



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003003

First-tier Tribunal No: HU/54730/2022
LH/00782/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 November 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ALI SHOAB
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, instructed by Eaton Adams Solicitors.
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 31 October 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Clems ('the Judge'), promulgated following a hearing at Manchester on 24 February 2023, in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom on human rights grounds.
2. The Judge records the appellant entering the UK on 15 July 2018 lawfully with a partner visa valid until 13 April 2021. The appellant and his partner, Mrs Hussain, married in Pakistan in December 2016. The appellant made an application for leave to remain on 11 April 2021.
3. The refusal letter is dated 14 July 2022.
4. The decision maker found the appellant could not satisfy Appendix FM and so considered the claim under the 10 year partner route. The refusal states that the appellant did not qualify for leave under the 10 year partner route for the reasons set out in the refusal.
5. The decision-makers then went on to consider exceptional circumstances which would render refusal a breach of Article 8 ECHR but found no such circumstances existed in this case.

6. The Judge's findings are set out from [7] of the determination. In addition to the documentary evidence the Judge had the advantage of considering the oral evidence of both the appellant and his wife.
7. The Judge accepts, on the basis of the agreed evidence and concession by the Secretary of State, that the appellant and his wife have a family life which they exercise in the UK. In relation to the Immigration Rules, the Judge commences consideration of this from [13] noting the Secretary of State's case that the appellant and his wife would not face very significant difficulties in continuing their family life in Pakistan or problems that could not be overcome or that would entail very serious hardship for them.
8. Having assessed the evidence the Judge finds at [18] that the factors individually and cumulatively did not establish insurmountable obstacles to the couple continuing their family life outside the UK.
9. The Judge thereafter considers Article 8 ECHR outside the Rules, concluding at [25] that the appellant had not established that the interference by the respondent with his Article 8 rights was unlawful and disproportionate as a result of which the appeal based on Article 8 failed.
10. The appellant sought permission to appeal arguing the Judge failed to apply the correct test which should be found in the Partner rules under Appendix FM of the Immigration Rules. The grounds assert the Judge failed to address whether the requirements of R-LTRP.1.1 are met which was the primary case before the Judge. It is argued that if the requirements of Rules were met there was no need to go on to consider EX.1 or to look at the matter outside the Rules.
11. It is pleaded, in the alternative, in ground 2 that in failing to consider whether the appellant met the substantive requirements of the Partner rule the Judge failed to have regard to material matters.
12. It is further pleaded, ground 3, that the Judge failed to give adequate reasons for why the appellant could not succeed under the Partner rule and failed to give adequate reasons for why it was proportionate to remove the appellant notwithstanding his ability to satisfy the Rules.
13. Permission to appeal was granted on a renewed application by Upper Tribunal Judge Jackson on 18 September 2023 the operative part of the grant being in the following terms:

The Appellant seeks permission to appeal four days out of time against the decision of First-tier Tribunal Judge Clemes promulgated on 5 March 2022 dismissing his appeal against the Respondent's refusal of his human rights claim. The application asserts that the application is made in time, being 14 days after the date of notice sent and in any event, the initial refusal of permission to appeal was only discovered in a spam folder over a week after being sent and instructions were then taken as quickly as possible for this application. It appears that the application was received after business hours one day late and it is in the interests of justice to extend time for this short period.

The grounds of appeal are that the First-tier Tribunal erred in law in (i) failing to determine whether the requirements of Appendix FM for leave to remain as a spouse were met; and (ii) failing to give adequate reasons why the Appellant did not meet the requirements of Appendix FM, or why his removal was proportionate notwithstanding the rules were met.

Whilst the material before the First-tier Tribunal was not entirely clear, in that the Respondent's decision letter did not directly dispute that the Appellant met the requirements of the Appendix FM (it being silent on some matters, but must have found some were not met to go on to consider paragraph EX.1) and there being no skeleton argument on behalf of the Appellant identifying the issues for consideration; the appeal statement and documents submitted on behalf of the Appellant arguably raised the issue of whether the rules were met. There was an express statement that the 2

financial requirements and English language requirements were now met (with documentary evidence supporting both and an explanation as to why they may not previously have been satisfied) and that should have arguably been considered by the First-tier Tribunal as a starting point. If the rules were met, that would arguably have been determinative of the appeal in the Appellant's favour.

The First-tier Tribunal's decision does contain an arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted.

14. In a Rule 24 reply dated 30 October 2023 Mr Tan writes:

2. In relation to the basis of refusal and consideration under the 10 year route, that was the application made. The application made 11/04/21 expressly says that the financial requirement could not be met. There was no evidence of payslips and employment in relation to the appellant as part of the application that could meet FM-SE. Further, the appellant had not passed the A2 level English language requirement.
3. However, the respondent does not oppose the appellant's application for permission to appeal that the FTT erred for the reasons in ground 2 and 3, namely a failure to consider whether the rules were met/nearly met as part of a proportionality assessment.
4. As to a claim that the rules could be met, there is a language certificate in the appellant bundle which post dates the refusal and is sufficient to meet the requirements of a hypothetical application.
5. As to finances, FM-SE 1(I) requires the specified evidence to be dated no earlier than 28 days to the application. Unfortunately in this instance as the FTT date of hearing was 24/02/23, the evidence would, if to conform along the lines of FM-SE need to be as recent as the end of January 2023. The 6 month window would be from this point backwards.
6. The bank statements in relation to the appellant appear to be missing December 2022 (appellant bundle) and thus the corresponding wage payment at the end of December is not evidenced. Everything else seems to be in order showing his income up to this point and in January 2023.
7. The partner of the appellant's bank statements end 17/01/23 so do not evidence the salary paid at the end of January, aside from not falling within the 28 day evidential requirement.
8. In order to succeed, the appellant is reliant on both of the incomes of the appellant and sponsor. In the absence of that evidence being before the FTT, it is not accepted that the evidence showed the rules were met on the basis of the date of hearing equating to a date of application.

Discussion and analysis

15. The Tribunal is grateful to Mr Tan for producing the Rule 24 response which produced an email from the appellant's representative, sent at 11:50 hours the day before the hearing, providing substantial additional evidence.
16. It is not disputed that the Judge has erred in law, especially on the basis of the concession made by Mr Tan, and on that basis I set the determination of the Judge aside.

17. It was not disputed before me that on the material now provided the appellant is entitled to succeed on the basis that any interference with his family life recognised by Article 8 in the UK would not be proportionate.
18. I also highlight a further matter arising in the determination where the Judge appears to have found that the appellant had not proved that interference was disproportionate when the burden is upon the Secretary of State prove it is proportionate.
19. In light of the acceptance the appellant is entitled to succeed on human rights grounds I allowed the appeal pursuant to Article 8 ECHR only.

Notice of Decision

20. The First-tier Tribunal materially erred in law. I set that decision aside. I substitute a decision to allow the appeal on human rights grounds only.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 October 2023