



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

Appeal Number: HU/02505/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 16 September 2019**

**Decision & Reasons Promulgated
On 16 October 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**ANSAR [K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of Counsel, instructed by Kalam Solicitors
For the Respondent: Mr S Kandola, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Law promulgated on 26 June 2019, in which the Appellant's appeal against the decision to refuse his human rights claim dated 17 December 2018 was dismissed.
2. The Appellant is a national of Pakistan, born on 13 October 1981, who first entered the United Kingdom on 24 January 2009 with leave to remain as a student to 31 May 2010. A further application for leave to remain as a student was rejected and the Appellant has remained in the United

Kingdom unlawfully since 11 June 2010. Further to being encountered by immigration officers during the enforcement visit, the Appellant made an application on 20 September 2017 leave to remain on human rights grounds, which was refused on 28 September 2017. His most recent application was on 13 March 2018 for leave to remain on the basis of private and family life.

3. The Respondent refused the application the basis that the Appellant could not meet the immigration status requirements for leave to remain under Appendix FM and could not show that they would be insurmountable obstacles to family life continuing outside of the United Kingdom for the purposes of paragraph EX.1 of Appendix FM. In particular, the Appellant's partner's father could be cared for by others in the United Kingdom and the Appellant would be able to support himself on return to Pakistan. The application was also refused under paragraph 276ADE of the Immigration Rules on the basis that there were no very significant obstacles to the Appellants reintegration in Pakistan. The Respondent did not accept that there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules and there was no evidence of the Appellant's claimed child from a previous relationship, or that there was any genuine and subsisting parental relationship with that child.
4. Judge Law dismissed the appeal in a decision promulgated on 26 June 2019 on all grounds. At his appeal hearing, the Appellant did not rely on any relationship with a child in the United Kingdom, pursuing his appeal primarily on the basis of his partner's care for her father; that an application for entry clearance for him to join her as a spouse would be bound to succeed and on the basis of ongoing fertility treatment for the Appellant and his partner.
5. The First-tier Tribunal found that there would be no very significant obstacles to the Appellant's reintegration in Pakistan such that he did not meet the requirements of paragraph 276ADE of the Immigration Rules and that there were no insurmountable obstacles to family life continuing outside of the United Kingdom for the purposes of Appendix FM. In particular, the Appellant had not addressed the points in the refusal letter about alternative care for his partner's father and there was no right to remain in the United Kingdom for fertility treatment.
6. Overall, the Appellant's removal was not found to be a disproportionate interference with his right to respect for private and family life, taking into account the public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002, including that the Appellant was not financially independent, that he had overstayed in the United Kingdom for many years and the First-tier Tribunal was not satisfied that the application for entry clearance was bound to succeed.

The appeal

7. The Appellant appeals on two grounds. First, that the First-tier Tribunal materially erred in law in its assessment of whether an application for entry clearance would be likely to succeed, following cases of Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 and Agyarko v Secretary of State for the Home Department [2017] UKSC 11. Although the First-tier Tribunal accepted that the Appellant would be exempt from the financial requirements under Appendix FM as his partner was in receipt of carer's allowance, the Judge found that there were other suitability and communication requirements to be met. However, no suitability issues were raised in the refusal letter or during the course of the appeal and in relation to accommodation, there was no dispute that the Appellant is already residing with his partner in the United Kingdom and would do so on return.
8. Secondly, the First-tier Tribunal erred in its determination of the consequences of the Appellant's partner leaving the United Kingdom in circumstances where she is the primary carer of her father and is his registered carer. This should have been taken into account in the balancing exercise under Article 8, using a balance sheet type approach and with more detailed reasons given for the evidential findings.
9. At the oral hearing, Mr Karim on behalf of the Appellant relied on the written grounds of appeal and made further oral submissions. In relation to the issue of the care provided by the Appellant's partner to her father, this is dealt with in paragraph 18 of the decision of the First-tier Tribunal, in which there is no recognition that the factor may be relevant to the Article 8 assessment as well as whether there are insurmountable obstacles to family life continuing abroad. The evidence in relation to caring was provided in the Appellant's written statement at paragraph 5 and in his partner's written statement at paragraphs 5 and 7. This is supported by a letter from a GP that the Appellant's partner is a registered carer for her father and entries in the medical records show that both the Appellant and his partner attended an appointment with her father, with the Appellant assisting in interpretation. There would therefore be a disruption in the care provided if the Appellant were removed even for a temporary period to make an application for entry clearance to the United Kingdom.
10. In relation to the Chikwamba point, Mr Karim relied on paragraphs 35 and 51 of the Supreme Court's decision in Agyarko and maintained that the issue was squarely before the First-tier Tribunal. The principal was not exclusively applicable to cases involving children and the relevant factors are that there would be disruption to the Appellant's fertility treatment and disruption to the care provided to his partner's father. In these circumstances, if an application for entry clearance is bound to succeed, there would be no public interest in removing the Appellant and nothing therefore to outweigh his private and family life established in the United Kingdom. The First-tier Tribunal erred in relying on possible reasons for refusal of an entry clearance application, which were contrary to the

Respondent's refusal letter and position in the appeal, in which no suitability concerns were raised.

11. Mr Karim accepted that fertility treatment alone was not sufficient to warrant a grant of leave to remain, but was one factor which needed to be taken into account in the proportionality assessment, which the First-tier Tribunal failed to do.
12. On behalf of the Respondent, Mr Kandola submitted that the evidence in relation to the Appellant's partner's father was particularly thin and could not establish an insurmountable obstacle to family life continuing outside of the United Kingdom. It was submitted that this factor did not affect the assessment of Article 8 outside of the rules.
13. In relation to the Chikwamba point, this is not an automatic matter to be considered by a First-tier Tribunal, and it was submitted that something exceptional is required for it to benefit an individual, for example the presence of children, although it was accepted that the provision of care may be relevant.

Findings and reasons

14. In relation to insurmountable obstacles, the findings of the First-tier Tribunal are as follows:

"18. The first factor is that the sponsor was said to be the sole carer and received carer's allowance in respect of her father. The refusal letter addresses this by saying that her father would be entitled to access free healthcare by the NHS. This is an argument which neither the appellant nor sponsor referred to in their statements and so I am not satisfied that this factor constitutes an insurmountable obstacle. Many married couples have to live some distance away from the parents for employment reasons and so are not able to become full-time carers.

*19. The second factor is that the appellant and sponsor are receiving fertility treatment. However, in **Erimako v SSHD [2008] EWHC 312** the Court rejected the contention that a person or persons in this country, otherwise without any right to remain in this country, should be entitled to remain in this country in order to undertake fertility treatment (paragraph 8 of the judgement).*

20. No other factors were put forward on the half of the appellant. I note that neither the appellant nor the sponsor mentioned any health concerns and I find that there are no health considerations relevant to whether they could live in Pakistan."

15. For these reasons, the First-tier Tribunal was not satisfied that there were any insurmountable obstacles to family life continuing outside of the United Kingdom.
16. The evidence before the First-tier Tribunal in relation to care for the Appellant's partner's father was very limited indeed. The Appellant's written statement states that his partner is the only carer for her father, who was paralysed in 1974 following a stroke, and that the Appellant also shares the caring responsibilities for him. In her written statement, the Appellant's partner states the same and additionally that the Appellant helps with doctor's appointments and cares for her father sometimes whilst she is out shopping. She states that there is no one else to look after her father. The Appellant's partner's GP confirmed in writing that she is registered as her father's carer and attaches his medical records which set out a number of minor ongoing problems and medication. The Appellant's partner is in receipt of carers allowance, meaning that the Department for Work and Pensions are satisfied that she provides at least 16 hours care per week for her father.
17. There is a letter in the bundle from the Appellant's partner's father stating that he cannot walk, or can only walk a few steps with great difficulty and that he needs constant care throughout the day and night. He said that his daughter cares for him and helps him to dress, eat, undress, giving medication, cooks for him, helps him use the toilet and generally keeps an eye on him. It is however unclear from the evidence as to whether the Appellant's partner lives with the Appellant or with her father, her written statement gives her address as the same as the Appellant, but some correspondence is also addressed to her at her father's address.
18. On the basis of the limited evidence before the First-tier Tribunal, I find no error of law in the assessment of whether there are insurmountable obstacles to family life continuing outside of the United Kingdom. There was no evidence about whether any alternative care would be available for the Appellant's partner's father and if so, no reason given as to why this would not be appropriate. The statement from the Appellant's partner's father suggesting that he requires constant live in care is also not supported by what the Appellant or his partner themselves say, nor is it supported by the contradictory evidence of where the Appellant's partner actually lives. The Appellant's desire to continue fertility treatment in the United Kingdom does not assist his claim insurmountable obstacles to family life being continued abroad for the reasons given by the First-tier Tribunal and further, there was no evidence before the First-tier Tribunal that such treatment would not in any event be available in Pakistan. For these reasons, there is no error of law in the assessment of insurmountable obstacles.
19. In relation to Article 8 more generally, the First-tier Tribunal sets out relevant case law and findings that the Appellant and his partner in a genuine subsisting relationship and that the Appellant has established

some degree of private life in the United Kingdom. The public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002 are applied in paragraph 31 of the decision. In particular, it was found that the Appellant was not financially independent, his relationship was established at a time when he was in the United Kingdom unlawfully and little weight can therefore be attached to his private and family life.

20. The First-tier Tribunal refers to the cases of Chikwamba and R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC), noting that it would be comparatively rarely, certainly family cases involving children, that an Article 8 case should be dismissed on the basis it would be proportionate and more appropriate for an individual to apply for leave from abroad. Specifically, in relation to Chen, it was noted that in all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights.
21. In paragraph 35 of the decision, the First-tier Tribunal found that although the Appellant would not have to satisfy the income requirement because his partner received carer's allowance, there are other issues such as accommodation and suitability which would have to be considered on the application for entry clearance. In these circumstances the First-tier Tribunal was not satisfied that the application for entry clearance would be bound to succeed.
22. In the reasons for refusal letter, the Respondent expressly accepted that the Appellant's application did not fall for refusal on suitability grounds and the relationship eligibility requirements were all met. There was no express reference to the financial or accommodation requirements, although as accepted by the First-tier Tribunal, the Appellant would be exempt from the financial requirements because his partner is in receipt of carer's allowance. The First-tier Tribunal erred in raising suitability requirements as a possible reason for refusal of an entry clearance application in light of the Respondent's acceptance that these did not provide any basis for refusal. However, accommodation requirements would still be required. It had not been accepted by the Respondent that these were or would be met and there was no evidence before the First-tier Tribunal on this matter. In particular, as above, there was instead contradictory evidence as to where the Appellant's partner was living and evidence that the Appellant was supported by his partner, herself wholly supported by public funds. For these reasons there is no material error of law in the assessment of whether an entry clearance application would be bound to succeed despite the error in relying on suitability criteria, as its success had not been established on all other grounds.
23. In any event, as confirmed by the Court of Appeal in Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423 (at paragraphs 43 to 45), the facts in Chikwamba were striking and the application of the principle does not trump all public interest matters, including, for example

a poor immigration history. Even in cases where an applicant was certain to be granted leave to enter, there *might* be no public interest in removing the applicant. What is required is a fact-specific assessment in each case, the principle will only apply in a very clear case and even then, will not necessarily result in a grant of leave to remain. On the facts and evidence before the First-tier Tribunal, which did not include any evidence at all of the impact of a temporary separation if the Appellant were to return to Pakistan and make an entry clearance application, this is not a very clear case in which Chikwamba would in any event have assisted the Appellant.

24. Finally, the First-tier Tribunal noted that whether there were insurmountable obstacles to family life continuing outside of the United Kingdom was a different question to whether there would be a disproportionate interference with family and private life if the Appellant were removed. On the latter, having taken into account all of the considerations set out in the decision, the decision was found to be proportionate. Although the Court of Appeal and Supreme Court have advocated the benefits of using a balance sheet approach when assessing proportionality for the purposes of Article 8, this is not a requirement and not an error of law if the First-tier Tribunal sets out its findings in a different way. In this appeal, the First-tier Tribunal reached findings which were open to it on the evidence and which were adequately reasoned, such that I find no error of law in the Article 8 assessment.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

14th October 2019

Upper Tribunal Judge Jackson