



IAC-TH-CP/LW-V2

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

Appeal Number: IA/07357/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 January 2016**

**Decision & Reasons Promulgated  
On 1 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APPEYARD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS ROZINA HUSSAIN  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr. K. Norton, Home Office Presenting Officer.

For the Respondent: Mr. M. Iqbal, Counsel.

**DECISION AND REASONS**

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as “the respondent” and Mrs Hussain as “the appellant”.
2. The appellant is a citizen of Pakistan who is married to Mr. Shah Hussain, who first entered the United Kingdom as a student. On 7 January 2015 he

was granted indefinite leave to remain under the ten year long residence provisions. The appellant and her husband were married on 7 August 2006. She first entered the United Kingdom as a student dependent on her husband on 11 December 2006 with leave to remain until 28 February 2007. There were various grants of leave as a student dependent on her husband until 20 December 2012. An application for leave to remain was commenced on 24 September 2012 but withdrawn by the appellant on 19 January 2015. A further application was made on 8 December 2014 but refused on 11 February 2015. The Reasons for Refusal Letter stated that:-

- “• the Appellant did not meet the requirements of paragraph R-LTRP1.1(c) of Appendix FM of the Immigration rules because specified evidence relating to the financial and English language requirements had not been provided;
- the Appellant did not meet the requirements of paragraph R-LTRP1.1(d) because paragraph EX.1 was not satisfied in that the Appellant had not shown that there are insurmountable obstacles to family life with her partner continuing outside the United Kingdom;
- the Appellant did not meet the requirements of paragraph 276ADE(vi) because it was not accepted that there would be very significant obstacles to her integration into Pakistan if she required to leave the United Kingdom and return there;
- it was not accepted that there were exceptional circumstances justifying a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules.”

3. For those reasons the respondent made a decision to refuse to vary leave to remain in the United Kingdom and to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
4. The appellant appealed and following a hearing on 30 June 2015, in a decision promulgated on 8 July 2015, Judge of the First-tier Tribunal Chapman dismissed her appeal under the Immigration Rules but allowed it under Article 8 of the European Convention on Human Rights (ECHR).
5. The respondent sought permission to appeal which was granted by Judge of the First-tier Tribunal Cruthers on 7 October 2015. His reasons for so doing were:-
  - “1. By a decision promulgated on 8 July 2015, First-tier Tribunal Judge Chapman allowed this appeal. Having assessed the evidence, the judge had concluded that the appeal did not succeed by reference to the immigration rules (paragraph 39 of the decision under consideration). But the judge’s view was that the appeal did succeed through the application of article 8 of the European Convention on Human Rights ‘at large’ (his paragraphs 40 to 51).

2. It is arguable, as per the grounds on which the respondent seeks permission to appeal, that the judge may not have sufficiently taken account of some of those factors that the grounds make reference to. Specifically:

it is arguable that the judge should have factored in what the Court of Appeal recently said as regards 'exceptionality' in **SS (Congo) & Others [2015] EWCA Civ 387**. And arguable that the judge may not have given sufficient weight to the immigration rules (see, for instance, his paragraph 44)

and arguable that the judge has not dealt properly with the clear possibility of the appellant returning to her country of nationality (Pakistan) and making an application for entry clearance as a spouse from there (see **Chen (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)**, circulated on 20 April 2015)"

6. Thus the appeal came before me today.
7. Mr. Norton relied on the respondent's grounds seeking permission to appeal and further submitted that paragraphs 35 and 37 of the judge's decision disclose no "insurmountable obstacles" or "serious hardship" to suggest that there was any reason why the appellant could not return to her country of origin. This related to the judge's analysis of the appeal under the Immigration Rules. This, he said, is in contrast though to paragraph 51 of his decision and the analysis therein of the required balancing exercise under Article 8.
8. He further submitted that these issues have already been dealt with within the Immigration Rules themselves and there is an expectation that the "Rules" will be followed. There is nothing in this appeal that enables consideration of Article 8 outside the "Rules". Indeed at no point in the judge's findings does he lawfully engage with the test outside of the "Rules" - that being, in this case by virtue of the failure of the appellant to take the benefit of EX.1 of the "Rules" a "strict test of exceptionality". The judge's consideration is therefore contrary to the decision of **SSHD v SS (Congo) & Ors [2015] EWCA Civ 387**, in particular he relied upon paragraph 31 thereof which states:-

"In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules (or within the Rules themselves, where particular paragraphs are formulated so as fully to cover the applicability of Article 8, as in paragraphs 399 and 399A as interpreted in *MF (Nigeria)*). The relevant general balance of public interest considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at

stake (as in the precarious cases considered in *Nagre* and the foreign criminal deportation cases considered in *MF (Nigeria)*) that a strict test of exceptionality will apply.”

9. Beyond that it was argued that the judge failed in considering the public interest by failing to take account of other material factors such as that the appellant’s family life in the United Kingdom was precarious on the basis that she only ever had limited leave to remain and would have, like her husband at the time of the decision, no expectation of remaining in the United Kingdom other than through successful reliance on the substantive Immigration Rules.
10. Further it was argued that the judge misapplied the authorities of **R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)** and **Chikwamba [2008] UKHL 40** itself.
11. Mr. Iqbal responded by submitting that the respondent’s grounds themselves were flawed and it was not possible for family life to be precarious only “immigration status and private life”.
12. He referred me to paragraph 39 of **Nagre, R (on application of) v SSHD [2013] EWHC 720** which states:-

“In such a case, there is a substantial body of Strasbourg case-law which explains the general approach to be applied when assessing the proportionality of a removal of a foreign national by reference to Article 8. In *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, drawing on previous statements in its jurisprudence, the ECtHR explained the approach at para. 39, as follows:

‘The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Art.8 does not entail a general obligation for a state to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in

the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Art.8 .”

He argued that “precariousness” only comes into play when the relationship of a party is formed when the status of that person is precarious. Also that the judge had correctly analysed Section 117B of the Nationality, Immigration and Asylum Act 2002 which has no mention of “precariousness” but talks about “unlawfulness”. As the judge had not allowed the appeal on private life grounds it was a lawful decision upon a correct application of Section 117B.

13. As to the second of the respondent’s grounds he argued that following **SS (Congo) & Ors [2015] EWCA Civ 387** paragraph 31 - which states:-

“In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules (or within the Rules themselves, where particular paragraphs are formulated so as fully to cover the applicability of Article 8, as in paragraphs 399 and 399A as interpreted in *MF (Nigeria)*). The relevant general balance of public interest considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at stake (as in the precarious cases considered in *Nagre* and the foreign criminal deportation cases considered in *MF (Nigeria)*) that a strict test of exceptionality will apply.”

the test of exceptionality does not have “blanket application” and only applies where the status of one party is unlawful and where no children are involved. He argued that the correct approach is to be found in paragraph 33 of **SS (Congo)** which states:-

“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.”

and the instant appeal turned on “compelling circumstances”. Paragraphs 47 and 48 of the judge’s decision show the “compelling circumstances” that the judge identified.

14. As to the respondent’s third ground he argued that any failure by the judge to fully “copy and paste” the relevant head note of **Chikwamba** cannot be said to make a difference in this appeal. The judge correctly

focused his mind on proportionality and the impact of a temporary separation between the appellant and her husband. The judge has provided a balanced judgment acknowledging, as was the position, that the appellant conceded she could not meet the requirements of the Immigration Rules, that this is one of the rare cases where proportionality plays a part and that it would be disproportionate for the appellant to be removed.

15. I do not accept the arguments of Mr. Iqbal.
16. In particular I find that the judge should have factored in what the Court of Appeal said regarding “exceptionality” in **SS (Congo)** and has failed to give sufficient weight to the Immigration Rules. Moreover, the judge has failed to properly deal with the possibility of the appellant returning to her country of origin and making an application for entry clearance therefrom as a spouse. The judge has failed to identify what is “compelling” about this appellant’s claim for it to succeed on Article 8 grounds outside the Immigration Rules or to consider whether there is a “gap” between the Immigration Rules themselves and Article 8 and whether there are circumstances in this appeal which take it outside the class of cases which the Immigration Rules properly provide for. A test of “exceptionality” was disapproved of in the House of Lords in **Huang v SSHD [2007] UKHL 11**. Whether the circumstances are described as “compelling” or “exceptional” is though not a matter of substance. They must be relevant, weighty and not fully provided for within the Immigration Rules.
17. The agreed facts here can be gleaned from paragraph 32 of the judge’s decision which states:-

“However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As Beatson LJ observed in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558; [2014] Imm AR 6, at [40], the new Rules in Appendix FM:

‘... are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been.’

Accordingly, a court or tribunal is required to give the new Rules ‘greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights’ (para. [47]).”

18. Also, the conclusion at paragraph 33 where the judge finds that the appellant and her husband would have care and support if they went to Pakistan.

19. The facts of this appeal do not take it to a position where there should be a freestanding Article 8 analysis. The appellant does not meet the requirements of the Immigration Rules such that there is a “gap” as referred to in **SS (Congo) [2015] EWCA Civ 387** and (for further explanation) **R (on the application of Sunasee) v UTIAC [2015] EWHC 1604 (Admin)**. There are here no relevant weighty matters which are not fully provided for within the “Rules”. If there are then in any event I find the respondent’s decision to be a proportionate one considering the factual matrix found here alongside the public interest factors. In particular the ability of this appellant and her own family to continue their family life in Pakistan where they have, unlike in the United Kingdom, extended family members. Indeed on an analysis of the factors found by the judge at paragraphs 32 and 35 of his decision there is nothing within this appeal to render the respondent’s decision disproportionate.
20. The judge bore in mind the authority of **R (on the application of Chen) v SSHD IJR [2015] UKUT 00189 (IAC)** and the light it throws on the authority of **Chikwamba v SSHD [2008] UKHL 40**. There was in this appeal no evidence to suggest that a temporary separation from a family member to enable the appellant to apply for entry clearance abroad would be disproportionate. It was the appellant’s task to prove this to a required standard and on the facts she failed to do so.

### **Conclusions**

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
22. I set aside the decision.
23. I remake the decision in the appeal by dismissing it on all grounds.

Signed

Date 29 January 2016

Deputy Upper Tribunal Judge Appleyard

### **TO THE RESPONDENT FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 29 January 2016

Deputy Upper Tribunal Judge Appleyard