



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13161/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 June 2017

Decision and Reasons Promulgated  
On 12 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

AAMIR SHAHZAD AHMED  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J M Rene (direct access)

For the Respondent: Mr P Singh (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of Aamir Shahzad Ahmed, a citizen of Pakistan born 14 June 1986, against the decision of the First-tier Tribunal of 4 November 2016 dismissing his appeal brought against the decision of 27 November 2015 to refuse his application for leave to remain on human rights grounds.
2. The application of 20 May 2015 had been made on the basis of his connections with this country including his relationship with a British citizen, Laura Louise

Ahmed, who he had married on 23 October 2014; a letter from her stated that she feared kidnapping and murder in Pakistan where the culture was totally different to life in the UK, where she had a permanent job with the Midlands Trade Centre (earning £19,200 annually); she was by then pregnant. The Appellant explained that his family had disowned him because of his marriage to a white British woman, and that he would have no support or livelihood in Pakistan; his wife did not speak Urdu, only English.

3. The application was refused because, whilst the genuine nature of the marriage was accepted, it was not considered that there were insurmountable obstacles to the couple's relocation to Pakistan: any difficulties for Laura's adaptation to the different cultural and religious beliefs might be hard, but would not entail very serious hardship. The immigration history provided by the Respondent sets out that the Appellant arrived with leave to enter as a Tier 4 student on 25 July 2010, his leave being extended until 20 May 2015. An application of 8 January 2015 was refused on 2 March 2015.
4. The First-tier Tribunal heard the appeal, apparently accepting the historical facts asserted in the application. It dismissed the appeal because
  - (a) There were no insurmountable obstacles to life in Pakistan for the couple: any problems with the Appellant's family could be avoided by relocating to a different part of the country, there was no medical evidence as to any difficulties with the child's health (it seems an offer was made by the Appellant at the hearing to look at the medical records in the form of the Red Book customarily given to new mothers, but the Presenting Officer declined to do so);
  - (b) Alternatively the Appellant could return to Pakistan on a short-term basis and make an application for entry clearance, and that his wife could make appropriate childcare arrangements and resume work with the former employer who had given her a favourable reference; the reference to the wife's family being unable to help her save on the weekends, the claim that there was limited help available, because the grandfather had high blood pressure and the mother was a working nurse, was considered insufficient, absent more precise confirmation of their circumstances. 98% of visa applications were considered within 120 days so the period of difficulty would not be long.
5. Grounds of appeal contended that the First-tier Tribunal's decision was unlawful, for a failure to engage with the difficulties the couple would face in Pakistan given the Appellant's wife's British background and Western demeanour, and failed to assess the child's best interests having regard to the appropriate starting point for a British citizen child.

6. The First-tier Tribunal granted permission to appeal on 16 March 2017 on the basis that all grounds were arguable. A Rule 24 response asked that the appeal be dismissed as the First-tier Tribunal had properly directed itself.
7. Before me Mr Rene submitted that no attention was given to the objective evidence that supported the Appellant's claim that he and his wife would face insurmountable obstacles to life in Pakistan: for example, FCO travel advice from May 2015 that set out the heightened threats to British nationals travelling in Pakistan, including risks of kidnapping resulting in extended periods of detention. Other evidence itemised violent incidents, particularly in Lahore, including suicide attacks on churches and assaults on Christians. Additionally there was no express reference to section 117B factors, which had doubtless contributed towards the wrong starting point being adopted as to the correct approach to the consequences of a British citizen child's departure: no powerful reasons had been identified for considering the infant's relocation to be reasonable.
8. For the Respondent, Mr Singh submitted that the considerations identified in section 117B were addressed in substance if not form, given that the Appellant's English language proficiency, and the precariousness of his immigration status, were both specifically addressed. The Appellant could return to Pakistan temporarily to seek entry clearance, to avoid the whole family relocating to Pakistan: the First-tier Tribunal had found this to be appropriate, via reasoning that was not irrational. Terrorist dangers were not necessarily greater in Pakistan generally than in the UK: the FCO warnings regarding travel there were reminiscent of the situation in the UK, which after all had itself been on a heightened state of alert.

### **Findings and reasons**

9. I consider that the Appellant's grounds of appeal are made out, and there are material errors of law in the decision of the First-tier Tribunal.
10. The relevant parts of the Immigration Rules are

#### **"Section EX: Exception**

**EX.1.** This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with

refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

11. Firstly, there was no recognition of the appropriate starting point identified as relevant by Ex.1 vis-à-vis the best interests of a British citizen child. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, Ex.1 “establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary”; albeit that §73: “It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.”
12. It is often said that matters of weight are for the primary decision maker. However, where the alleged defect goes to the evaluation of proportionality and lies not simply in the balancing of particular factors but in setting the scales in the first place, the Court of Appeal has repeatedly recognised that it may amount to a material error of law, see for example Arden LJ in *IT (Jamaica)* [2016] EWCA Civ 932 §2:

“The tribunals in this case recognised the role of the public interest but fell into error because they did not direct themselves as to the weight to be given to it in balancing it against the interests of the applicant and others.”
13. Secondly, there was clearly an evidence-backed case going beyond the norm as to the circumstances in which the Appellant and his wife would find themselves in Pakistan. She would be a white British woman unfamiliar with the culture there. I do not think one can equate the express warnings against travel to the country given by the FCO with the general state of alert regarding the prospect of terrorist outrages in the United Kingdom: there is a difference between the general risks faced by the citizens of a country, to those present where a particular religious or ethnic group of migrants are targeted. The need to take measures to avoid standing out would materially impact on the Sponsor's freedom of movement and ability to integrate in Pakistan, and the couple would have to face the challenges of making a life for themselves without the social capital normally available from a supportive extended family.
14. Thirdly, the FTT addressed the possibility of the Appellant's return to Pakistan to seek entry clearance there. It did so as part of the consideration under the Rules, though that was a mistake: the reliance on the possibility of a short-term return abroad to apply for entry clearance is not a consideration posited by the Immigration Rules, see eg the headnote to *Chen (IJR)* [2015] UKUT 189 (IAC) at (i): there the Upper Tribunal went on to explain that a strong evidence-backed case may demonstrate good reason for departing for the general requirement of prior entry clearance, having regard to the principle identified in *Chikwamba* [2008] UKHL 40.
15. As shown by *Hayat (nature of Chikwamba principle) Pakistan* [2011] UKUT 444 (IAC), where the only matter weighing on the Respondent's side of an Article 8

proportionality balance is the public policy of requiring an application to be made under the Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the Appellant's side of the balance. As it was put by Elias LJ in *Hayat (Pakistan)* [2012] EWCA Civ 1054 at [30](b): "Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so." Similar thinking is seen more recently in *Agyarko* [2017] UKSC 11 §51:

"Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba ...*"

16. It seems to me that the First-tier Tribunal failed to have regard to these principles given that an evidence-backed case as to the difficulties that would be faced by the Sponsor absent the Appellant's presence was put to it. Those problems included the limited family support that would be available for childcare because of the health problems and professional commitments of relatives. Any shortfall in the availability of care would be likely to impact a British citizen babe-in-arms. The First-tier Tribunal needed to address how it would be that the child would be cared for, in the light of these difficulties, if the Sponsor returned to work.
17. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Signed

Date 1 June 2017



Judge Symes  
Deputy Judge of the Upper Tribunal