



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/20679/2014

THE IMMIGRATION ACTS

Heard at Bradford  
On 3<sup>rd</sup> February 2015

Decision & Reasons Promulgated  
On 12<sup>th</sup> February 2015

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

YASIR SHARIF  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ghani of Ismail & Ghani  
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Grimshaw made following a hearing at Bradford on 16<sup>th</sup> September 2014.

## **Background**

2. The Appellant is a citizen of Pakistan born on 20<sup>th</sup> May 1983. He arrived in the United Kingdom on 12<sup>th</sup> December 2009 with a student visa valid to 31<sup>st</sup> January 2011. He entered into an Islamic marriage with Farzana Kousar on 24<sup>th</sup> January 2010. Miss Kousar had two children and the couple now have a daughter born on 16<sup>th</sup> July 2014. She is a British citizen.
3. The Appellant's application for leave to remain on human rights grounds, made on 14<sup>th</sup> March 2012, was refused with no right of appeal on 15<sup>th</sup> July 2013. He made another application on 20<sup>th</sup> December 2013 which was refused on 23<sup>rd</sup> April 2014 and it is this decision which was the subject of the appeal before Judge Grimshaw.
4. The judge was satisfied that the Appellant and Miss Kousar were in a genuine and subsisting relationship. However the evidence before her was that the couple did not begin living together full-time until February 2012 because there were family problems with their relationship, and accordingly they had not been living together for two years as at the date of application in December 2013. They therefore could not meet the requirements of GEN1.2 of Appendix FM.
5. The judge said that to meet the eligibility requirements of Appendix FM under the parent route the Appellant must show that it would not be reasonable for the child to leave the UK. It was clearly in the child's best interests for her to remain with her mother in this country and although Miss Kousar had a number of health problems there was no suggestion that her parenting capacity was impaired so long as she received adequate support from the care professionals.
6. So far as Article 8 was concerned the judge said that the Appellant had to show more than mere inconvenience as a consequence of being removed, and whilst it would cause practical difficulties for those he leaves behind, the genuine and subsisting relationship which he enjoys with his partner and children would not be severed by his return to Pakistan since the separation would only be temporary. It was his intention to seek entry clearance as a partner or fiancé. Miss Kousar could continue her life in the United Kingdom with access to the family and educational support services as she requires.
7. Moreover the Appellant came to the UK in a temporary capacity. He acknowledged that he had no right to remain here after 2011.
8. The judge said that she bore in mind that Section 117 of the Nationality, Immigration and Asylum Act 2002 makes it clear that little weight should be given to a relationship formed with a qualifying partner or a private life which is established by a person at a time when he or she is in the United Kingdom unlawfully or where their immigration status is precarious. There were no non-standard or particular features of the application requiring leave to be granted outside the Rules and accordingly she dismissed the appeal.

## **Grounds of Appeal**

9. The Grounds of Appeal state that since the Appellant made his initial application on 14<sup>th</sup> March 2012 and further submissions were made in December 2013 the application should have been considered before the new Rules came into effect.
10. Second, the judge failed to consider the evidence of cohabitation since January 2010. Furthermore even if it was accepted that cohabitation commenced in February 2012, as at the date of the hearing the parties had been in cohabitation for over two years. The Appellant relied on the case of YZ and LX (effect of Section 85(4) 2002 Act, China [2005] UKIAT 00157.
11. The judge failed to consider that the Appellant's removal would result in unjustifiably harsh consequences for the family and has not properly applied the case of Chikwamba when concluding that the effect of separation will only be temporary. She was wrong to state that the Appellant formed family life when his status was precarious and failed to give any consideration to the welfare of the three children of the family.
12. Permission to appeal was granted by Judge Cruthers on 24<sup>th</sup> November 2014.
13. On 3<sup>rd</sup> December 2014 the Respondent served a reply defending the determination.

## **Submissions**

14. Mr Ghani relied on his grounds save that so far as the Edgehill point was concerned he accepted that the Appellant had made a second application in December 2013.
15. He submitted that the judge had failed to take into account the submission that, by the date of the hearing the Appellant was able to meet the requirements of the Immigration Rules since as at that date the parties had cohabited for more than two years. Furthermore she had not properly applied Section 117 of the 2014 Act which states that the public interest does not require the person's removal where he/she has a genuine and parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK.
16. He also submitted that the decision was in breach of Article 12 of the ECHR, the right to marry, because the Respondent had failed to supply him with a certified copy of his passport and thereby prevented him from entering into a marriage under English law.
17. Mrs Pettersen submitted that there was no mention of Article 12 in the original grounds of application but in any event there was no evidence that the Appellant had pursued his request for his passport or followed the correct processes in order to obtain a certified copy of the documents.

18. GEN1.2 states that cohabitation for two years is a requirement as at the date of application and accordingly the Appellant could not meet the requirements of the Rules. However she accepted that the judge had not properly considered paragraph 117 of the 2014 Act and to that extent her decision was flawed.

## **Findings and Conclusions**

### **The decision under the Rules**

19. As Mr Ghani properly conceded the decision under appeal was made following an application in December 2013 and accordingly the new Rules apply.
20. Under GEN1.2 of Appendix FM, for the purposes of this Appendix a partner means –
- (i) The applicant's spouse.
  - (ii) The applicant's civil partner.
  - (iii) The applicant's fiancé or proposed civil partner, or
  - (iv) A person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application unless the context otherwise requires.
21. The Appellant criticises the judge on two counts, firstly by not taking into account evidence of cohabitation prior to February 2012 and second by not taking into account cohabitation up to the date of hearing.
22. With regard to the first, it seems to have been the clear evidence before the judge that the couple did not begin living together until February 2012. Although Mr Ghani states that there was evidence that, prior to that date, they lived together at weekends plainly the judge was entitled to conclude that cohabitation began when the couple joined their households together on a full-time basis.
23. The Tribunal in YZ and LX was concerned with an application when an applicant attained the age of 65 between the date of decision and the date of the hearing before the Adjudicator. It held that the Appellants were entitled to rely on the change in circumstances i.e. that the first Appellant was now 65, as constituting a matter which was relevant to the substance of the decision in accordance with Section 85(4) of the 2002 Act.
24. The situation is different here. Section 85(4) does not assist the Appellant because he could not meet the requirement specifying that the two years must have elapsed when he applied. It is a requirement of the relevant Immigration Rules that, to meet the definition of partner, an applicant has to have been living together with a person in a relationship akin to a marriage for at least two years prior to the date of application. Since he had not done so the Respondent was bound to refuse the application, and the issue before the judge was whether that decision was in accordance with the law and the Rules, which it plainly was.

## The ECHR

25. Mr Ghani did not pursue his arguments in relation to Article 12. I accept Mrs Pettersen's submission that there can be no question of a breach of Article 12 in circumstances where the Appellant has not shown that he followed the proper processes for the return of his passport. The sole evidence produced is a photocopy of an undated handwritten letter requesting a faxed or photocopy of the passport but no evidence at all that it was followed up and proper process pursued.

26. However the challenge to the judge's considerations under Article 8 is made out.

27. The judge cited Section 117 of the 2014 Act but not the most relevant Section in this case which is Section 117B(vi) -

"In the case of a person who is not liable to deportation the public interest does not require the person's removal where -

(a) The person has a genuine and subsisting relationship with a qualifying child, and

(b) It would not be reasonable to expect the child to leave the UK."

28. This is a mirroring of the wording of Section EX.1(a) which applies where an applicant has a genuine and subsisting parental relationship with a child who -

"(aa) is under the age of 18 years,

(bb) is in the UK.

(cc) is a British citizen or has lived in the UK continuously for at least the seven years preceding the date of application and

(2) it would not be reasonable to expect the child to leave the UK."

(i) The judge did not properly cite Section 117 in relation to the weight to be given to private and family life. A distinction is made in Section 117B between private life, which should be given little weight when established by a person at a time when the person's immigration status is precarious and a relationship formed with a qualifying partner which is established by a person at a time when the person is in the United Kingdom unlawfully. It is not clear from the determination that the judge had that distinction in mind.

(ii) The Appellant's relationship was established by the time of January 2010 when he entered into an Islamic marriage and when he was in the UK lawfully. Although the Appellant had a period of overstaying, from July 2011 until March 2012 the evidence is that the relationship was formed before that date. His status was precarious but that is only relevant to the assessment of his private life and not his family life.

- (iii) Moreover, in stating that there was no requirement for the child to leave the UK and that her mother could properly look after her here, the judge appears to have been bringing into account additional considerations set out in Section 117C in cases involving foreign criminals where an applicant has to show that the effect of deportation on the partner or child would be unduly harsh.
- (iv) Most importantly, when considering the Article 8 issue, no reference was made to the statutory provision that public interest does not require removal where it would not be reasonable to expect the child to leave the United Kingdom, mirroring the requirement in Section EX.1.
- (v) There is a clear distinction in the 2014 Act between Article 8 cases involving foreign criminals and Article 8 cases which do not. The Article 8 consideration in this case appears to have confused the two in that it seems that the judge's focus was whether the effect of the Appellant's removal would be unduly harsh which is only relevant in deportation cases and not in removal cases.
- (vi) The judge did not properly take into account the relevant statutory framework and thereby erred in law.
- (vii) On the unchallenged evidence the Appellant has a genuine and subsisting relationship with his daughter who is a British citizen. She lives in a family unit with her British mother and British half siblings in the UK. No argument was made by Mrs Pettersen that it would be reasonable to expect the child to leave the UK.
- (viii) The Appellant does not meet the requirements of a partner because he does not satisfy the definition as set out in GEN1.2. However he does meet the test set out in EX.1(a), and the public interest does not require his removal.

### **Notice of Decision**

- (ix) The original judge erred in law. Her decision is set aside. The Appellant's appeal is allowed with respect to the Immigration Rules and EX.1(a) and on Article 8 grounds.

No anonymity direction is made.

Signed

Upper Tribunal Judge Taylor

Date 10/02/2015