Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00087/2015**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision Promulgated**
On 20 November 2015	**On 8 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

K J

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Royston counsel instructed by SMK Solicitors.
For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. An anonymity order was previously made and shall continue.
2. The Appellant was born on 2 August 1967 and is a national of Pakistan. He is 48 years old.

3. This is the resumed hearing of an appeal against the decision of the Respondent dated 8 December 2014 to refuse the Appellant's application dated 18 November 2014 for leave to remain based on his relationship with his unmarried partner MW, a 71 year old British citizen. The Secretary of State refused the Appellant's application by reference to Appendix FM, EX.1 and 276ADE and also considered whether there was any basis for granting discretionary leave outside the Rules.
4. The Appellant appealed the decision and his appeal came before First-tier Tribunal Judge Nichol on 20 March 2015 and he allowed the appeal under Appendix FM and under Article 8 outside the Rules.
5. The Respondent appealed that decision and after a hearing on 18 September 2015 I set aside that decision as it contained a number of errors of law. The matter was adjourned for me to re hear the appeal in relation to EX.1 as the Appellant could not otherwise meet the requirements of Appendix FM for an unmarried partner and alternatively in relation to Article 8.
6. Mr Royston indicated that he did not intend to call his clients to give evidence relying on the preserved findings and the documentary evidence in the bundle. Mr Harrison indicated that he was content with that as he had no questions for either the Appellant or his partner.

Submissions

7. At the hearing I heard submissions from Mr Harrison on behalf of the Respondent that :
   (a) He relied on the reason for refusal letter.
   (b) The issue in relation to EX.1 was whether the Appellant and his partner faced 'insurmountable obstacles' to family life with the partner continuing outside the UK.
   (c) He argued that the appellant could return to Pakistan and make an entry clearance application for return to the United Kingdom.
   (d) The relationship was established at a time when the Appellant's leave was precarious.
   (e) The Appellant's partner has medical conditions which are common in Pakistan –diabetes, heart disease. It was not correct that these issues could not be addressed.
   (f) This was an attempt to circumvent the Rules using Article 8 and it was an application for leave by blackmail as they said they would not marry.

8. On behalf of the Appellant Mr Royston submitted that :

(a) The Appellant's partner MW is a 71 year old British citizen. The test under Ex.1 is whether the Appellant and MW would suffer serious hardship if they lived *together* in Pakistan.

(b) MW is a retired British national with no connection to Pakistan other than with her partner. She has health problems.

(c) The most significant risk that the parties would face is as unmarried partners in Pakistan. The Respondent suggests that the Appellant could return alone to make an entry clearance application but the test is whether family life can continue with them living together in Pakistan not whether the Appellant could make an application from there to rejoin MW in the United Kingdom.

(d) The Respondent suggests that the parties could marry. This was a matter of high constitutional importance: can the state determine how people enjoy family life. He drew the analogy with the case of HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 (07 July 2010) in that the Appellant and his partner would only be marrying to avoid the threat of persecution.

(e) He suggested that the Judge in the first appeal did not make a finding that the parties would marry eventually but that this was a couple who were not minded to marry.

(f) The state could not dictate what should be an enduring form of family relationship.

(g) EX.1 and 2 had to be considered against this background.

(h) The poor health of the sponsor MW also had to be considered in the light of the care and support provided by the Appellant for MW. MW's diagnosis and complex treatment regime were relevant to the issue of serious hardship.

(i) He had to accept for the purpose of the Rules that the personal care provided by the Appellant would continue if they relocated together to Pakistan but it was nevertheless relevant to the issue of proportionality under Article 8.

(j) In relation to the medical evidence he relied on page 12 of the Appellant's bundle. The lengthy concluding paragraph was sufficient evidence of the

complexity of her regime and her condition. To the suggestion that simply taking a number of medications did not make the regime a complex one he suggested that it demonstrated that the process of moving from one country to another less developed on than the UK was a factor that I could take into account. He accepted that there was no evidence to suggest that her medical problems could not be addressed in Pakistan.

(k) The test was an aggregate one and that I should have regard to all of the factors cumulatively in determining whether EX.1 was met.

(l) In relation to Article 8 he suggested that the test was one of reasonableness. If MW decided she wanted to stay in the United Kingdom that was not unreasonable.

(m) The care that the Appellant provided to MW became significant. She faced not only losing her partner but the loss of personal care by a person with whom she was intimate rather than from a stranger. The assessment turned on the credibility of the care provided

(n) In relation to the possibility of the Appellant leaving the United Kingdom and making an entry clearance application from Pakistan he suggested that Chikwamba (FC) v SSHD 2008 UKHL 40 was still good law and there should be a careful assessment of the factual circumstances. In this case it was not appropriate to require return in that MW was 71 years old and not in good health. Even a delay for a couple of years would impact significantly on the totality of the period they would spend together.

Legal Framework

9. The provisions of EX.1 at the time of the decision were as follows:

EX.1. This paragraph applies if

(a).....

(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.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing

their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

Findings

10. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

11. The Appellant is a 48 year old national of Pakistan who arrived in the United Kingdom in 2002 and while he claims that he fled in fear of his life he did not claim asylum and lived in the United Kingdom thereafter unlawfully.

12. He met MW in 2006 and in January 2008 the Appellant and MW began to live together and this was accepted by the Respondent. Again I note he did nothing to regularise his status on the basis of his relationship with her until he made an application dated 8 March 2010. That application was refused on 23 April 2010 by the Respondent and on 11 June 2010 he requested reconsideration of that decision and further evidence was submitted.

13. On 8 December 2014 the application was refused and it is that refusal that is the subject of this appeal. The application was considered by reference to Appendix FM and paragraph 276ADE of the Immigration Rules. It is not in dispute that the Appellant could only succeed under Appendix FM if he met the requirements of EX.1 and 2.

14. I accept as did the Respondent in the refusal letter that the Appellant and MW are for the purpose of EX.1 (b) in a genuine and subsisting relationship. The issue is therefore whether there are insurmountable obstacles to family life with MW continuing outside the United Kingdom and the definition of 'insurmountable obstacles' is that set out in EX.2. I have also considered R(on the application of Agyarko) [2015] EWCA Civ 440 where it was held that the phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. ...The phrase as used in the Rules is intended to have the same

meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor.

15. I accept Mr Roystons argument that at this stage the solution proffered by the Respondent through Mr Harrison, that the Appellant returns to Pakistan to make an entry clearance application, does not address the requirement of EX.1 which is in essence whether they could continue their family life *together* in Pakistan.

16. The two factors advanced both in the skeleton argument and orally before me by the Appellant in support of his assertion that they face insurmountable obstacles are that they are unmarried partners and MW's health and those are the two factors I have assessed. The Appellant argues that he and MW would face very significant difficulties in Pakistan if they were living together as unmarried partners as this is illegal and socially unacceptable in Pakistan (WS paragraph 10). The Respondent argues that this obstacle could be overcome by the parties marrying.

17. I have considered Mr Royston's argument that it is not for the state to dictate how parties enjoy their family life and he drew the analogy in paragraph 16 of his skeleton argument and in oral submissions before me with HJ. I am not persuaded by this argument: I note of course that HJ was concerned with an 'immutable characteristic', sexuality, and whether an applicant should be required to conceal this in order to avoid persecution. I note that neither the Appellant nor MW have given any social, moral, religious or philosophical reasons to suggest they oppose the principal of marriage and therefore I do not consider that for either of them it could be described as an immutable characteristic but rather it is a choice that they have made for the present time that they do not wish to marry. I do not accept the argument that I can draw from their present intention not to marry that they will never marry as I am satisfied that it is not what they say in their witness statements, they simply say they do not intend to marry "in the near future" (Appellant's witness statement paragraph 17 ; MW's WS paragraph 8). I therefore find that given this is apparently an issue of timing rather than principal the problems that would face them as unmarried partners could be overcome by them marrying.

18. I have considered the evidence placed before me in respect of MW's health and whether this is a factor that could amount to an insurmountable obstacle to them enjoying family life together in Pakistan. I accept that MW has ischaemic heart disease (She had a successful triple by pass in 2009), type II diabetes, high blood pressure and high cholesterol. She is on a number of medications to control her conditions. Her diabetes has worsened and affected her eyes. While I accept that MW takes a number of medications their number does not necessarily mean that her conditions or regime are complex or unusual, nor are they described as such, and there was no evidence before me to suggest that her medications were unavailable in Pakistan or that she could not be monitored there as she has been in the United Kingdom although clearly the medical services may not be as good as in the UK. Mr Royston conceded for the purpose of EX.1 that the personal care and support provided to MW by the Appellant could be provided in Pakistan as it has been in the United Kingdom.

19. While I accept that for a 71 year old woman uprooting from the United Kingdom and relocating to Pakistan would involve disruption and inconvenience I do not accept that given my finding that the parties could marry sooner rather than later to avoid religious or societal problems that there is sufficient evidence for me to conclude that MW's health issues alone meet the test in EX.1.

20. In relation to Article 8 I remind myself that the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that ***compelling circumstances*** *would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. (my bold)*

21. Mr Royston argued that there were issues in this case which were not properly addressed by the Rules that amounted to compelling reasons to allow the appeal outside the Rules and he set those out for me on oral arguments and in his skeleton argument both of which I have taken into account. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

22. I am satisfied that the Appellant and MW have a family life in the United Kingdom because I have accepted that they have lived together as unmarried partners since January 2008. The Appellant claims to have arrived in the United Kingdom in 2002 and while there is no evidence of his engagement with the community beyond his relationship with MW I accept that inevitably he has created a private aswell as family life with her.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

23. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

24. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

25. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals

into its territory and Article 8 does not mean that an individual can choose where he wishes to enjoy his private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

26. In carrying out the proportionality assessment I am required to give weight to the public interest factors as set out in section 117B of the Nationality Immigration and Asylum Act 2002. I must therefore take into account and give weight to the fact that the maintenance of effective immigration controls is in the public interest and effective immigration controls are underpinned by the consistent and fair application of the Immigration Rules to all applicants. This Appellant did not meet the requirements of the Rules in part because he had been in the United Kingdom unlawfully since 2002. While he claimed that he was at risk in Pakistan he did not claim asylum and that must undermine the credibility of that aspect of his history.

27. I accept that the Appellant speaks English as there is documentary evidence to that effect.

28. There is no evidence before me to suggest that the Appellant is personally financially independent because he has been unable to work because of his lack of status. However I accept that MW has been able to financially support the Appellant.

29. I remind myself however s 117(4) (b) that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully. The Appellant in this case has at all times been in the United Kingdom unlawfully and I attach considerable weight to this factor in the balancing exercise.

30. I have reminded myself that Lord Bingham in Razgar stated that in a judgement on proportionality that the ultimate question is, "*whether the refusal of leave to enter or remain in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide*."

31. I have therefore assessed firstly whether it would be *reasonable* for the Appellant and sponsor to continue their family life in Pakistan – a very different test to that set out in EX.1 I accept. MW asserts in her witness statement that she would not wish to live in Pakistan: given her age and the inevitable disruption that relocation to a country that was socially and culturally very different to the UK and the benefits she derives in terms of the access to the NHS I accept that her stance, while not an insurmountable obstacle as required by EX.1 is not an unreasonable one.

32. I am satisfied however that this is not the only choice open to the couple as I am satisfied that the Appellant could return to Pakistan to re apply for entry clearance on the basis of his relationship with MW. I have to consider whether such a period of separation would be disproportionate. I have considered R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). I am satisfied that the ratio was that there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may not be disproportionate. 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. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

33. It is argued by Mr Royston that 'the likely delay would be considerable' (paragraph 23 of the skeleton argument) although there is no evidential basis for this argument contained within the papers. It is suggested that any delay could be an appreciable portion of her remaining life but again the medical evidence that I have considered does not suggest that MW's demise is imminent as her surgery was successful in 2009 and while has a number of ailments consistent with old age non are described as life threatening or chronic and all appear to require simply monitoring. It is suggested that MW will be deprived of the care and emotional support of the Appellant during any period of separation but while I accept that they have lived together since 2008 and have a supportive relationship the exact nature of the care he provides in relation to her health is unclear and unspecified in the witness statements and not referred to at all in the

medical evidence. I am therefore unable to attach in the balancing exercise much weight to this argument in the absence of clear evidence of both the nature of that assistance and the claimed length of the delay in processing the application.

34. Taking all of the matters into account as set out above I am satisfied that the Appellant failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in his case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms.

35. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.

DECISION

36. **The appeal is dismissed under the Immigration Rules.**

37. **The appeal is dismissed under Article 8.**

38. **Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.**

Signed

Deputy Upper Tribunal Judge Birrell Date 28.11.2015