to rely upon Article 8 of the ECHR.
22. There is no reason why he should not return to Pakistan to make an application for leave from there. He retains a business there. He has family including a mother and brothers there. He has lived most of his life in that country.
23. Secondly, it is in the public interest and in particular in the interest of the economic well-being of the United Kingdom, that a person who seeks to remain in the United Kingdom is financially independent. We do not know what the financial situation of the Appellant is, but the tax documents submitted by his wife do not indicate that he would meet the maintenance requirement of the Immigration Rules. The Appellant has submitted a number of documents which indicate that his wife is in receipt of Council Tax Reduction, Housing Benefit, Child Tax Credits, and Working Tax Credits (pages 135 to 142). None of this would suggest that he would not be a financial burden to the United Kingdom.
24. We do not know what the Appellant's proficiency in English is although it is noted that he gave evidence through an interpreter at the hearing.
25. I also take into account that the business was bought at a time when the Appellant's immigration status was precarious and the business was purchased in the full knowledge that he might be required to leave the United Kingdom.
26. It is reasonable for the Secretary of State to require a proper application to be made in the correct form, including the correct information, at the correct time and place to enable a reasoned decision to be made as to whether the Appellant

meets the requirements of the Immigration Rules. The United Kingdom, subject to compliance with its treaty obligations, is not obliged to allow the Appellant to remain upon its territory whilst the Appellant satisfies the Respondent that he meets these requirements.

27. These are all factors which in my view weigh heavily when considering the question of proportionality.
  28. There are no very significant obstacles to the Appellant's reintegration into Pakistan were he to be required to return there. He entered the United Kingdom in June 2014. He has lived most of his life in Pakistan. He has family and business connections there and is familiar with the language and customs of that country. Paragraph 276ADE(vi) of the Immigration Rules does not apply."
11. The Judge thus concluded that he was satisfied that the Appellant did not fulfil the requirements of the partner route (or I would observe the parent route) of Appendix FM as he did not meet the eligibility requirements having made his application whilst in the United Kingdom as a visitor.
  12. Further whilst the Judge accepted that there would be an interference with the Appellant's right to respect for his family and private life and that Article 8 was engaged, he found that such interference was in accordance with the law and necessary in a democratic society both for the economic well-being of the country and for the protection and the rights and freedoms of others that the interference was proportionate to the legitimate public ends on the facts of this appeal.
  13. Permission to appeal to the Tribunal was granted on the basis that it was arguable that the First-tier Tribunal Judge erred in law in his approach to Article 8 proportionality of the Appellant's removal to Pakistan in order to make an appropriate application for entry clearance to rejoin his wife and children in the United Kingdom.
  14. The renewed grounds referred inter alia to Chikwamba [2008] UKHL 40, Hayat [2012] EWCA Civ 1054, R (On the application of Chen) IJR [2015] UKUT 00189 (IAC) and MA (Pakistan) [2009] EWCA Civ 953.
  15. In Chikwamba their Lordships pointed out that the likelihood of return by entry clearance should not ordinarily be treated as a factor rendering removal proportionate. In Hayat it was made plain that in appeals where the only matter weighing on the Respondent's side of an Article 8 proportionality balance was the public policy of requiring an application to be made under the Immigration Rules from abroad that that legitimate objective would usually be outweighed by factors resting on the Appellant's side of the balance. In Chen it was pointed out inter alia, that in all cases it would be for the individual to place before the Secretary of State evidence that such temporary separation would interfere disproportionately with protected rights. It would not be enough to rely solely upon the case law concerned in Chikwamba. Lord Brown was not laying down a legal test when it 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.

16. In MA (Pakistan) it was held that following Chikwamba it was not appropriate to ask whether there were obstacles to the Appellant returning to his country of origin to seek entry clearance but rather whether it was reasonable to expect him to do so. The real question was not whether there were insurmountable obstacles to the Appellant returning, in that case to Pakistan, in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so. Thus was it reasonable?
17. That concept was followed in Hayat where within its guidance it was stated that where Article 8 was engaged, it would be a disproportionate interference with family and private life to enforce such a policy unless there was a “sensible” reason for doing so and whether it was sensible to enforce that policy would necessarily be fact sensitive.
18. The grounds further contended that the First-tier Tribunal Judge failed to properly address the issue of whether the decision to refuse to vary the Appellant’s leave to remain was disproportionate on the basis of the “no-switching” Rule, it being said that this was the sole reason for refusal under the Rules with respect to the Parent and Partner routes, the Respondent in her decision, referring to the mandatory eligibility requirements of the Rules. Here it was said the Appellant fell outside the Immigration Rules, because of the mandatory ban on switching from visitor to spouse/parent.
19. In the course of the hearing, I drew to Ms Naik’s attention, that this was not an issue raised in the original grounds of appeal or further grounds before the First-tier Tribunal Judge and there was nothing within the determination to suggest that the issue was raised before him by the Appellant’s Counsel (who was not Ms Naik). It was thus in my view not an appropriate challenge to the findings of the Judge to raise an issue that was not placed before him for his consideration.
20. In that regard, Ms Naik most fairly accepted that the Tribunal would not normally in such circumstances have to consider it, although she asked me to bear it in mind. I shall briefly do so at this stage of my determination as on its face I consider this challenge to be misconceived. The Secretary of State has made a Rule which has been endorsed by Parliament that says you cannot switch from one category to another. There are on its face, good reasons and indeed the entry clearance that is provided to visitors are a relatively light touch. Such a person’s status is as insecure as it could possibly be and is predicated on that person returning to his home country at the end of his visit. There can be no expectation that such a person is entitled to switch, in circumstances where it is clearly not provided for in the Rules, and it is thus proportionate to construct a system of immigration which does not, as a matter of right, permit a person of his own volition to change from one category to another.
21. The simple existence of a no-switching Rule is a continuation of the public interest in not allowing people who come as visitors, to further develop relationships here,

unlike others who are expected to return home and make an appropriate application for entry clearance.

22. In the present case and as I observed in the course of the hearing before me, no evidence was submitted on behalf of the Appellant that these provisions acted unfairly or prevented a visitor making an effective application for entry clearance on another basis after his return to his home at the conclusion of his visit to the United Kingdom.
23. Ms Naik drew my attention to the fact that the First-tier Tribunal Judge did not refer to any case law at all within his determination, notwithstanding that he had a case law bundle in front of him. She submitted that this was particularly important not least in a case that fell outside of the Immigration Rules. Further there had been no legal analysis of proportionality such as by reference to Razgar [2004] 2 AC 368. Ms Naik submitted that it was “inevitable” that the Judge’s failure to demonstrate a consideration of case law guidance against the backdrop of the facts as found “would have made a difference” and that the Judge “would have been obliged to make more findings consistent with that guidance”.
24. Mr Tarlow in response submitted that reference to case law in a determination may have been preferable, but it was clear from the determination that the First-tier Tribunal Judge had made comprehensive and reasoned findings of fact that were appropriate and not perverse. This was no better exemplified than by reference to paragraphs 19 to 21 of the determination (above). It was in Mr Tarlow’s view clear, that the judge had in mind the bundle of case law on file and that it was apparent that the judge’s reasoned conclusions encompassed such guidance. For example, at paragraph 21 of his determination the “sensible” reasons for the Appellant’s return to make an entry clearance abroad, were briefly identified that included a proportionality assessment and therefore no material error emerged from the Judge’s reasoning when reading the determination and his findings as a whole.

### **Assessment**

25. When I granted permission I was mindful of the contention in the grounds as to the utility of requiring the Appellant to return to Pakistan to seek entry clearance from abroad and whether it was proportionate for him to do so.
26. On further reflection I am satisfied that it must be legitimate to remove a non-national who has not established that he meets the requirements of entry clearance, when it is reasonable and sensible for him to return to his home country to make an application from abroad. There were as found by the First-tier Tribunal Judge no obstacles to his return to Pakistan for this purpose.
27. Whilst life in the United Kingdom for those remaining here would be subject to an inevitable degree of disruption, that was proportionate and reasonable given the circumstances.

28. Were the Appellant to fail in his out of country application that would be on the basis that there was a public interest requirement that he had not met and in such a case it was impossible to say that it would be unreasonable to refuse him entry clearance.
29. We cannot speculate as to whether the requirements for entry clearance upon the Appellant's application will be found to be met and the Appellant himself has not advanced his case on the case that they will be met.
30. Had it been established that all of the requirements for entry clearance would be there requiring nothing to be done but to travel to Pakistan and make an application that was bound to succeed, the Chikwamba principle establishes that such a fruitless expenditure of time and money and effort would be disproportionate.
31. The current case however is predicated on the uncertainty about whether those requirements are met and that can only be satisfied by the Appellant making his appropriate application from abroad as found by the Judge. The Judge clearly approached the case on the basis that he could not tell what the decision would be and he could not proceed on the basis that the Appellant had established the relevant requirements.
32. Assuming the Appellant does not meet the requirements of the Rules, there is nothing exceptional about his case. There is nothing unreasonable in requiring the Appellant to make an out of country application when he has a home and family to return to who will be continuing the status quo, ante which has been enjoyed for many years.
33. As found by the Judge, the Appellant's wife had a business where she was helped by staff and by a number of her children and it was not established on the evidence that this business would collapse if the Appellant returned to Pakistan.
34. The relevant child was at the time of the hearing 12 years old and inevitably requirements for his care were significantly different than for a child that was of more tender years. The First-tier Tribunal Judge in the present case clearly and broadly identified those factors within his reasoning.
35. It is not an error of law for a Judge to fail to direct himself specifically in terms of applicable jurisprudence provided it can be seen from his judgment that he has applied the right principles in reaching his decision.
36. Chikwamba was a case where the Appellant's partner was a refugee and did not have the option of returning to Zimbabwe but here the Appellant in effect seeks that the requirements of the Immigration Rules available to every other person should not apply in his case. It is not an appropriate use of Article 8 to seek thereby to circumvent the requirements of the Immigration Rules.
37. In this particular case, the Judge found that there were no compelling reasons as to why in order to avoid an infringement of Article 8, it was necessary to allow the Appellant to be excused from the need to meet the clear requirements of the Rules.

38. On the public interest there was a clear Rule of which the Appellant was aware, that he should return to Pakistan to apply for entry clearance and on the basis that there are cogent public interest arguments to support the contention that the Rules should be applied in a predicable and uniform manner.
39. The other side of the balance is founded on a remarkable situation, that because the Appellant started a business when he knew his status was precarious, he should not have to meet the requirements of seeking entry clearance.
40. This is an Appellant who had a history of moving between Pakistan and the United Kingdom and it is inconceivable that it can be said now to be disproportionate to expect him to return to Pakistan to do something he always knew he would have to do.
41. It is unarguable that the First-tier Tribunal Judge was required to set out a self direction identifying the jurisprudence. It was not an error of law for him not to do so. The only question is whether in reaching his determination he disclosed that the correct principles were applied. In this case, the Judge particularly had in mind all the matters relied upon by the Appellant including the best interests of the 12 year child and the fragility of a fledgling business acquired at a time when all around him knew that his immigration status was precarious. Therefore his failure to refer to the case law guidance is I find in the circumstances of this case, immaterial.
42. It is apparent to me given the findings of the Judge in the present case, that it cannot be said they were irrational and/or Wednesday unreasonable such as to amount to perversity. It cannot be said they were inadequate.
43. It is apparent to me that the First-tier Tribunal Judge reached findings that were supported by and open to him on the evidence and thus sustainable in law.

### **Decision**

44. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

No anonymity direction is made.

Signed

Date 16 November 2015

Upper Tribunal Judge Goldstein