Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12405/2019

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 10 September 2021	**On 19 October 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ZIA UR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Sophie Panagiotopoulou, instructed by Edwin Coe LLP
For the Respondent: Julie Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Pakistani national who was born on 1 April 1989. On 9 November 2020, I issued a decision in his appeal in which I found that the First-tier Tribunal (Judge B A Morris) had erred materially in law. I set aside that decision in part and ordered that the decision on the appeal would be remade in the Upper Tribunal, on the basis of the findings of fact made by the FtT. I set out a summary of those findings below but it is necessary before I do so to describe something of the background.

Background

2. The appellant entered the UK in 2011. He held entry clearance as a student. Further leave to remain in that capacity was subsequently granted until 8

February 2014. In the meantime, the appellant had met a British citizen named Annie Pasha. They married on 26 September 2013. The appellant applied for leave to remain as her spouse. The first such application was rejected on 10 April 2014 but the second was granted on 23 May 2014 and the appellant received leave to remain until 23 November 2016.

3. The appellant made an application for further leave to remain as Ms Pasha's spouse on 23 November 2016 and that application was also granted, with the appellant receiving leave to remain until 23 May 2019. Having completed five years of Discretionary Leave under Appendix FM of the Immigration Rules, the appellant sought Indefinite Leave to Remain as a spouse under that Appendix. He only did so on 4 June 2019, however. Since that was after the expiry of his leave to remain, the appellant was unable to satisfy the Immigration Status Requirement in Appendix FM and it was not accepted that there were insurmountable obstacles to the appellant and his wife continuing their family life in Pakistan. The application for ILR was refused under the Immigration Rules, therefore, and the respondent did not accept that the appellant's removal would be in breach of Article 8 ECHR. The application was refused on 4 July 2019.

4. The appellant's appeal was dismissed by the FtT on 4 December 2019. The judge noted that it was accepted by the appellant that he had made his application for ILR 12 days late. His leave had expired on 23 May 2019 but he had not applied for ILR until 4 June 2019. The judge did not accept that the reason given by the appellant for this delay was a good reason, beyond the control of the appellant or his representatives, which attracted the relief provided by paragraph 39E of the Immigration Rules: [25]. The judge went on to consider whether there were insurmountable obstacles to family life continuing in Pakistan and concluded that there were not: [27]-[28]. The judge did not accept that there would be very significant obstacles to the appellant re-integrating into Pakistan: [29]-[31]. Although she accepted that there was a family life between the appellant and his wife, the judge considered that it was proportionate to interfere with that relationship: [32]-[34].

5. Ms Panagiotopoulou advanced three grounds of appeal before the Upper Tribunal. The first related to the judge's conclusion in relation to paragraph 39E of the Immigration Rules but Upper Tribunal Judge Kekic refused permission to appeal on that ground. The second ground related to the judge's consideration of section 117B of the Nationality, Immigration and Asylum Act 2002. I found that ground to be made out because "s117B(5) could not apply to discount the weight which was to be attached to the appellant's family life". The third ground related to the judge's consideration of proportionality outside the Immigration Rules. I found that third ground was also made out, firstly because the judge had failed to consider whether it was proportionate for the appellant and her spouse to live in Pakistan and secondly because she had failed to consider the weight which properly attached to immigration control where, as here, the appellant fell foul of the Rules solely by reference to the delay in making his application for ILR.

Submissions

6. Ms Panagiotopoulou confirmed, at the outset of her submissions, that she did not intend to call evidence from the appellant or the sponsor, both of whom had joined the hearing via Microsoft Teams. She also confirmed that there was no further documentary evidence beyond that which had been filed with the FtT. Ms Isherwood did not have that short bundle and it was provided to her electronically. Upon Ms Isherwood confirming that she was ready to proceed, I heard submissions from Ms Panagiotopoulou.

7. It was submitted on behalf of the appellant that his removal would be a disproportionate course. He enjoyed a genuine and subsisting relationship with the sponsor and his removal would interfere with that relationship. The first two of Lord Bingham's questions from R (Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368 were to be answered in his favour. It was clear from GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630, which was cited in the Upper Tribunal's first decision, that the absence of insurmountable obstacles was only a relevant factor in the proportionality analysis and the focus must be on striking a fair balance between the competing interests at stake. The appellant was 32 years old and had been living in the UK for ten years, having entered in January 2011 and subsequently received further leave. The immigration history was uncontroversial. There were said to be some gaps in residence caused by the rejection of earlier applications but those were not understood by the appellant.

8. The appellant had met his wife in 2012 and they had married the following year. The representations which had been made in support of the 2019 application for ILR explained the circumstances in which the application was made late by 12 days, which was a very short period on any view. The appellant was not a person who had tried deliberately to avoid immigration control; he needed to find funds and make arrangements for making his application.

9. The appellant and his wife enjoy a close relationship with her family. They do not live with her family but they visit them regularly. There was evidence of the sponsor's father's ill-health and it was thought by the doctor who had written the medico-legal report that he would only become more dependent upon others as time passed. He is an elderly man who requires assistance and the sponsor would be very concerned to leave him. It was also relevant to note that the sponsor's sister had suffered cancer in the relatively recent past although there was no recent evidence about this. The sponsor's brother had suffered with severe mental health problems in the past. The family clearly required the support of the appellant and the sponsor.

10. The sponsor is a follower of Sunni Islam and a Punjabi speaker. She had limited links with Pakistan and the uncle who was once there had moved to Saudi Arabia The appellant had been told by his family that he should have a Shia wife and there was a family rift as a result. As a result of that rift, the appellant and the sponsor would not receive any support from his family. In any event, his family lived in a part of Pakistan which borders Afghanistan and they – as Westernised people who drink alcohol – would not fit in there. It would be unjustifiably harsh to expect the sponsor to relocate. Only s117B(1) of the 2002 Act weighed against

the appellant. The remaining public interest factors were either of no application or were neutral.

11. Ms Isherwood helpfully began her submissions by providing information for which I had asked Ms Panagiotopoulou during the course of her submissions. I had asked what the cost of an ILR application was. Ms Isherwood stated, having checked online, that the cost of such an application is currently £2389. She and Ms Panagiotopoulou were content for me to proceed on the basis that the cost for the appellant in 2019 would have been in the same region, albeit slightly less.

12. Ms Isherwood invited me to dismiss the appeal. The starting point was the appellant's inability to meet the Immigration Rules because paragraphs 39E and EX1 were not satisfied. The appellant had entered the UK as a student and had not finished his course. It was submitted that the appellant did not understand why his previous applications had been rejected but there was no evidence from him to show that the applications should not have been rejected. Although it was accepted that the appellant was financially independent in the sense considered in Rhuppiah v SSHD [2018] UKSC 58; [2019] Imm AR 452, he might yet become a burden on the state because his previous business ventures had failed.

13. There was no evidence that the appellant was dyslexic and there was no medical evidence to show that the sponsor's sister was anything other than well. There was very limited medical evidence about the sponsor. There was an assertion that the appellant and his wife were vital to her family. But they did not live with her family and the FtT had found that the sponsor's father was able to do things for himself and that her sister had recovered. There was no adequate evidence of the dependency between the couple and the sponsor's family. They saw each other comparatively infrequently. It could not be assumed that the sponsor's father's condition had worsened.

14. The case was really about the appellant and the sponsor choosing where they wanted to spend their married life but there was no proper basis upon which it could be found that it would be unduly harsh for them to carry on their married life in Pakistan. There was no background evidence to show that the appellant or the sponsor would be in difficulty in Pakistan. The proportionality balance was in favour of immigration control.

15. In a short reply, Ms Panagiotopoulou submitted that the couple no longer live far away from the sponsor's family. The sponsor had a close relationship with her sister. Her father had lived in the UK since the 1970s and the only close relative in Pakistan had since left. Ms Isherwood had been wrong to submit that the appellant might not be financially independent of the state in the future; the focus was necessarily on the present. The real issue in this case was whether it was proportionate to remove the appellant when, but for the 12 days delay in making his application, he would have had ILR.

16. I reserved my decision.

Analysis

17. The logical starting point in this case is to examine the relationships which are in issue. It has been accepted throughout that the appellant and the sponsor are in a

genuine and subsisting relationship. There is no reason to think that they are anything other than a devoted couple who have been married for eight years. One of Ms Panagiotopoulou's submissions, however, is that their relocation to Pakistan would bring about particular hardship to her family. In considering that submission, I look first to the findings made by the FtT, which were expressly preserved in my first decision.

18. The judge in the FtT heard evidence from the appellant, the sponsor, the sponsor's father and the sponsor's sister. No oral evidence was called before me and the judge in the FtT was therefore much better placed to assess the what was said about the family's circumstances. The judge undertook a careful analysis of the circumstances and found that there was insufficient evidence before her to suggest that it was only the sponsor who could provide care for her father. The judge noted that the appellant and the sponsor had lived in Birmingham, whilst her family were in Chingford and Walthamstow. The medical evidence suggested that the sponsor's father could cook and undertake chores in any event. That chimed with the oral evidence he had given. The evidence did not show that there had been a deterioration in his condition since the appellant and the sponsor went to live in Birmingham. The sponsor's father had said that his other daughter had come to help when the sponsor moved away. There was no evidence – despite her cancer scare in the past – that she would be unable to provide similar care now.

19. In her elegant submissions, Ms Panagiotopoulou sought to persuade me to revisit this assessment but there is, in truth, no proper basis upon which to do so. There is no evidence from the appellant, the sponsor or any member of her family which suggests that the family circumstances have changed. Ms Panagiotopoulou sought to persuade me that the sponsor's father's condition would have deteriorated or at the very least that it would be likely to do so in the future. The doctor who wrote the medico-legal report considered that there was 'always a worsening of the condition' in cases of hypertension and diabetes. I agree with Ms Isherwood, however, that speculation of the kind suggested by Ms Panagiotopoulou would be most unsatisfactory. I accept, as did the judge in the FtT, that the sponsor's father has certain infirmities but I adopt the conclusions she reached in relation to his ability to cope on his own and to receive support from his other daughter as and when necessary. There is nothing to show that the sponsor's sister is anything other than well after her treatment for cancer and there is nothing to establish that the sponsor's brother (who, I accept, has suffered mental ill-health in the past) requires support from the sponsor. Whilst I take into account the fact that the sponsor's family will be upset in the event that she returned to Pakistan with the appellant, there is no proper evidential foundation at today's date for concluding that there would be any diminution in the care provided or available to the other family members as a result of her departure.

20. Considering the circumstances of the appellant and the sponsor themselves, I note (as did the judge in the FtT) that the sponsor has suffered with vertigo and lower back pain in the past. There is no suggestion that the appellant suffers ill-health of any description. The sponsor was born in the UK and has lived in this country her whole life. I accept that she has no family to speak of in Pakistan and that she is daunted by the prospect of living in that country, with which she has

comparatively little familiarity. Like the judge in the FtT, I do not consider the claims of religious difficulties between the two families to be credible. It was not mentioned in the witness statements and the sponsor did not mention it to the judge in the FtT. Like Judge Morris, I consider that the appellant would be able to find some support from his family in Pakistan. Even if he did not, or if he and his wife chose to settle in a part of Pakistan in which their Westernised outlook would be more commonplace, there is no proper reason to think that they would not eventually be able to make a way for themselves, as multi-lingual people of working age with no significant health problems. As the judge in the FtT found, there are no insurmountable obstacles to family life continuing in Pakistan. Relocation to Pakistan for the appellant and the sponsor would cause her significant upset and understandable concern about her family but these consequences do not cross the high threshold of insurmountable obstacles.

21. I have considered the consequences for the sponsor and her family in the event that she left this country with the appellant. There are two more possible outcomes in the event that this appeal is dismissed. *Firstly,* the appellant and the sponsor could part company and could live permanently in separate countries. *Secondly,* the sponsor could support the appellant in an application for entry clearance as her spouse. The first of those options would, I accept, cause the appellant and the sponsor very significant upset. They have been together for nearly a decade and have been married for eight years and it is a serious step indeed for a married couple to live permanently apart. The second option would at least hold the possibility of temporary separation but I note that the Financial Requirements of Appendix FM were only said in the application to be met as a result of the combination of the appellant's and the sponsor's income. Her income at that time was between £11,000 and £12,000 per annum and there must be some doubt that she would be in a position to meet Minimum Income Requirement in the Rules. It is more likely than not, in my judgment, that an application for entry clearance might founder on that basis, meaning that a period of supposedly temporary separation would become rather more open-ended.

22. Having considered the severity of the consequences for the appellant, the sponsor and her family, I turn to consider the matters on the respondent's side of the balance sheet. I accept Ms Panagiotopoulou's submission that the only subsection of section 117B of the 2002 Act which militates against the appellant is s117B(1). I accept that he speaks English to the requisite level because there was a certificate to that effect provided with the ILR application. I accept that the appellant and the sponsor are financially independent, as defined in Rhuppiah, as a result of the combined incomes as detailed in that application. There is no reason to speculate, as Ms Isherwood suggested I should, by assuming that they would not remain financially independent. Section 117B(4) is of no application because the appellant's relationship with the sponsor was not established at a time when he was in the UK unlawfully. Section 117B(5) is of no application because the appellant relies on his family life, and not on the private life which is caught by that 'little weight' provision: Cathrine Lal v SSHD [2019] EWCA Civ 1925; [2020] 1 WLR 858.

23. Much therefore turns on the weight which should be attached to the maintenance of effective immigration control in this case. I accept the submission made on

behalf of the appellant that the weight which can properly be attached to that consideration is not a fixity. In any case, there is the general consideration which Hickinbottom LJ articulated in SSHD v JCWI [2020] EWCA Civ 542; [2021] 1 WLR 1151:

> "It is in the public interest that a coherent immigration policy should not only set out the criteria upon which leave to enter and remain in a particular state will be granted, but also discourage the unlawful entry to, or continued presence in, that state of those who have no right to enter or be there."

24. The extent to which those general considerations, the importance of which are underlined in s117B(1) of the 2002 Act, militate against any particular individual in a given case will vary according to the facts. In some cases – such as those involving deception or a flagrant disregard for the immigration controls of the UK, the weight to be attached to the public interest in immigration control is considerable. In others – perhaps concerning a marginal failure to meet the Immigration Rules – the weight which must be attached to the maintenance of an effective immigration control might be rather less. In making those observations, I do not seek for a moment to suggest that Article 8 ECHR is a general dispensing power which comes to the aid of those who fail by a small margin to meet the Immigration Rules. To do so would be to act contrary to what was said in Patel & Ors v SSHD [2013] UKSC 72; [2014] 1 AC 651. It is simply to recognise the point made by Green LJ in GM (Sri Lanka), that the test for a proportionality assessment requires a fair balance to be struck between the competing public and private interests which are at stake.

25. The fact that the appellant is unable to meet the Immigration Rules is necessarily important and I give weight to it. There is a public interest in ensuring that applications for leave to remain are made timeously and it is entirely legitimate, in my judgment, that those who fail to do so must demonstrate good reason why that was the case. The reasons given by the appellant in this case were inadequate, as the judge in the FtT found, to engage paragraph 39E of the Immigration Rules. He knew that he was required to undertake an English language test or he should have taken timely legal advice on the position. He knew that there would be a fee to pay for the application for ILR and he should have been in a position to pay for it. Neither the fact that he chose to avoid taking an English test until the last minute nor the fact that he had saved insufficient funds to make the application more quickly begins to amount to a good reason beyond his control for failing to make the application on time.

26. Equally, it is significant that the FtT found (as have I) that there are no insurmountable obstacles to family life continuing in Pakistan. That is significant for the reasons explained by the Supreme Court in R (Agyarko & Anor) v SSHD [2017] UKSC 11; [2017] Imm AR 764 and because, as the ECtHR has stated for decades, Article 8 ECHR does not provide a family with a choice as to where their family life is enjoyed. In the absence of insurmountable obstacles, what the appellant must show in order to succeed is that removal would result in unjustifiably harsh consequences. To ascertain whether the circumstances would be unjustifiably harsh, there must be a conscientious assessment of the severity of the consequences and of the public interest which is said to justify those consequences.

27. Although the appellant is unable to meet the Immigration Rules for the reasons I have set out, I do not consider that anything more than modest weight attaches to the public interest in immigration control in this case. The appellant has sought to comply with the requirements of immigration control for many years and has generally succeeded in doing so. He failed to do so on the most recent occasion because he buried his head in the sand as regards the English Language test and the fee which was to be paid. In doing so he adopted a rather reckless approach to his status but I accept that he attempted to put matters back on the right track as quickly as he could once he had received legal advice and had received the English language certificate. As Ms Panagiotopoulou submitted, the gap in question was under two weeks. Is it fair and proportionate, in those circumstances, to find that the appellant and the sponsor may carry on their life in Pakistan? Is it fair and proportionate to expect the appellant and the sponsor to separate permanently and live their lives in different countries? Or is it fair and proportionate to expect the appellant to return to Pakistan so that he can make an application to re-enter the country in which he has lived with his wife for eight years? I do not find that the public interest in immigration control in this particular case suffices to justify any one of those courses. The weight which I can properly attribute to immigration control on the facts of this case does not outweigh the consequences for the appellant and the sponsor of his removal.

28. I add one further point about the 'general dispensing power' observation made by Lord Carnwath in Patel. The conclusion that I have reached above does not place the appellant in the same position he would have been in if he had made a timeous application for ILR. My conclusion that his removal would be disproportionate does not necessitate or justify a grant of ILR despite his inability to meet the requirements for that status. The appellant will as a result of my decision receive only a limited leave to remain. He will be required to make one or more paid applications for leave to remain in the future. The very fact that he will receive a lesser form of leave and can continue to be subject to conditions imposed under the Immigration Act 1971 is a recognition of the public interest in maintaining an orderly immigration control. I do not, in other words, decide that the refusal of ILR was disproportionate but merely that the appellant's removal would be unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by allowing it on human rights grounds.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 September 2021