



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-  
002804

First-tier Tribunal No: HU/59187/2022

LH/01021/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

22<sup>nd</sup> November 2023

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**Bismillah Bashir**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**Entry Clearance Officer**

Respondent

**Representation:**

For the Appellant: Mr J Martin, instructed by Connaught Law

For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

**Heard remotely at Field House on 15 November 2023**

**DECISION AND REASONS**

1. To avoid confusion, the parties are referred to below as they were before the First-tier Tribunal.
2. By the decision of the First-tier Tribunal dated 22.7.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Drake) promulgated 31.5.23 allowing the appellant's appeal against the decision of the Entry Clearance Officer dated 21.11.22 to refuse her application for Entry Clearance (EC) to join her sponsoring partner in the UK, ZK, pursuant to the Immigration Rules. The respondent reviewed the refusal decision on 20.2.23 but the decision was maintained.

3. It was common ground that the appellant and the sponsor were in a genuine and subsisting relationship. However, she could not meet the E-ECP 2.1 requirements of Appendix FM as the sponsor did not have settled status in the UK, only limited leave.
4. Nevertheless, the First-tier Tribunal allowed the appeal on article 8 ECHR grounds, concluding that to refuse EC would be unjustifiably harsh and, therefore, disproportionate.
5. The grounds submit (i) that at [23] of the decision the First-tier Tribunal Judge made a material misdirection in law in finding the facts of the present case to be analogous to those of FH (Iran) [2010] UKUT 275 and Aswatte (Sri Lanka) [2011] UKUT 476; and (ii) that the judge failed to take into consideration the public interest factors weighing against the appellant, in particular those of s117B of the 2002 Act.
6. After hearing the helpful submissions of both legal representatives, I reserved my decision to be provided in writing, which I now do.
7. The sponsor had argued that it would be difficult for him to integrate in Pakistan, given his personal circumstances, including running a business, and health conditions. He wanted his spouse (the appellant) to join him in the UK. However, the appellant accepted and at [2], [7] and [21] of the decision the judge agreed, that she could not meet the requirements of the Immigration Rules. At [2] the judge noted that it was not argued that there are insurmountable obstacles to family life continuing in Pakistan, the absence of which obstacles the judge specifically found at [23.6] of the decision. Neither could it be the case that there are very significant obstacles to integration for the sponsor in returning to Pakistan, particularly given that he was able to go there to marry the appellant.
8. In relation to the second ground, whilst the judge made a brief reference to the statutory public interest considerations under s117B of the 2002 Act at [8] of the decision, I agree with Ms McKenzie's submission there is no discussion of those factors elsewhere in the decision and it is not clear from the decision that they have been taken into consideration. However, I accede to Mr Martin's submission that in effect, those considerations are at best neutral, and that in any event the absence of any detailed consideration is not material to the outcome of the appeal, as none of them bear on the essential issues in the appeal. It follows that this second ground is not made out as a material error. What may be more relevant, however, is that the article 8 proportionality assessment appears to be rather one-sided and not the result of a balancing exercise.
9. In relation to the first ground, I have carefully considered the competing submissions. As Ms McKenzie points out, FH and Aswatte, both turn on the fact that the persons in the UK were refugees and unable for that reason to continue or resume family life within their country of origin. As stated at [11] of FH, "It is... odd that the refugee should be disadvantaged in that way, because, unlike other persons with limited leave in the United Kingdom under the Rules, the refugee is a person who cannot return home to enjoy married life there." The Upper Tribunal concluded that the Rules should be changed and "In the meantime it is most unlikely that it will be proportionate to refuse the admission of the spouse of a refugee where all the requirements of paragraph 281 are met save that relating to settlement." Aswatte made a similar decision but in relation to the fiancée of a refugee.
10. Mr Martin submitted that all the judge was doing by relying on Aswatte and FH was to point out a gap in the Rules and find that it could be filled under article 8 ECHR. As the only ground of appeal was under article 8 ECHR, it was theoretically

open to the First-tier Tribunal to find the decision unjustifiably harsh and therefore disproportionate. However, I am satisfied that the judge went far beyond the extent suggested in Mr Martin's submission by concluding at [23.2] of the decision that "the partners of persons with limited leave to remain should be treated similarly to those of students and sponsored workers." It appears from a reading of the decision that a determination to rectify the perceived flaw or gap in the Rules is the primary basis for the decision and underlies all of the supporting reasoning. However, it was not for the First-tier Tribunal to fill perceived gaps in the Rules by reliance on article 8 ECHR. The reasoning at [23.2] is to effectively run 'coach and horses' through the very specific categories permitted in the Immigration Rules to enable a person to join a partner in the UK who has only limited leave to remain.

11. More significantly, I am satisfied that the judge proceeded from that point onwards in an unbalanced way, losing sight of the crucial requirement of compelling circumstances sufficient to conclude, exceptionally, that refusal to grant entry clearance was unjustifiably harsh and, therefore, disproportionate. An example of that approach is found in the findings at [23.3] of the decision, where the judge relied on the fact that the sponsor was contributing to the economy, would find it very difficult to run his business from outside the UK, and by finding that the fact that he could visit his spouse in Pakistan does not mean that he would fully enjoy family life with the appellant or that the mere fact that he could visit Pakistan of itself mean that it is not disproportionate to force him to do so. The judge also noted that the relationship was genuine and subsisting, and that the appellant could be adequately maintained and accommodated in the UK without recourse to public funds. Whilst those were all valid and relevant factors in any proportionality balancing exercise, the exercise was largely one-sided. I am satisfied that on no reasonable objective assessment could those factors rendering the refusal decision unjustifiably harsh.
12. In the circumstances, I am satisfied that the First-tier Tribunal misdirected itself in law by reliance on the case law cited above. It must be borne in mind that in the present case, there were no insurmountable obstacles to the sponsor joining the appellant in Pakistan to continue their family life together. It was not necessary for family life to be able to continue for the appellant be granted EC to the UK. In reality, there was nothing other than the sponsor's preference to remain in the UK that prevented family life together continuing in Pakistan. It was also important to note that the marriage took place in the knowledge that the appellant had no right to join the sponsor in the UK. Any interference to family life arises from the action or inaction of the sponsor, not the respondent. In those circumstances, to conclude that the respondent's decision was unjustifiably harsh is unsustainable. The analogy with the cases cited is flawed and amounts to a misdirection in law.
13. It follows from the above that the decision of the First-tier Tribunal cannot stand and must be set aside to be remade. Before reaching my decision, I invited submissions as to the proper onward course, should I find an error of law sufficient to set aside the decision. Ms McKenzie remained neutral on the issue of remittal to the First-tier Tribunal. However, Mr Martin explained that no new evidence was relied on and pointed out that the essential factual circumstances have not changed and are not in dispute. He would not seek to call the appellant or proffer any further evidence. He submitted that the Upper Tribunal could remake the decision without the need for a continuation hearing or any further submissions. In the circumstances, I was satisfied that it was appropriate to remake the decision without any further hearing.

14. It is uncontentious to state that article 8 ECHR does not provide an individual with a choice to exercise their family or private life in a country of their choosing. On the facts of this case, as stated above, the appellant married the sponsor, fully knowing that because of his limited immigration status she did not have an automatic right to join him in the UK. That there may be a discrepancy between the sponsor and this appellant on the one hand and other migrants wishing to bring dependents to the UK on the other, does not render disproportionate the respondent's decision, which was entirely consistent with the Rules. In considering the proportionality balancing exercise, I bear in mind all that has been advanced as to the sponsor's health issues and his particular circumstances, including his successful business, which may be difficult to manage from Pakistan. I also accept that accommodation and maintenance are not a challenge for the appellant and the sponsor and that they would not be a drain on public resources. I further note from the refusal decision that all other requirements of the Rules but for eligibility were found to be met. On the other side of the balance, I must also take into account as appropriate the statutory public interest considerations under s117B of the 2002 Act and in particular the public interest in maintaining immigration control under the strict requirements set by the Rules. Those Rules clearly limit the circumstances in which a person with limited leave to remain may bring a spouse or other dependent to join them in the UK. Whilst the sponsor may have some challenges and the respondent concedes there may be a degree of hardship in the sponsor joining the appellant by returning to Pakistan, it is not argued that there are either very significant obstacles to the sponsor's integration in Pakistan, or that there are insurmountable obstacles to continuing family life in Pakistan or elsewhere outside the UK. For the reasons explained above, I am also satisfied that there are no exceptional or compelling circumstances in this case.
15. Considering the facts as a whole, in the round, I am satisfied that nothing in the grounds or the evidence before the First-tier Tribunal as to the circumstances of both the appellant and the sponsor demonstrates that they come anywhere close to being sufficient to render the refusal decision unjustifiably harsh. In reaching that conclusion I take into account all factors advanced in the favour of the appellant and sponsor. Weighing all matters together, I am satisfied that the respondent has demonstrated that the refusal was proportionate and not disproportionate to the article 8 rights to respect for family and private life.
16. It follows that the appellant's appeal against the respondent's refusal decision must be dismissed.

### **Notice of Decision**

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The decision is remade by dismissing the appeal.

I make no order for costs.

DMW Pickup

**DMW Pickup**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**15 November 2023**