



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

Appeal Number: IA/00484/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 January 2018**

**Decision & Reasons Promulgated  
On 21 February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

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

Appellant

**and**

**MR MUHAMMAD USMAN JAVED  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Ms C Proudman, of Counsel, instructed by Britain Solicitors

**DETERMINATION AND REASONS**

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Adio, who in a determination promulgated on 10 May 2017 allowed the appeal of the respondent, on human rights grounds, against a decision of the Secretary of State to refuse to vary his leave to remain as a Tier 2 (General) Migrant.
2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in

the First-tier. Similarly, I will refer to Mr Muhammad Usman Javed as the appellant as he was the appellant in the First-tier Tribunal.

3. The appellant came to Britain with leave to enter as a student in September 2007. He was granted further leave in that capacity until May 2013. On 30 April 2013 an application for leave to remain as a Tier 1 Entrepreneur was refused. In August 2013 he was granted leave to remain as a Tier 4 (General) Student until 24 October 2013. On 23 July 2013 he had made an application under the Tier 2 scheme. That was refused on 17 February 2015. The appellant's appeal was subsequently allowed to the extent that it was remitted to the respondent for a further decision.
4. It is that decision against which the appellant appealed. However, subsequent to that decision his grounds were amended so that the appeal before Judge Adio was solely on the issue of human rights. There was, in fact, no evidence to indicate that the initial decision had been wrong nor indeed has it been challenged. The basis of the human rights application was that the appellant, who had in the meantime made an application for leave to remain as the spouse of an EEA national which was quickly withdrawn, had, in January 2016, married a Pakistani woman who had leave to remain as a student. They have a child born in May 2016. The case was put on the basis that as his wife was studying the appellant had to look after the baby, who had been born prematurely, to enable his wife to complete her studies here. In his determination Judge Adio, having noted that the appeal was brought under Article 8 outside the Rules, considered the circumstances of the appellant and his wife in Britain.
5. He noted the role which the appellant took in looking after his child while his wife was either studying or working part-time. He considered that should the appellant have to leave Britain his wife would not be able to both look after the baby and to continue her studies and her work. He found that family life as being exercised in Britain took into account the fact that the appellant was not a burden on the state and was able to speak English and had integrated into society. He stated that the appellant was not in Britain unlawfully but accepted that he had got involved in a relationship with his wife when his immigration status was precarious. He found that his required "the immense support of the appellant at a time in which she is still recovering from childbirth as well as combining her studies". He concluded that it would be disproportionate for the appellant to be removed from the United Kingdom as that would lead to the break-up of the stability of family life and would have a negative effect on the child. He therefore allowed the appeal.
6. The Secretary of State appealed, asserting that the judge had erred by failing to give full reasons as to why there were compelling circumstances which would entitle the appellant to remain. The grounds emphasised that the family life was precarious and that the

family could return together to enjoy family life in Pakistan. It was stated that given that they could do this the judge's finding that the decision would lead to a break-up of the stability of family life was irrational, particularly given that the appellant's wife's student status was not on a route that could lead to settlement. It was submitted that the family had the option of returning to Pakistan where the appellant's wife could receive support from family members resident there. On those grounds permission to appeal was granted by Judge of the First-tier Tribunal Robertson on 14 November 2016.

7. At the hearing of the appeal before me Mr Tufan relied on the grounds of appeal, emphasising that the sponsor was here as a student on leave which was shortly to expire. He pointed out that the appellant's wife had only come to Britain as a student in May 2016. Given the fact that the appellant's wife's leave was shortly to end, he stated that the appeal was, almost, academic but argued that the judge had erred by not placing weight on the precariousness of the appellant's stay or indeed that of his wife.
8. In reply Ms Proudman, who accepted that no application had been made for the appellant to be considered as the dependant of a student, argued that the judge had properly considered the provisions of Article 8 outside the Rules and had reached conclusions, having heard evidence from the appellant and his wife, which were open to him. She emphasised the closeness of the family unit and the importance of the appellant's wife completing her education and the fact that the appellant was required to look after the baby while she did so. It was not realistic, she suggested, that the family should be expected to return to Pakistan at the present time. In reply Mr Tufan relied on the judgment of the Supreme Court in **Agyarko [2017] UKSC 11**. He stated that it was clear from that judgment that there should be shown to be exceptional circumstances, that is, "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". He stated that there was no reason why this family could not return to Pakistan and continue their life there.
9. I consider that there is a clear material error of law in the determination of the Immigration Judge. He appears not to have taken into account that the appellant's wife had only limited leave to remain and did not have a prospect of settlement here. Not only therefore was the appellant's stay in Britain precarious but so was that of his wife. Similarly, there was simply no reason why the appellant and his wife could not return to Pakistan with their child as a family unit. The appellant's wife has only lived in Britain since 2016.
10. I consider that, when assessing the proportionality of the refusal of leave to remain, the judge erred in law by placing insufficient weight on the necessity of immigration control and the fact that there would be no interference in family life if these two Pakistani parents returned to

Pakistan with their child. For that reason, I set aside the determination of the First-tier Judge.

11. I asked whether or not it was appropriate that I should proceed to redetermine the appeal. Ms Proudman asked that I remit the appeal back to the first-tier to allow an opportunity for the appellant to raise a further ground, which was that he should be allowed to remain because of ten years' lawful residence in Britain. I do not consider that that would be an appropriate step to take. I consider that on the clear evidence which was given before the judge it is appropriate for me to remake this decision.
12. In so doing I take into account the fact that the appellant's wife is studying and that he is looking after their child while she studies and indeed also works. However, more important in the proportionality exercise is the fact that the immigration status of both is precarious and that they could return to Pakistan together with their child. I consider that there is no factor which would mean that their circumstances would make it such that they would not be able to return or it would not be appropriate that they did so. For these reasons, having set aside the decision of the First-tier Judge, I remake the decision and dismiss this appeal.

### **Decision**

This human rights appeal is dismissed.

No anonymity direction is made.

Signed 

Date: 11 February 2018

Deputy Upper Tribunal Judge McGeachy