Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09951/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 November 2013	**On 02 December 2013**
Prepared 7 November 2013	……

Before

LORD BOYD SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MCGEACHY

Between

MUHAMMAD AWAIS TARIQ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Blundell, Counsel, instructed by Messrs Rashid & Rashid
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan born on 17 November 1986, appeals, with permission, against a decision of Judge of the First-tier Tribunal Thomas who in a determination promulgated on 3 September 2013 dismissed the appellant's appeal

against a decision of the Secretary of State made on 18 March 2013 to refuse him leave to remain as a spouse.

2. The appellant entered Britain as a student in June 2010 and received an extension of stay as a student until 2013. He married the sponsor, Ms Sejala Shah on 30 May 2012 and on October 2012 applied for an extension of leave as a spouse. His wife is a British citizen of Indian descent who was a Hindu but converted to the Muslim religion when she married.

3. The appellant's application was refused on three grounds under the provisions of paragraph R-LTRP 1.1. It was alleged that he did not meet the requirements of E-LTRP 2.2 as he had been in breach of the immigration laws because he had worked while a student for more than the twenty hours permitted week. He was also refused on the basis that it had not been shown that the sponsor had a sufficiently high income - £18,600. Finally he was refused on the basis that he did not have the appropriate English language certificate.

4. Judge Thomas found that the appellant met the English language requirements and furthermore that the financial requirements of the Rules were met. She found that the appellant had on a number of occasions taken employment in excess of the permitted twenty hours and therefore found that he had breached the conditions of his student visa. On that basis she found that the appellant could not meet the requirements of the Rules.

5. She went on to consider the appellant's rights under Article 8 of the ECHR, applying the relevant structured approach. She considered that the appellant had established family and private life in Britain, that his removal would be an interference with the exercise of those rights but that the interference would be both in accordance with the law and necessary in a democratic society in the interests of national security and public safety or the economic wellbeing of the country.

6. She then considered the issue of proportionality emphasising that she accepted the appellant was in a subsisting marriage but stating that he had entered into the marriage in the knowledge that his status was temporary and dependent upon him meeting the necessary requirements of the Immigration Rules. She wrote:-

> "Whilst I accept that the sponsor is a British citizen of Indian origin living with her parents in the United Kingdom, and may not wish to leave the United Kingdom to accompany the appellant to Pakistan, there is no evidence to show that she is not able to do so, and it is not necessarily unreasonable to expect her to do so. In the alternative she is supported by her parents with whom she lives and is in a position to support any further application for entry clearance the appellant may make."

7. In paragraph 21 she referred to the judgment of the House of Lords in **Chikwamba [2008] UKHL 40** and stated that the public interest required the upholding of the effective immigration control and that the legitimate aim relied on by the respondent

outweighed the appellant's right to respect for his amily and private life. She therefore considered the decision was proportionate.

8. The appellant appealed. The grounds of appeal dealt solely with the issue of the rights of the appellant under Article 8 of the ECHR. They argued that the decision on the issue of proportionality was in error as the judge had not assessed all the relevant factors and in particular had not placed sufficient weight on the fact that the sponsor was a British citizen of Indian origin. They questioned the statement by the judge that there was no evidence that the sponsor would not be permitted to join the appellant in Pakistan.

9. Having referred to the determination of the Tribunal in **Izuazu (Article 8 – new Rules) [2013] UKUT 45 (IAC)** and the judgment of Blake J in **MM v SSHD [2013] EWHC 1900 (Admin)** it was claimed that the judge had failed to weigh the appellant's wife's rights as a British national when considering the proportionality of removal and in then dismissing the appeal.

10. They went on to argue that the judge should have considered whether or not the appellant's family life could reasonably be expected to be enjoyed elsewhere and stated there was an error of law in that she did not do so. Having referred to the judgment of the House of Lords in **Beoku-Betts v SSHD [2008] UKHL 39** it was argued that the judge had failed to apply the guidance therein.

11. The Secretary of State issued a short Rule 24 statement arguing that the First-tier Tribunal Judge had directed hereof appropriately and that the grounds did not disclose any arguable error of law in the determination. The respondent emphasized that Article 8 should not normally be used to bypass the requirements of the Immigration Rules.

12. In his submissions Mr Blundell referred to the importance Blake J had placed on the British nationality of a sponsor in the judgment in **MM** and the fact that to refuse the appellant leave to remain was what he had called a constructive denial of her entitlement to family life. He referred to the judge's comments regarding "insurmountable obstacles" – the test used in paragraph 15 of the determination when the judge had said that she had found that the evidence had not demonstrated insurmountable obstacles to family life continuing elsewhere. He referred to paragraph 49 of the judgment of the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192** which emphasised that reasonableness was a factor which should be taken into account when assessing the concept of insurmountable obstacles. In that paragraph the Master of the Rolls had stated that:

> "We would observe that, if 'insurmountable obstacle' are literally obstacles which it is impossible to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we are inclined to the view that, for the reasons stated in detail by the UTJ In **Izuazu** paragraphs 53 to 59, such a stringent approach would be contrary to Article 8."

13. Moreover he argued that the judge had not followed the ratio of the judgment in **Chikwamba** when she had considered whether or not it was sensible to expect the appellant to return to Pakistan and apply from there. While he accepted that the appellant and the sponsor did not have a child, he emphasised that it should only be comparatively rarely that an appellant should be expected to return when their application was like to succeed.

14. He emphasised that in paragraph 20 of the determination the judge had referred to it being "not necessarily unreasonable" to expect the sponsor to join the appellant in Pakistan and stated that not only was that test, as applied by the judge, unclear but it was also not an appropriate test given the terms of the Master of the Rolls' judgment in **MF**.

15. In reply Mr Deller stated that it was clear that the judge was aware of the British citizenship of the sponsor and stated that the judge was also aware of the possible difficulties which he might face in Pakistan. He argued, however, that the judge had properly applied the law, reaching conclusions within the relevant framework. In particular he argued that there was nothing to indicate it would be impossible for the appellant to make an application from abroad and stated therefore that he did not consider that the terms of the judgment in **Chikwamba** had been met.

16. He accepted that the appellant's breach of conditions in working extra hours was not a breach such that it would be unlikely that the appellant would be refused entry but stated that it was a factor which would be taken into account.

17. We found that there were material errors of law in the determination of the Immigration Judge in the way in which she dealt with the rights of the appellant under Article 8 of the ECHR. We consider, in particular, that her approach to the issue of "insurmountable obstacles" to the family life continuing elsewhere was not sufficiently nuanced in the way which was indicated in the judgment of the Master of Rolls in **MF (Nigeria**) and we had difficulty in following her comment that there was no evidence to show that the sponsor was not able to go to Pakistan and it was "not necessarily unreasonable" to expect her to do so. We consider that there were a number of factors which should have been taken into account when reaching a conclusion on whether or not the sponsor could be expected to go to Pakistan particularly, following the judgment of Blake J in **MM** that the sponsor is British.

18. We therefore set aside the decision of the Immigration Judge.

19. We considered that it was appropriate that we should proceed to remake the decision. We, of course, only remake the decision with regard to the appellant's rights under Article 8 of the ECHR. In that regard we accept that the appellant and his wife are in a subsisting marriage and that there would be an interference with their family life if the appellant were removed. We place weight on the terms of the Immigration Rules and note that it is not argued that the appellant could succeed within the Rules but would comment that the reason that he does not – the fact it was

considered that he worked more hours than he was entitled to as a student was a breach of the Rules – and we would empathise that we take seriously any breach of the Rules – was not a breach which could be characterised as being towards the most serious end of the spectrum of breaches of conditions. We would, in any event, point out that we consider that there is likely to be some merit in the appellant's comment that the additional hours he was working were not during term time.

20. Be that as it may, that breach of the Rules is a matter which would lead to us finding that the removal of the appellant was, absent other factors, not disproportionate. However, we consider that there are important other factors. In particular, the fact that the appellant's wife is British and that she is of Indian descent. She has never lived in Pakistan and although she is now a Muslim she was a Hindu until she married. We consider that she would face difficulties therefore in Pakistan notwithstanding the fact that she speaks Urdu. We would add that we consider that she would face further difficulties as she would not receive support from the appellant's family who do not approve of the marriage. We note moreover that the appellant has never overstayed in Britain and that he has studied, successfully, here. We consider that he would qualify for entry but would not be able to do so if his wife accompanied him as she would not be working. Noting the comments of the master of the Rolls in **MF** we consider that there factors would amount to the "insurmountable obstacles" as to which reference is made in section EX.1.(b) of appendix FM of the rules.

21. Taking all these factors into account and placing particular weight on the terms of the Rules we conclude that the removal of the appellant would be a disproportionate interference of his rights under Article 8 of the ECHR.

22. We therefore, having set aside the determination of the Immigration Judge, remake the decision and allow this appeal on human rights grounds.

Decision

23. This appeal is allowed on human rights grounds.

Signed Date

Upper Tribunal Judge McGeachy