



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/01799/2015

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 7 April 2016

Decision and Reasons Promulgated  
on 11 May 2016

Before

Deputy Upper Tribunal Judge Mailer

Between

MR ASIF MUHAMMAD  
NO ANONYMITY DIRECTION MADE

**Appellant**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Respondent**

**Representation**

For the Appellant: Ms C H Bexson, counsel, instructed by Hussain Haider  
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Pakistan, born on 1 November 1977. He appeals with permission against the decision of the First-tier Tribunal Judge who dismissed his appeal under the Immigration Rules and on human rights grounds in a decision promulgated on 30 July 2015.
2. The Judge set out the appellant's immigration history. He entered the UK on 17 March 2002 and claimed asylum. His appeal against the respondent's refusal was dismissed and removal directions were served on him in March 2003. He did not leave the UK.

3. In August 2013, he made an application for leave to remain as the husband of a person with indefinite leave to remain in the UK, namely Ms Dinah Acham, a national of Uganda.
4. His application was refused. Following his judicial review application, the respondent agreed to reconsider the application, and, if it were refused, to make a removal decision with an accompanying right of appeal. That led to the decision dated 17 December 2014 refusing his application and to remove him from the UK pursuant to s.10 of the Immigration and Asylum Act 1999. It was against those decisions that he appealed [4].
5. In refusing his application, the respondent accepted that although the appellant had a genuine and subsisting relationship with a settled partner, who had spent most of her life in the UK and had employment here, this does not mean that they could not live together in Pakistan. There was no evidence that there were 'insurmountable obstacles' to family life with that partner continuing outside the UK, as set out in EX.1(b), albeit it that it was acknowledged that there was a degree of hardship for the settled partner in doing so [6].
6. The appellant moreover did not meet the requirements of paragraph 276ADE (vi) of the Rules as he would not encounter very significant obstacles to re-integration into Pakistan society. Nor were there any exceptional circumstances requiring a consideration of his human rights claim outside the rules.
7. The respondent was not represented at the hearing before the First-tier Tribunal on 8 July 2015. The Judge clarified matters at the outset with counsel who represented the appellant (not Ms Bexson). Counsel could not say when the application was made, although it was after the changes to the Rules in July 2012. Counsel is said to have 'resisted the need for his solicitors to provide a copy of application to show the date when it was made, because he would pursue only an Article 8 EHCR argument' [11].
8. After hearing evidence from the appellant and his wife, Ms Achan, the Judge accepted that she would suffer insurmountable hurdles in living in Pakistan. She has two children in the UK, has lived here for 27 years and has not lived in Pakistan and does not speak Urdu or any other mainstream language used there, apart from English. She is Christian and is black; he did not consider that it is realistic for her, with the combination of these factors, to be able to live in Pakistan, and to be integrated into society there. He found that even returning with the appellant, a Pakistani national, she would face insurmountable obstacles in living there [34].
9. The Judge also rejected his claim that he could not return to Pakistan alone for reasons concerning his safety [35].

10. He found that the appellant could not meet the Rules [37-38]. Counsel is said to have conceded that the appellant 'could not now meet the Rules' [38].
11. The Judge then considered whether there were any identifiably "exceptional circumstances" outside the rules [39]. He noted that the Rules presuppose that there is a genuine and subsisting relationship with a settled person.
12. The Judge considered s.117B(4)(b) of the 2002 Act and noted that the appellant's wife confirmed that she knew her husband was unlawfully in the UK when they met [42]. In the circumstances, he was not satisfied that the requirement to make entry clearance from abroad for the couple to be reunited in the UK could give rise to a need to separately consider the Article 8 ECHR claim [43]. He dismissed the claim under the Rules.
13. He found that even if he were wrong in this regard, and that the claim should be considered under Article 8 of the Human Rights Convention, he would find that the appellant had a family and private life in the UK.
14. In terms of the proportionality of the proposed return, he noted his genuine relationship with a settled person and her adult daughters. He has been here for 13 years. On the other hand, he had been here unlawfully throughout; their relationship was entered into with both parties being fully aware that he may be required to leave and that she would be unable to return to Pakistan with him [47].
15. The Judge had regard to s.117B which requires that little weight be given to this relationship and to the private life relied on. His departure would not result in family life 'tumbling' [47]. He was not satisfied that the interference caused to their family life by removal would be disproportionate to the need for immigration control. He dismissed the appeal [47-48].
16. On 15 February 2016, Upper Tribunal Judge Canavan granted the appellant permission to appeal. It was arguable that, having found that there would be insurmountable obstacles to the appellant's wife living in Pakistan [34], the Judge erred in failing to consider whether the appellant met the requirements of paragraph EX.1(b) of Appendix FM, notwithstanding the concession made by his representative (arguably wrongly made in the light of the Judge's findings).
17. Ms Bexson relied on the grounds of appeal. She referred to the reasons for refusal, summarised by the First-tier Judge at [6].
18. She submitted that it was therefore evident that the only objection raised by the respondent was in respect of the failure of the appellant to prove insurmountable obstacles to his family life in Pakistan. She submitted that the Judge erred in dismissing the appeal despite having accepted that the appellant cannot continue

his family life along with his wife in Pakistan [34]. He expressly found that his wife would, if she returned with the appellant, face insurmountable obstacles in living there.

19. This is all the more so in the light of the earlier finding that the appellant is in a genuine and subsisting relationship with his wife, a settled person. From those findings, it was evident that the appellant met the requirements set out in paragraph EX.1(b) of the rules and was entitled to be granted leave to remain in the UK under the ten year partner rules.
20. In the Rule 24 response, it was submitted that it had been conceded that the appellant would not meet the requirements of the rules and that it cannot now be "reasonably argued" that the Judge erred in law by not considering certain sections of the Rules. The Judge correctly proceeded to consider Article 8 of the Human Rights Convention.
21. Mr Walker submitted that the alleged "concession" referred to has had the effect of 'muddying the waters'. He very fairly accepted that it is open to a Judge to decline to accept a concession if it is not considered that it was properly made in the circumstances. This was a case where the appellant's claim under the exceptions to the relevant eligibility requirements for leave to remain as a partner, should have been dealt with and considered by the Judge. This is particularly so in the light of the finding that there would be insurmountable obstacles to the appellant's wife living in Pakistan.
22. Mr Walker accordingly accepted that the decision should be set aside and re-made on the basis of the Rules.

### **Assessment**

23. I find that the concession made by Mr Walker was properly made. The First-tier Judge was not bound by counsel's asserted "concession."
24. In the reasons for refusal, the respondent was not satisfied that EX.1 applied in this case as he did not meet the requirements of R-LTRP.1.1 (d). That sets out the requirements for limited leave to remain as a partner. It is thus provided that the appellant must not fall foul for refusal under sections S-LTR: Suitability Leave to Remain; and also that he met the requirements of paragraph E-LTRP.1.2 – 1.12 and E-LTRP.2.1 and that paragraph EX.1 applies.
25. The respondent accepted that the appellant had a genuine and subsisting relationship with his settled partner. Whilst it is acknowledged that she has lived in the UK most of her life and is in employment here, this did not mean that they were unable to live together in Pakistan. There was no evidence to suggest that there are

any insurmountable obstacles in accordance with EX.2 preventing them continuing their relationship in Pakistan. He accordingly failed to fulfil the requirements under EX.1 (b) of Appendix FM.

26. The First-tier Judge however expressly found that the appellant did have a genuine and subsisting relationship. His wife was a settled person with adult daughters here. He found that even returning with the appellant, his wife would face insurmountable obstacles to living in Pakistan.
27. The Judge accordingly accepted that there would be very significant difficulties which would be faced by his partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for his partner. There was no contention that he fell foul of the suitability requirements for leave to remain. Nor was there any contention that he did not meet the requirements set out at R-LTPRP .1.1 (d) (ii).
28. In the circumstances, the Judge was required to consider whether the appellant met the requirements of paragraph EX.1 (b) of Appendix FM.
29. Accordingly, the failure to consider whether he met those requirements resulted in the making of a material error of law. I accordingly set aside the decision.
30. I was invited by the parties to re-make the decision on the available evidence.
31. I find, on the basis of the Judge's findings, properly arrived at, that there would be insurmountable obstacles to the appellant's wife living in Pakistan.
32. The appellant has accordingly demonstrated that he meets the requirements for limited leave to remain as a partner and that he has met the requirements of paragraph EX.1(b) of Appendix FM.

### **Notice of Decision**

The appeal is allowed under the Immigration Rules.

No anonymity direction is made.

Signed

Date 4 May 2016

Deputy Upper Tribunal Judge Mailer