



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/09711/2019

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 4 March 2020

Decision & Reasons Promulgated  
On 19 March 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MR IDREES JAVED  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr N Ahmed, Counsel, instructed by Royal Solicitors

For the Respondent: Mr C Bates, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appeal brought by the Appellant against the decision of Judge of the First-tier Tribunal Fowell dated 23 August 2019. The Appellant had appealed against the decision of the Respondent dated 20 May 2019 to refuse leave to remain and to refuse a human rights claim. The Appellant is a national of Pakistan, contrary to the reference made in the first paragraph of the decision suggesting that the Appellant is a national of India.

2. The Appellant first came to the United Kingdom in August of 2012 as a Tier 4 (General) Student and had leave to remain until 10 April 2014. An in time application for leave to remain was made as a student and was granted until 2 July 2015. A further application was made for leave to remain on 30 June 2015 for leave outside of the Rules which was refused in a decision of 5 November 2015.
3. The further background of this matter is that the Appellant is married by an Islamic marriage ceremony to Ms Tanveer Akhtar, a fellow national of Pakistan who is now also naturalised as a British citizen. The couple had known each other in Pakistan, being related to one another. There had been a proposal of marriage on the part of the Appellant's family to Ms Akhtar's family in 2010 which had been declined.
4. However when the Appellant was present in the United Kingdom in 2015 the couple are said to have met again at another mutual relative's wedding. That is said to have taken place in April 2015. It is said that the couple entered into a relationship, and entered into an Islamic marriage on 29 August 2015.
5. After the Appellant became an overstayer (the date of which is discussed further below), various applications were made by the Appellant for leave to remain including an asylum application on 8 October 2017 (which is as yet undecided). The present decision of the Respondent dated 20 May 2019 was in relation to an application for leave to remain dated 23 December 2017 in which the Appellant relied upon his relationship with Ms Akhtar. In refusing that application, the Respondent held that the Appellant did not meet the immigration status requirement set out in Appendix FM, as being an overstayer and on bail [8]. It was also further held by the Respondent that there were no insurmountable obstacles to family life continuing outside of the UK [10]; that under paragraph 276ADE of the Immigration Rules there were no very significant obstacles to the Appellant's integration into Pakistan were he to return [11-15]; and that there were no exceptional circumstances demonstrating that the refusal of the human rights claim resulted in a disproportionate interference with the appellant's private and family life in the UK [17-33].
6. It is to be noted that in the consideration of the Appellant's application for leave to remain outside of the Rules at [17] onwards, the Respondent noted at [20] that the Appellant and Ms Akhtar had asserted that their families did not approve of their marriage and that there was a risk of harm to them both if they were to return to live in Pakistan. The Respondent noted at [26] that this fear of harm was being considered in the appellant's asylum application and would not be addressed further in the present decision.
7. The Appellant appealed against the Respondent's decision and the matter came before the judge at the Birmingham Hearing Centre on 19 August 2019. Both the Appellant and Ms Akhtar gave evidence.
8. At [13]-[17] of the judge's subsequent decision, seemingly when considering whether there were any insurmountable obstacles to family life continuing outside the UK,

the judge proceeded to consider whether any risk of harm arose for either the Appellant or Ms Akhtar in Pakistan, notwithstanding that the Respondent had declined in the decision to consider the Appellant's arguments regarding risk of harm. The judge held, directing himself at [13] and [15] that the standard of proof in the human rights appeal was on a balance of probabilities, that the Appellant had not established any such risk [15], [17], [30].

9. Under the hearing 'Are the rules met?' at [18], the judge held that 'In the circumstances there appears to be no real obstacles to a return to Pakistan, either together or by Mr Javed to seek entry clearance ...'.
10. From the third sentence in [18], to [21], the judge appears to consider whether the immigration rules might be met by the appellant upon an application for entry clearance if made from abroad, and whether there was any 'sensible reason' to require him to make such an application. The judge expressed reservations in this passage that the immigration rules would be met, in particular regarding the specified evidence required to satisfy the financial requirements of appendix FM, and held at [21] that there did appear to be a sensible reason for requiring such an application.
11. In considering the question of the proportionality of the respondent's decision at [22] onwards, the judge considered the application of s.117B NIAA 2002. The judge held at [27] as follows:
 

*"The fourth and fifth points (ie s.117B(4) and (5)) are very similar. They are in slightly different terms for someone here unlawfully and someone whose leave is precarious. Precarious for this purpose means anything short of indefinite leave to remain but the short point is that little weight should be given to family life when established whilst here unlawfully, as here. Mr Javed's leave to remain expired on 2 July 2015 and their religious wedding took place just under three months later. Those considerations therefore leave matters very much as they were under the Rules"*.
12. The judge ultimately dismissed the appeal.
13. The Appellant applied for permission to appeal, making an application to the First-tier Tribunal in the first instance. Those grounds dated 3 September 2019, argue that the judge erred in law, in summary, as follows:
  - (i) when assessing whether there were insurmountable obstacles to family life continuing outside of the UK, by failing to take into consideration certain relevant factors; failing to make findings on the credibility of the appellant's wife's evidence; erring in law in proceeding on the basis that certain facts had been admitted by the appellant, which was denied; failing to take into account certain objective evidence; and
  - (ii) in relation to the judge's approach to the considerations set out in s.117B NIAA 2002, by proceeding unfairly, by querying the details of Ms Akhtar's employment in the UK; erring in the assessment of the appellant's financial

independence, and in the assessment of the application of the Chikwamba principal.

14. In 'Supplementary Grounds of Appeal' dated 24 October 2019, the Appellant also asserts that the judge erred in law in failing to consider the issue of the reasonableness of expecting the Appellant's British partner to leave the United Kingdom, and referred to the recent authority of GM (Sri Lanka) v SSHD [2019] EWCA Civ 0630.
15. The Appellant also prepared 'Additional Grounds of Appeal' dated 21 November 2019, arguing that the judge erred in law in failing to take into consideration as part of the proportionality assessment the material fact that the appellant had been lawfully resident in United Kingdom at the time that the appellant and his partner entered into their relationship, and referred to the further recent authority of Lal v SSHD [2019] EWCA Civ 1925.
16. Permission was refused in a decision of Judge of the First tier Tribunal Froom dated 18 November 2019, finding that the judge had been plainly entitled find that the Appellant had not established his case of risk on return to the applicable civil standard, and was plainly entitled to find that the Chikwamba principal did not apply, and that family life could continue abroad.
17. Renewed grounds of appeal were made to the Upper Tribunal directly in an application dated 3 December 2019. The appellant stated at [7(a)] that he relied upon the original grounds of appeal, and set out [7(b) and 7(c)(i)-(ix)] certain points which were in essence a further elaboration of the points raised in the Supplementary Grounds of Appeal of 24 October 2019 and Additional Grounds of appeal of 21 November 2019.
18. In a decision dated 12 December 2019, Upper Tribunal Judge Blum granted permission to appeal in the following terms
 

"Renewed application for permission to appeal on grounds already rejected by the First-tier Tribunal is **granted only in respect of the First-tier Judge's application of the proportionality assessment and not in respect of his factual findings.**" (*Emphasis in the original*)
19. Under the heading 'Reasons', Judge Blum provides:
  1. The judge properly considered the evidence relating to whether the Appellant and his partner would face any risk of harm from their families on account of their marriage in accordance with the balance of probabilities test given that the Appellant was only relying on Article 8 and had had an outstanding protection claim and the judge was clearly aware that she had suffered abuse during her previous marriage [6]. The factual findings in relation to whether the partner's family would have any continuing objection to the marriage was one rationally open to the judge for the reasons given ([14] to [17]). In reaching his findings the judge specifically considered that the partner had not returned to Pakistan.

2. Although the judge considered the s.117B factors when assessing proportionality and that a temporary separation would not breach the Chikwamba ([2008] UKHL 40) principle, it is arguable that the judge failed to consider or make any finding as to whether it was 'reasonable' for the Appellant's partner to leave the UK by reference to GM (Sri Lanka) v The Secretary of State for the Home Department [2019] EWCA Civ 1630, a relevant factor to the overall proportionality assessment".

### Submissions

20. Before me Mr Ahmed of Counsel sought to adopt the Appellant's grounds of appeal. However at an early juncture within Mr Ahmed's submissions he argued that the Judge had erred in law at [27] by proceeding under a mistake of fact. It was argued that the Appellant's leave to remain had not expired on 2 July 2015 as asserted by the judge at [27]; rather, it expired on 5 November 2015 at the earliest. This was on the basis that although his last grant of leave to remain was to expire on 2 July 2015, the appellant made an in time application for leave to remain on 30 June 2015 which was only refused on 5 November 2015. The Appellant's leave to remain had thus been automatically extended by operation of s. 3C of the Immigration Act 1971 until 5 November 2015.
21. Mr Ahmed argued that the judge having proceeded under that mistake of fact was a matter which had been raised in the Appellant's grounds of appeal renewed before the Upper Tribunal at paragraph 7(c) (vii) which reads as follows:
 

"At paragraph 27 of the determination the FtTJ has erred in failing to take into consideration as part of the proportionality assessment the material fact that the Appellant was *lawfully* resident in the UK at the time that the Appellant and his partner entered into their relationship. This was materially relevant under the provisions relating to the consideration of the Section 117B(5) NIAA 2002. The FtTJ wrongly determined that appeal on the basis that the family life had been established whilst the Appellant was in the UK unlawfully which was contrary to the position in this case".
22. I heard submissions from the both parties as to:
  - (i) whether the alleged 'mistake of fact' point was one which was actually raised within the appellant's grounds of appeal;
  - (ii) if not, whether the point was *Robinson obvious* ([1998] QB 929);
  - (iii) if *Robinson obvious*, whether proceeding under such a mistake of fact represented a material error of law on the part of the judge.
23. For his part, Mr Bates appeared to accept that the judge had, at [27] appeared to proceed under a mistake of fact, although did not accept that the point was raised in that way in the Appellant's grounds of appeal; that the point was not *Robinson obvious*, and would not have made any material difference to the outcome of the appeal.

## Discussion

24. I find that the judge did proceed under a mistake of fact regarding the date on which the appellant became an overstayer in the United Kingdom. Once one considers the Appellant's immigration history and observes that he made an in time application for further leave to remain before the expiry of his leave to remain on 2 July 2015, it is clear as a matter of law that the Appellant's leave to remain did not expire on 2 July 2015 as held by the judge at [27] but rather, on 5 November 2015.
25. The sequence of events in relation to the relationship was said to be that the couple had always known each other; there was a refused proposal of marriage in Pakistan in 2010; they both left Pakistan; they met again in April 2015 (see decision at [6]); and they underwent an Islamic marriage on 29 August 2015. The couple had therefore met again, formed a relationship, and were married under Islamic law, all before the Appellant's leave expired.
26. However, it is clear that the judge has given little weight to the Appellant's relationship with his wife, directing himself at [27] that '... little weight should be given to family life is established whilst he unlawfully, as here' (emphasis added). The basis on which has done so appears to be directly related the judge's misapprehension as to when the appellant became unlawfully present in the United Kingdom.
27. I find that the wording of the Appellant's grounds of appeal at set out at paragraph 7(c)(vii) of those grounds, set out above, does not raise the above point clearly. The grounds do not assert with any particularity *how* the judge erred, for example, by making assertions as to the date on which the appellant ceased to be lawfully present United Kingdom, or the date on which it was said that the relationship was entered into.
28. However, when the point is set out as I have at [24]-[27] above, it becomes obvious that the judge proceeded under a mistake of fact that amounted to an error of law. At [22] onwards in the decision, the judge was considering the proportionality of the respondent's decision, and in particular, the application of the mandatory considerations set out in s.117B NIAA 2002. The judge erred by giving the relationship little weight, when he was under no obligation under s.117B NIAA 2002 to do so. The judge's approach to the weight to be attached to the Appellant's relationship, a key element to the appeal, was therefore erroneous.
29. I find that it is not inevitable that judge would have arrived at the same overall conclusion as he did, in finding that the Respondent's decision refusing the human rights claim was proportionate, had the judge not erred in law on the application of s.117B(4) NIAA 2002. It is arguable that a different outcome may have prevailed if the judge had proceeded without the misapprehension of a fact under which he was labouring.
30. I therefore find that the judge's overall decision was made having made a material error of law and I set the decision aside.

31. I do not therefore find it necessary to consider the remainder of the appellant's grounds of appeal. When this decision is remade, it will have to be remade in accordance with the legal principles set out in any relevant authority, including in accordance with the two recent Court of Appeal authorities referred to by the appellant.
32. Due to the extent of the findings of fact which need to be made regarding the appellant's relationship, and the weight to be attached to it, I find that it is appropriate to remit this appeal to the First tier Tribunal.
33. However, in the rehearing of this appeal, it is to be noted that there has been no successful challenge to the Tribunal's finding that there is no risk of harm to the Appellant or his partner in Pakistan. The re making of the decision should be made on that basis. A Mirpuri interpreter will be arranged. If any other interpreter is required, the Appellant should make the appropriate request.

### **Decision**

The making of the decision involved the making of a material error of law.

I set the decision aside.

I remit the appeal to the First tier Tribunal.

No anonymity direction is made.

Signed

Date 12.3.20



Deputy Upper Tribunal Judge O'Ryan