



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10212/2015

THE IMMIGRATION ACTS

Heard at Manchester
on 30 January 2018

Decision promulgated
on 01 February 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MUHAMMAD IMRAN BUTT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karnik instructed by KM Solicitors.

For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Pickup promulgated on 4 January 2017 in which the Judge dismissed the appellant's appeal on all grounds.

Background

2. The appellant, a citizen of Pakistan, was born on 19 June 1982. He appealed to the First-tier Tribunal against the respondent's decision, dated 22 October 2015, to refuse an application made on 28 September 2015 for leave to remain in the United Kingdom on the grounds of his private and family life.

3. The appellant entered the United Kingdom lawfully in 2010 as a student but overstayed when that leave expired and has remained without leave since. The appellant met Ms Quinn, a British citizen, in 2012 and married in an Islamic marriage ceremony on 30 November 2012 and then under UK civil law on 7 February 2013. There are no children of the relationship.
4. The Judge sets out findings of fact from [13] of the decision under challenge which can be summarised in the following terms:

- a. That the appeal hinges on the issue of insurmountable circumstances with reliance being placed by the appellant on Ms Quinn's personal and medical circumstances to render the decision of the Secretary of State disproportionate [17] and [27].
- b. In relation to EX1, the appellant has failed to demonstrate insurmountable obstacles to continuing family life with his partner outside the UK, in Pakistan in which, by EX2, could not be overcome or would entail very serious hardship for either of them [30].
- c. If Mrs Quinn chose to relocate to Pakistan, a matter of her choice, they will be able to continue their family life [30].
- d. The Judge accepted the evidence of Ms Quinn's medical condition and her age but thereafter finds:

"However, the most that could be said is that it would be difficult and inconvenient for Ms Quinn to relocate to Pakistan, given her family connections in the UK, and that obtaining medical treatment and medication for her arthritis-related medical conditions might be expensive for them. However, expense alone does not render the circumstances insurmountable or the difficulties so very significant that they could not be overcome or which would entail "very serious hardship". There is no evidence presented to me that medical treatment would not be available to Ms Quinn. I was not presented with any costings of medication, and note that the refusal decision explains that medical treatment is widely available in Pakistan, supported by extracts from country background information. Orthopaedic check-ups are available in Pakistan, both within and out-patient treatment by GP and/or rheumatologist. Ms Quinn would also be able to continue to receive a state pension whilst in Pakistan. The appellant will be able to work and provide for them, and continue his care and support or employ others to do so.

- e. The Judge finds that while Ms Quinn may face cultural and language obstacles to her integration in Pakistan she has the assistance of the appellant and has converted to Islam. The Judge took into account submissions Ms Quinn will be relocating as a mature woman and leaving behind her adult son and regular contact with other family members, that she has lived all her life in the UK and has no experience of life in Pakistan, but did not accept that these would entail very serious hardship or difficulties that could not be overcome [31].
- f. It was found the appellant cannot meet the requirements of Appendix FM in relation to family life with his partner [32].

- g. The appellant cannot meet the requirements of paragraph 276 ADE and has failed to demonstrate very significant difficulties to his integration in Pakistan, particularly given that he was living there until 2010 and has retained his family, social and cultural ties, including language [33].
 - h. The Judge concludes that taking the evidence as a whole, on the most generous basis in the appellant's favour, he was not satisfied that there are any sufficiently compelling circumstances inadequately recognised in the Rules to justify granting leave to remain outside the Rules under article 8 ECHR [34].
 - i. The Judge found the appellant entered into a relationship with Ms Quinn at a time when not only had his visa expired so that he was unlawfully present as an over stayer but that he had stopped studying more than a year before he met her; indicating that he had and continues to have no intention of returning to Pakistan. The appellant has no legitimate expectation of being able to remain in the United Kingdom. Previous applications have been refused. The appellant and Ms Quinn must have entered the relationship in the foreknowledge he had no basis to remain and their relationship was entirely precarious. That Ms Quinn has family in the UK with whom she has good relationships does not render the decision unjustifiably harsh [34].
 - j. If going on to consider Article 8 outside the Rules and applying the Razgar stepped approach, the Judge concludes the decision is proportionate [35 - 39].
5. The appellant sought permission to appeal on two grounds the first of which asserts the Judge erred in his application of EX.1. The second ground asserts the Judge fails to take material matters into consideration, namely the appellant's wife's disability and her receipt of Attendance Allowance.
 6. Permission to appeal was granted by another judge of the First-tier Tribunal in the following terms:

The Applicant seeks permission to appeal in time against a decision of the First-tier Tribunal (Judge Pickup) who in a decision promulgated on 4 January 2017 dismissed the Appellant's appeal on human rights grounds. The grounds in the permission application argue that the Judge erred in his application of the Immigration Rules paragraph EX1 of Appendix FM. It is argued that the Appellants partner's eligibility the receipt of attendance allowance means that he met the financial requirements of Appendix FM of the Immigration Rules. However, the Appellant was obliged to fall back and rely on EX.1 because he could not meet the immigration status requirement. It is argued that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an Applicant to return to his home country to make an entry clearance application to rejoin family members in the UK. It is argued that the judge failed to consider the Appellants wife's disability and her receipt of attendance allowance and the judge correctly says that she may continue to receive her pension but the same cannot be said about her entitlement to attendance allowance which would cease were she to reside in Pakistan and that this was relevant under paragraph EX.1 and Article 8. Entitlement to attendance allowance and its loss were she to relocate to Pakistan were relevant as is the loss of entitlement to free health care under the NHS. It is argued that

the judge's consideration is therefore incomplete. All grounds are arguable and there is an arguable error of law in the manner in which the Judge apply the evidence to paragraph EX.1 and article 8.

7. The respondent opposes the application in a Rule 24 response dated 25 August 2017.

Error of law

8. The appellant's wife's medical condition is accepted by the Judge and it is not disputed that payment is also made of Attendance Allowance. Documentary evidence of this appears in the bundle by way of a letter from the Department of Work and Pensions and a letter addressed to the appellant relating to payment of a Carers Allowance.
9. I record at this point an issue raised by Mr McVeety in his submissions which is that the appellants claim for and receipt of a carers allowance is and has always been unlawful as such allowance will not be paid to a person under immigration control. As stated, this was a matter that was raised at the error of law hearing and not before the First-tier Tribunal.
10. It was not disputed that the pension paid to the appellant's wife will continue. A State pension of £144.73 a week appears in the letter of 20 April 2016 which appears to be the figure, adjusted in accordance with any annual increases, the Judge found will continue to be received by Mrs Quinn. There is also a pension credit £17.42 paid according to the same correspondence.
11. The Judge clearly considered the evidence with the required degree of anxious scrutiny and has given adequate reasons for findings made.
12. In relation to EX.1. It is not argued the Judge misdirected himself at [27] of the decision under challenge. The issue was whether the appellant had demonstrated there will be insurmountable obstacles to continuing family life with his wife outside the United Kingdom. The Judge defines his understanding of such a term as "...which is defined as very significant difficulties which will be faced by either of them and which could not be overcome or which would entail very serious hardship for either of them".
13. Mr Karnik, in his submissions, addressed the question of the payment of the attendance allowance at some length. It was pointed out that such allowance is only paid if the need arises as is the carers allowance.
14. It is known the carers allowance helps with extra costs if a person has a disability severe enough that they need someone to help look after them and that a carer can get £62.70 a week if they care for someone for at least 35 hours a week and they get certain benefits, subject to the exclusion is not being applicable.
15. The starting point for the Judge is the appellant's wife's medical condition as it is that that gives rise to the entitlement within the United Kingdom to the payment of attendance allowance to help with the extra costs of living in the UK. It was not made out that the appellants wife's medical condition comes anywhere near meeting the article 3 threshold.
16. The Judge was not required to assess the matter in anything other than the manner in which he did. In *ZZ (Tanzania) v SSHD* [2014] EWCA Civ 1404 the

Rwandan claimant's wife was disabled. The Court of Appeal said that there was no authority for the submission that in deportation cases, the fact that a spouse, partner or dependent family member of the prospective deportee was disabled within the meaning of the 2010 Act, must be given separate consideration from other aspects of the balancing exercise. Any caring responsibilities could be put into the scale, and if those responsibilities were towards a family member who was seriously ill, that was likely to carry greater weight than those towards a family member in good health. The assessment did not need to incorporate references to the public-sector equality duty under section 149 of the 2010 Act, and still less to the complex jurisprudence of the European Court of Human Rights on Article 14 of the ECHR.

17. The Judge was aware of the need for medication, which was found to be available within Pakistan, and also for the need to consider the cost and ability to fund the same, together with caring arrangements. The specific finding at [30] that "Ms Quinn would also be able to continue to receive a state pension whilst in Pakistan. The appellant will be able to work and provide for them, and continue his care and support, or employ others to do so" shows these issues were not only considered but appropriate findings made. The fact the appellant's wife will lose her Attendance Allowance when she leaves the United Kingdom is not the determinative factor. So far as that allowance is paid to cover additional costs of living in the UK, it could be argued those costs will no longer be present. In relation to the costs of having to live and function in Pakistan the Judge found that such costs could be reasonably met without the attendance allowance.
18. In relation to caring needs, it was not made out on the evidence before the Judge at the appellant needed to be a full-time carer. The Judge clearly addressed the availability of care. To this end it was noted by the Judge that the appellant's wife is treated with anti-inflammatory medication.
19. It was not made out on the evidence before the Judge that the loss of the Attendance Allowance if the appellant's wife relocated with him to Pakistan would create a situation which could not be overcome or which would entail very serious hardship. The finding by the Judge that the situation could be overcome and that any such hardship was not made out is within the range of findings available to the Judge on the evidence.
20. If the appellant's wife chooses not to join him in Pakistan, as the Judge recognises would fall within the scope of choices available to her, she will remain in the United Kingdom with family and access to medical and other services; some of which she could fund by the benefits she would continue to receive. It was not made out on the evidence before the Judge that the appellants presence in the United Kingdom was the determinative factor.
21. It is said in the grounds that an attendance allowance is paid in order to allow the appellant's wife to make necessary adjustments for her disability but that is for necessary adjustments within the United Kingdom. It was not made out that the same could not be facilitated Pakistan even without the attendance allowance. Loss of benefits flowing from the appellant's wife's British nationality are issues that have been considered by the senior courts and do not amount to insurmountable obstacles.

22. As stated above, there is no discriminatory effect of the decision. The decision is in accordance with the law. The loss of entitlement will be to an entitlement paid to a person within the United Kingdom. That applies to all those entitled and no discriminatory effect upon any particular group has been made out. As stated, the Court of Appeal considered the situation for a disabled partner in ZZ (Tanzania).
23. The Judge is also criticised for the finding at [37] in which the Judge finds “This is not a Chikwamba situation, as it is far from clear on the limited evidence whether an application from Pakistan for entry clearance as a spouse will succeed. The appellant will have to meet the financial minimum income threshold requirements”. The grounds assert legal error on the basis there is no need to meet the £18,600 minimum income threshold when a person is in receipt of state benefits. This is arguably correct as the requirement is to prove that maintenance and accommodation can be covered without further recourse to public funds.
24. This is, however, not the core finding of the Judge. The Judge found the appellant could not succeed under Appendix FM and that is a decision that has not been shown to be infected by arguable legal error. The Judge at [35] found there was no reason to consider article 8 ECHR on the basis that all the relevant facts being considered could be determined under the Rules. The primary finding is that the appellant could not succeed under the rules or article 8.
25. In the alternative, the Judge examined the case from [35] by reference to *Razgar*. The Judge adopted the structured approach and considered the points for and against within the body of the determination. The Judge found the decision will be proportionate.
26. The case of *Chikwamba* related to a policy decision by the Secretary State that people should not be permitted to ‘jump the queue’ and should return to their home state for the purposes of making a fresh application, in line. In that case it was not possible for the family to return to Zimbabwe together with their child because the appellant’s partner had been recognised as a refugee from the country to which the appellant was to be returned, making it impossible for the partner to return with the appellant to Zimbabwe. The Court found it unacceptable to expect a person to return to their home state in such circumstances just to make an application to return to the United Kingdom in relation to which it was argued they would succeed.
27. The Secretary State refers to the more recent decision of *R (on the application of Chen) v Secretary State the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 which examined this issue in the context of Appendix FM. In the appeal under consideration, it is important to recognise that Judge Pickup is not finding the appellant should go to Pakistan with his wife remaining in the United Kingdom whilst he made an application to return, as the Judge found that family life can continue with the appellant and his wife living in Pakistan together.
28. In *R (on the application of Chen)* it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. 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 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. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)).

- 29. Having considered the issues raised by the advocates in both written and oral form, having considered that the purpose of Article 8 is not enable a person to choose the country in which they wish to live but rather to prevent unwarranted interference with a protected right, in light of the fact the Judge clearly considered the evidence with the required degree of anxious scrutiny and has given adequate reasons for the findings made, in light of the fact the core finding that family life can continue in Pakistan has not been shown to be infected by material legal error, and in light of the fact the appellant failed to place before the Judge or Secretary of State evidence that any separation will interfere disproportionately with protected rights, this tribunal finds the appellant has failed to make out any arguable legal error material to the decision to dismiss the appeal that warrants the Upper Tribunal interfering with this decision. It is a decision reasonably open to the Judge on the evidence.

Decision

- 30. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

- 31. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 31 January 2018

