



IAC-AH-KRL-V1

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

Appeal Number: IA/09176/2015

THE IMMIGRATION ACTS

**Heard at Bradford
On 18 March 2016**

**Decision & Reasons Promulgated
On 14 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MR AFZAN ASGHAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aziz
For the Respondent: Mr Diwnycz, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this decision I will refer to the parties by their designations before the First-tier Tribunal (FtT).

2. The respondent appeals the decision by First-tier Tribunal Judge Hillis (the Immigration Judge) to allow his appeal against the respondent's decision to refuse the appellant leave to remain in the UK. The Immigration Judge found that notwithstanding the appellant failed to meet the requirements of the Immigration Rules Article 8 of the European Convention on Human Rights (ECHR) was engaged. He found that the respondent had not been able to show that the interference with the appellant and his sponsor's family life was proportionate to the maintenance of effective immigration control. The Immigration Judge's decision is dated 28 June 2015 and was promulgated on 2 July 2015.
3. Upper Tribunal Judge Eshun gave the respondent permission to appeal to the Upper Tribunal on 29 October 2015 because the Immigration Judge appeared to have failed to make a proper finding on the question of whether it would be unjustifiably harsh to require the appellant and sponsor to return to Pakistan, where they could continue their family life. The grounds were at least arguable, in her view.
4. The grounds criticised the Immigration Judge, pointing out, that no weight had been given to the public interest in enforcing effective immigration control. The Immigration Judge appeared to have ridden roughshod over the requirements of the Immigration Rules and had failed to properly consider the requirements of the Rules, as well as the fact that it was not unjustifiably harsh for the appellant to continue his family life in Pakistan with the sponsor. These amounted to material misdirections of law. Article 8 does not oblige the UK to accept any person who wishes to form a family life in the UK without complying with the Immigration Rules. The obstacles to the re-settlement in Pakistan of the appellant and the sponsor were not insurmountable. Were they to do so, the couple could continue to enjoy their family life.

The Hearing

5. The hearing was fairly brief. A letter dated 16 March 2016 had been submitted shortly before the hearing but was received by the hearing centre on 18 March (the day of the hearing). In that letter the appellant's representatives asserted that their client had a "strong claim" on the basis that it would be disproportionate to expect the appellant to return to Pakistan and lodge a fresh application when it was clear that all the Immigration Rules would be met.
6. Mr Aziz attended the hearing and made oral submissions on his client's behalf as well as relying on the letter referred to. He said that the appellant had been in the UK for five years, that the sponsor was earning over the £18,600 threshold required but he had not "put the money in the bank" so that there were two missing entries in the bank statements submitted to the respondent. This meant that he did not comply with the requirements of the Rules. He described the requirements that his client go back to Pakistan to make a fresh application for entry clearance as a "waste of time" and serving no purpose. Accordingly, the judge was "right" to allow the appeal

under Article 8, having regard to the leading case of **Razgar [2004] UKHL 27**. The appellant had clearly established a family life in the UK and based on the facts there was no purpose served in splitting up the family.

7. Mr Diwnycz submitted that the sponsor could not meet the Immigration Rules as he had not deposited the money into the account evidencing the necessary funds for the purposes of those Rules. There was nothing “compelling” about the case. It had been wrong for the Immigration Judge to allow the appeal on Article 8 grounds.
8. At the end of the hearing I reserved my decision as to whether there was a material error of law and if so what should be done about it.

Discussion

9. An assessment under Article 8 requires a two stage approach:
 - (1) Whether the appellant meets the requirements of the Immigration Rules?
 - (2) Whether there are exceptional or compelling circumstances in the case making it necessary to go beyond those Rules?
10. The Immigration Judge correctly summarised the respondent’s case in paragraphs 15-16 as follows:
 - (1) that it was simply a matter of choice for the appellant and his sponsor to live in the UK and there were no insurmountable or very significant obstacles preventing their return to Pakistan;
 - (2) there were no compelling circumstances requiring the claim to be considered outside the Immigration Rules. Having regard to the recent case of **SS Congo [2015] EWCA Civ 387** the appellant could return to Pakistan and make a fresh application. His wife could travel there with him once she had paid her “cash” wages into her bank account for the relevant six-month period.
11. Having found that the appellant did not meet the requirements of the Immigration Rules in paragraphs 23 and 24 of his decision the Immigration Judge failed to go on and ask whether it was necessary to go beyond those Rules. He should have asked himself whether there were compelling circumstances requiring him to do so. There plainly were not and it was wrong to characterise the requirement of the appellant to return to Pakistan, from whence he came in November 2011, to make a fresh application, as a “significant interference with the appellant” or with his family life with the sponsor. There was no adequate basis for the Immigration Judge to conclude that it would “put a strain on the marriage” as the respondent had submitted, if the parties did decide to part for a few months this would be a matter of personal choice. The respondent was not bound to facilitate family life in the UK

amongst those who did not comply with the Immigration Rules. In my view the respondent correctly submitted that this was a matter of choice.

Conclusions

12. I do not seek to belittle the inconvenience and expense to which the appellant will be put by having to return to Pakistan. However, this must be seen in the context of the need to have a firm but fair system of immigration control. For the reasons already set out, the Immigration Judge failed to adopt the two-stage approach which has been suggested by a number of recent authorities, including **SS Congo**, and therefore erred. The Immigration Judge treated this case as a “near miss”, although he did not expressly say so. He was wrong to conclude that the expense of leaving the UK for a period of months was a “compelling reason” or a “significant obstacle” against doing so. In addition, the Immigration Judge failed to consider properly the provisions of Section 117A-D of the Nationality, Immigration and Asylum Act 2002 adequately. Those provisions explicitly recognised the public interest in the need for integration of those coming to the UK and to have regard to the need to ensure the economic well-being of the UK, which includes meeting minimum financial thresholds. Furthermore, little weight should attach to private life formed where one’s immigration status is precarious (see Section 117B (5) of the 2002 Act). The appellant came to the UK as a Tier 4 Migrant. He was never led to believe that he would be entitled to leave to remain in the UK. The Immigration Judge appears to have paid little regard to the public interest in maintaining effective immigration control. The respondent was entitled to take the view that until the appellant satisfied the requirements of the Immigration Rules there was every reason to fear that the appellant would become a burden on taxpayers.
13. The appellant having established a family life in the UK knowing that he needed to return to Pakistan at the end of his leave had not established a proper basis for remaining in the UK by virtue of Article 8.
14. Having regard to the wider public interest explicitly recognised by the Immigration Rules and by Sections 117A-D of the 2002 Act it was wrong for the Immigration Judge to conclude that the appellant fell to be considered under Article 8 in circumstances where he did not comply with the requirements of the Immigration Rules. It was not disproportionate to require the appellant to return to Pakistan and make a proper application. It would be likely that his wife, who is a UK national, could accompany him to Pakistan without any undue hardship.

Notice of Decision

15. The decision of the First-tier Tribunal contains a material error of law. I set aside that decision and substitute the decision of the Upper Tribunal which is to dismiss the appeal against the respondent’s decision to refuse leave to remain.

16. No anonymity direction was made by the FTT and I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

No fee award was made by the First-tier Tribunal and I make no fee award.

Signed

Date

Deputy Upper Tribunal Judge Hanbury