



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

Appeal Number: HU/24762/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3<sup>rd</sup> April 2019**

**Decision & Reasons Promulgated  
On 04<sup>th</sup> April 2019**

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**MRS SAFIA BIBI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S. Woodhouse (HS Immigration Consultants)

For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is an appeal to the Upper Tribunal by the appellant, permission having been granted by Upper Tribunal Judge Pitt on 29<sup>th</sup> August 2018. It relates to a Decision of First-tier Tribunal Judge Boylan-kemp promulgated on 4<sup>th</sup> January 2018 in which he dismissed the Appellant's appeal.

2. The appellant is a citizen of Pakistan born on 9<sup>th</sup> August 1984. She had applied for leave to remain in the United Kingdom under Appendix FM on the basis of her marriage, which application was refused by the Secretary of State on 14<sup>th</sup> October 2016.
3. There is a considerable history to this case. The appellant came to the UK on 12 December 2013 with entry clearance as a spouse valid until March 2016. The appellant made an in-time application in March 2016 for further limited leave to remain. That application was rejected as invalid on 3 May 2016 because she had not paid the Immigration Health Surcharge (IHS). She made a further application on 9 May 2016 but that application was again rejected as invalid on 14 July 2016. That was also rejected on the basis that she had not paid the IHS. The appellant did not challenge either of those decisions but rather made a further application on 1 August 2016. That application was refused on 14 October 2016 on the basis that she did not meet the eligibility requirements of Appendix FM and that paragraph Ex.1 did not apply.
4. The appellant argued that the Secretary of State had been wrong to reject as invalid the application made in May 2016 because she had paid the IHS on the same day she submitted the application. She produced an email confirming that she had paid the IHS on 9 May 2016, the same day she lodged her visa application.
5. In the last refusal, the subject of the appeal, the Secretary of State had found she was an overstayer, her previous application having been invalid and bringing to an end her s.3C leave. Therefore, she did not meet the eligibility requirements. She had not produced the requisite financial documents and did not satisfy the language requirement. So far as Ex.1 is concerned the Secretary of State found there were no insurmountable obstacles to the appellant and her husband continuing their family life outside the UK.
6. The judge dealt with the validity issue at paragraph 12 of the Decision and Reasons. He noted, and it is clear from the email, that although the IHS was paid on 9 May 2016 it was in fact paid after the appellant had lodged her visa application. This, the appellant said, was because there were problems in submitting the payment. It is clear from the receipt that she needed to include the reference number of the receipt on her visa application. This of course she could not do as it had already been submitted. The judge therefore found that he could not go behind the Secretary of State's validity decision, which in any event the appellant had not challenged by way of Judicial Review. The judge therefore concluded that the Secretary of State was correct in finding that the appellant was an overstayer at the date of application.
7. Legally that is correct. However, it is also clear that the appellant had in fact paid the IHS and at the time she had submitted that application she did comply with all of the other requirements of Appendix FM. Had it not

been for the fact she submitted her visa application prior to making the payment, she would have succeeded under Appendix FM.

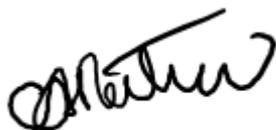
8. The judge having found the Secretary of State's decision about validity to be correct went on to consider whether Ex.1 applied.
9. The appellant's argument in relation to that was that her husband suffered from an eye condition for which he was receiving treatment from an optometry department. Evidence from that department indicated that he was required to wear rigid contact lenses on top of soft piggyback lenses and that he was seen six monthly by specialists. When he had to wear his glasses, as opposed to the contact lenses, his vision was very poor.
10. The appellant also relied upon the fact that her husband had been diagnosed with paranoid schizophrenia and was being treated with risperidone and group therapy sessions. He was under the care of his GP for his mental health condition having been discharged from the psychiatry department in July 2017.
11. The appellant also relied on the fact that the couple were undergoing fertility treatment for which they were privately paying.
12. In relation to those health matters the judge found that the appellant's husband was unable to wear his contact lenses in the UK in the summer and therefore any argument that the impact of living in Pakistan would have a detrimental effect was insufficient to render it an insurmountable obstacle.
13. So far as the self-funded fertility treatment was concerned, whilst acknowledging it to be stressful and an emotional time, the judge did not find the desire to have a child amounted to an insurmountable obstacle. The judge found that they could access similar treatment in Pakistan if they chose.
14. So far as the husband's psychiatric conditions was concerned the judge noted that he was maintained on medication which could be obtained in Pakistan.
15. The appellant also relied upon the fact that her husband provided care for his mother in the UK with whom they lived and who suffers from arthritis and received both physical and emotional care from her son. In that regard the judge noted that the husband had an elder brother in the UK who could be responsible for his mother's care and that additionally there were local services which could provide such care as was necessary.
16. For those reasons the judge found there to be no insurmountable obstacles to the couple enjoying family life together in Pakistan and that therefore the decision to refuse the human rights claim was proportionate.
17. With the consent of Miss Everett on behalf of the Secretary of State, I found that while the judge was legally correct in his treatment of the

validity issue, it was an important factor to be taken into consideration with regard to the question of proportionality and the judge did not take that into account at all. That I find to be a material error of law as it goes to the proportionality decision such that the decision must be set aside.

18. The judge had found that had the 2016 application been valid, the appellant would have met the requirements of the rules both financial and on the basis of the English language certificate. The only reason she did not satisfy those by the time of the more recent application was because the documents were by then out of date and as an overstayer the English language certificate was no longer valid.
19. In substance therefore, the May 2016 application would have succeeded had she submitted the payment for the IHS immediately before, rather than a few hours after she submitted the visa application. Mr Woodhouse provided a copy of the Immigration (Health Charge) Order 2015 which at paragraph 5 (1) provides that a person required to pay a charge "must pay the amount required when the person applies for entry clearance or leave to remain, as applicable". That Statutory Instrument does not state in terms that it must be paid prior to the application and in this case the appellant in fact made the payment on the same day as she made the application. It would have been a matter that may have been resolved by Judicial Review at the time. Unfortunately, the appellant was at all times making her applications without the benefit of legal advice.
20. Factoring that into the assessment of proportionality and adding the inherent unfairness in this appellant's application being refused (albeit strictly legally correctly) and adding that to the health issues relating to her husband, the fact that they are undergoing self-funded fertility treatment and the husband's relationship with and care of his mother, the appellant is clearly entitled to succeed on Article 8 grounds. The refusal is a disproportionate breach of the appellant and her husband's right to family life. Miss Everett conceded that to be correct.

### **Decision**

21. The Decision and Reasons of the First-tier Tribunal containing a material error of law it is set aside. In redeciding the appeal, it is allowed on Human Rights grounds.
22. The First-tier Tribunal did not make an anonymity direction and I see no justification for one.



Signed

Date 3<sup>rd</sup> April 2019

Upper Tribunal Judge Martin