



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001086

First-tier Tribunal No: HU/51574/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 May 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Saima Toseeb
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr R Rashid of Counsel, instructed by E Smith Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard by remote video at Field House on 10 May 2023

DECISION AND REASONS

1. At the error of law hearing before me, conducted by remote video, I reserved my decision and reasons to be given in writing, which I now do.
2. The appellant, a national of Pakistan who entered the UK in 2017 on a spousal visa to join her British citizen husband, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Alis) promulgated following a hearing on 20.1.22, dismissing her appeal against the respondent's decision of 21.4.21 refusing her application for further leave to remain (FLR) as a spouse.
3. The application was refused by the respondent under the provisions of Appendix FM of the Immigration Rules, as (i) her visa had already expired before she made the application on 26.2.21 and (ii) she did not meet the financial eligibility requirements. The respondent found no insurmountable obstacles to family life continuing in Pakistan, no very significant obstacles to private life continuing in

Pakistan, and no exceptional circumstances under GEN 3.2. The application was also rejected under article 8 ECHR.

4. The First-tier Tribunal found the appellant could not meet the requirements of the Rules and, on considering the matter outside the Rules pursuant to article 8 ECHR, concluded that there were no exceptional circumstances sufficient to render refusal disproportionate.
5. In summary, the grounds first complain that at [32] the judge took as a point against the appellant that the sponsor had claimed he had taken three weeks leave to Pakistan in February 2021 but could not return to work in the UK as expected in March 2021 because Pakistan was placed on the UK Government's Covid pandemic 'red list', yet the government's website confirmed that Pakistan was not placed on the 'red list' until 9.4.21. At [33] the judge found that even if there was a mistake about the dates, there was nothing to prevent the sponsor from returning to the UK before Pakistan came off the 'red list', as his parents had managed to do. It is submitted that it was unfair for the judge to conduct his own post-hearing research and reach an adverse credibility finding on the basis of evidence not before the Tribunal and not put to the appellant for comment.
6. The second ground, relying on Chen and Hayat [2012] EWCA Civ 1054, is that the judge erred in dismissing the appeal on article 8 grounds where the respondent had failed to "adequately justify" the interference with the appellant's rights by insisting that the appellant should return to Pakistan to make an application for entry clearance.
7. The appellant's skeleton arguments submitted that the appellant qualifies for LTR under the 10-year route to settlement under EX1 with a genuine and subsisting relationship with a British citizen spouse and there are insurmountable obstacles to family life with her partner continuing outside the UK. In the alternative, even if there are not insurmountable obstacles, the skeleton argument submits that she should be permitted to remain on Chikwamba v SSHD [2008] UKHL 40 principles, as a temporary separation to enable an entry clearance application from Pakistan would be disproportionate. Reliance is also placed on the respondent's Covid-19 policy guidance in relation to the financial requirements under the Rules, to disregard a temporary loss of employment or income attributable to the Covid-19 pandemic. Both skeleton arguments as well as the policy guidance were put before the First-tier Tribunal and considered by Judge Alis. At [30] of the decision, Judge Alis also found that the sponsor did not fall within the policy guidance, as Mr Schwenk accepted and recorded at [31].
8. In granting permission to appeal on 17.5.22, Judge O'Callaghan considered that "the ground asserting that the Judge made an adverse finding on an issue not put to the appellant is arguable. The appellant can expect to have to address the issue of materiality at the error of law hearing. The remaining challenges do not, on initial consideration, enjoy strength but it is appropriate that they are advanced at an oral hearing."
9. Before reaching any findings and my conclusion, I have taken into account the helpful submissions of both legal representatives and the various documents in the case. Mr Rashid did not pursue the second ground, even when Mr Terrell pointed out that it had not been addressed in submissions.
10. In relation to the first ground, as Judge O'Callaghan pointed out, the appellant must establish the materiality of this so-called adverse finding. Reading the decision as a whole, I am not satisfied that the issue was material, as even without the alleged difficulty in returning to the UK the sponsor could not even begin to meet the financial requirements. I agree with Mr Terrell's characterisation

of this ground as 'hopeless.' Whilst it might have been better had the judge canvassed with the parties the issue of when Pakistan went onto the 'red list', I note that it has not been disputed that there is any factual error in the dates provided by the judge at [32] of the decision. More significantly, the issue was not relied on against the appellant and sponsor as at [33] the judge states that even if the sponsor was mistaken as to the dates, he could have returned earlier, as his parents apparently did in August 2021, which is not disputed. In any event, the issue is a very minor point and I cannot see that it was relied on in any way as undermining of the appellant or the sponsor's credibility or otherwise material to the outcome of the appeal.

11. The fact remains that for whatever reason, the sponsor spent the time between February 2021 and 22 September 2021 in Pakistan. That fact is indisputable. Even if the point had been put to the sponsor for comment and response, it could not have assisted him with the failure to meet the financial requirements. It cannot be properly argued that but for his delayed return to the UK he would have met the financial requirements as it is clear he has not had any regular income since 2017. As the judge pointed out at [30] he could not demonstrate that his income was materially affected by the pandemic.
12. The indisputable length of the sponsor's 2021 stay in Pakistan only served to undermine the claim that there were insurmountable obstacles to family life continuing there, the judge having set out several other factors supporting the conclusion that there were no such insurmountable obstacles. Putting the point to the appellant or sponsor would and could not have changed the facts of the matter. It follows that any error in this regard was not material.
13. The judge went on to make a careful assessment under EX1 and insurmountable obstacles, concluding at [37] and for the reasons explained in that paragraph and at [38] of the decision that the appellant could not satisfy the test. The judge then went on to consider exceptional circumstances and article 8 ECHR outside the Rules, applying the factors identified in s117B of the 2002 Act, but found no such exceptional circumstances.
14. In relation to the second ground, the judge also went on from [48] to consider whether the facts allowed the appellant to benefit from the Chikwamba v SSHD [2008] UKHL 40 and Chen principle, but concluded that this was not a case where the appellant would be bound to succeed on an entry clearance application, for the reasons stated, which are obvious. As stated above, this second ground was not pursued before me and in any event, I can find no error of law in respect of that ground.
15. In all the circumstances, and for the reasons explained above, I find no material error of law in the making of the decision of the First-tier Tribunal sufficient to require it to be set aside.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands, and the appeal remains dismissed on all grounds.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 May 2023