Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13311/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 January 2014	**On 16 January 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR M F
(Anonymity direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Naik of counsel instructed by Legal Rights Partnership LLP
For the Respondent: Mr C Avery a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 13 April 1986. He has been given permission to appeal the determination of First-Tier Tribunal Judge Nicholls ("the FTTJ") who dismissed his appeal against the respondent's decision of 5 April 2013 to refuse to vary his leave to enter or remain in the UK on human rights grounds.

2. The appellant arrived in the UK on 27 November 2011 with leave to enter as a visitor for up to 6 months. This leave was due to expire on 6 April 2012. During the period of this leave the appellant met and married his wife who is a British citizen whose family were originally from Pakistan. The application was made by solicitors on behalf of the appellant who, in their letter dated 3 April 2012 said that his wife suffered from a slight learning difficulty and was not able to work. The appellant did not want to be separated from her and argued that it would be a breach of his human

rights if he had to return to Pakistan. The basis of the application set out in the letter is important and I will return to this.

3. The respondent considered the application under the Article 8 principles set out in Appendix FM of the Immigration Rules. The appellant fell foul of the non-switching requirements in E-LTRP 2.1 and the exemption in paragraph EX.1. did not apply. The respondent concluded that there were no insurmountable obstacles preventing the relationship between the appellant and his wife continuing in Pakistan. They had no children. The appellant did not meet the requirements for leave to remain on the grounds of his private life in the UK.

4. The appellant appealed and the FTTJ heard his appeal on 11 October 2013. Both parties were represented, the appellant by Ms Naik who appears before me. The FTTJ heard oral evidence from the appellant and his sister-in-law. The appellant's wife did not give evidence, although she attended the hearing.

5. The FTTJ found that the appellant had not shown that there were insurmountable obstacles to family life continuing in Pakistan. He was not entitled to the benefit of exception EX.1. The FTTJ took into account the principles set out in MA (Pakistan) [2009] EWCA Civ 953 and Hyat (Pakistan) [2012] EWCA Civ 1054 that it would be a disproportionate interference with family or private life were Article 8 engaged simply to enforce the policy that an applicant must return to the country of nationality to apply for entry clearance. Where there was no sensible reason for enforcing the policy the decision maker should determine the Article 8 claim on it substantive merits. The FTTJ went on to consider the Article 8 grounds outside the Immigration Rules under what I will refer to as the Strasbourg jurisprudence. He concluded that there was no evidence to show that it would be unreasonable to expect the family life created in the UK to be continued in Pakistan. Applying the five-step Razgar tests he answered the first four in the affirmative and, in relation to the last, proportionality that it would not be a disproportionate interference with the private and family lives of the appellant and his wife to require him to leave the UK and, by implication, his wife with him.

6. The appellant applied for and was granted permission to appeal by a judge in the First-Tier Tribunal. The grounds of appeal submit that the FTTJ erred in law. Firstly, by failing to address the argument that the "no switching" policy in Appendix FM To the Immigration Rules as applied to this appellant represented a disproportionate interference with his and his wife's rights to private and family life. Secondly, by failing to take into account relevant factors such as the wife's British citizenship, her inability to speak relevant languages or the loss of the benefits and support she receives in this country because of her learning disability and speech impediment. Thirdly, by imposing a requirement for corroborative evidence as to the wife's disability.

7. I have before me what I am told are all the documents which were before the FTTJ including the skeleton argument submitted to the FTTJ by Ms Naik, her skeleton argument for today's hearing and a folder containing authorities and legal materials.

8. I drew Ms Naik's attention to the appellant's solicitor's letter of 3 April 2012. She said that she only had alternate pages. I provided her with a copy. She relied on the grounds of appeal and her skeleton argument In reply to my question she accepted that the decision in Zhang v Secretary of State for the Home Department [2013] EWHC 891 (Admin) was not binding on the Upper Tribunal although she argued that it was a strong persuasive effect. I was referred to R (Aguilar Quila and another) v Secretary Of State for the Home Department [2011] UKSC 45 between paragraphs 67 and 74. The Immigration Rule which refused to permit an applicant to switch between categories was not justified in the circumstances of this case and should have been held to be invalid. She accepted that the Upper Tribunal could not quash such a rule. She submitted that the FTTJ should have remitted the application to the respondent to reconsider on this basis because her decision was not in accordance with the law. However, this would only be necessary if it was not possible to determine the application and appeal on some other basis namely the Article 8 provisions in the Strasbourg jurisprudence. In reply to my question, she said this meant that the respondent would need to consider the application under paragraph 284 of the Immigration Rules even though the appellant had not provided information with the application to show how he claimed to meet the requirements of this rule. The FTTJ should have concluded that the non-switching provisions were invalid and allowed the appeal on Article 8 human rights grounds if, in substance, he accepted that the requirements of paragraph 284 of the Immigration Rules were met.

9. Ms Naik relied on her skeleton and the grounds of appeal in relation to grounds 2 and 3. In relation to ground 2 she submitted that paragraph 14 of the grounds, which came under ground 1, should also be considered under ground 2.

10. I was asked to find that the FTTJ erred in law and that his decision should be set aside. If an error of law was found and the rehearing was adjourned she asked that this take place in the First-Tier Tribunal. The appellant wished to submit evidence to show that the requirements of paragraph 284 of the Immigration Rules were met.

11. Mr Avery submitted that the application made to the respondent was on the basis that the non-switching provisions applied. This was the basis on which the application was considered and it was not open to the appellant to raise the issue at some later date. There were clear and proper policy reasons for the non-switching provisions and these were set out in the appellant's bundle.

12. He argued that ground 2 was no more than disagreements with findings properly made by the FTTJ. There was an appropriate assessment of all the evidence and he reached conclusions open to him on that evidence. There was no indication that the documents from the Department of Work and Pensions had been put before the FTTJ (Ms Naik accepted this). The FTTJ had not suggested that the appellant was in this country unlawfully and took no adverse point on his status. There was clear consideration of the position of the appellant and his wife if he had to go to Pakistan. I raised a point in relation to paragraph 16 of the grounds of appeal relating to the languages not spoken or written by the appellant's wife. Neither representative was able to point me to any evidence which indicated the first languages of the appellant and his wife. I reserved my determination.

13. In the letter of 3 April 2012 from the appellant's solicitors making the application to the respondent the third paragraph states; "Our client meets all the main requirements of paragraph 284 of the immigration rules. However, paragraph 284 (i) does not permit a visitor to switch leave to remain in the UK on the basis of marriage. Accordingly our client's case falls for consideration under article 8 of the ECHR. The reasons given below we would submit that our client has a compelling case the grant of leave to remain in the UK".

14. The immigration status requirements in E-LTRP.2.1 and 2.2 are that;

> "The applicant must not be in the UK-
> (a) as a visitor;
> (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings; or
> (c) on temporary admission or temporary release (unless paragraph EX.1. applies).
> 2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies."

15. Section EX.1 states;

> "This paragraph applies if
> (i) the applicant has a genuine and subsisting parental relationship with a child who-
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> (bb) is in the UK;
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
> (ii) it would not be reasonable to expect the child to leave the UK; or
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

16. The provisions of paragraph 284 of the Immigration Rules setting out the requirements for an extension of stay as the spouse or civil partner of a person present and settled in the United Kingdom are that:

> "(i) the applicant has or was last granted limited leave to enter or remain in the United Kingdom which was given in accordance with any of the provisions of these Rules, other than where as a result of that leave he would not have been in the United Kingdom beyond 6 months from the date on which he was admitted to the United Kingdom on this occasion in accordance with these Rules, unless:

(a) the leave in question is limited leave to enter as a fiancé or proposed civil partner; or

(b) the leave in question was granted to the applicant as the spouse, civil partner, unmarried or same-sex partner of a Relevant Points Based System Migrant (excluding a Tier 5 (Temporary Worker) other than a private servant in a diplomatic household who applied to enter the UK before 6 April 2012 or a Tier 4 (General) Student) and that spouse or partner is the same person in relation to whom the applicant is applying for an extension of stay under this rule; and

(ii) the applicant is married to or the civil partner of a person present and settled in the United Kingdom; and

(iii) the parties to the marriage or civil partnership have met; and

(iv) the applicant has not remained in breach of the immigration laws, disregarding any period of overstaying for a period of 28 days or less; and

(v) the marriage or civil partnership has not taken place after a decision has been made to deport the applicant or he has been recommended for deportation or been given notice under Section 6(2) of the Immigration Act 1971 or been given directions for his removal under section 10 of the Immigration and Asylum Act 1999; and

(vi) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and

(vii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(viii) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(ix)(a) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:

(i) the applicant is aged 65 or over at the time he makes his application; or

(ii) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or;

(iii) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement; or

(ix)(b) the applicant is a national of one of the following countries: Antigua and Barbuda; Australia; the Bahamas; Barbados; Belize; Canada; Dominica; Grenada; Guyana; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; United States of America; or

(ix)(c) the applicant has obtained an academic qualification (not a professional or vocational qualification), which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, from an educational establishment in one of the following countries: Antigua and Barbuda; Australia; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Ireland; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and The Grenadines; Trinidad and Tobago; the UK; the USA; and provides the specified documents; or

(ix)(d) the applicant has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and

(1) provides the specified evidence to show he has the qualification, and

(2) UK NARIC has confirmed that the qualification was taught or researched in English, or

(ix)(e) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and provides the specified evidence to show:

(1) he has the qualification, and

(2) that the qualification was taught or researched in English."

17. I find that there is no material difference between the non-switching provisions of paragraph 284 and E-LTRP.2.1. It has not been suggested that they were brought into force for different policy reasons. I cannot see how the appellant who submitted an application on the basis that he was bound by the non-switching requirements of paragraph 284 can be heard to complain that he was not bound by the non-switching requirements of paragraph E-LTRP.2.1. There is no indication in the application that the appellant sought to argue that any of the non-switching requirements were invalid.

18. Ms Naik's submissions in relation to the invalidity of the non-switching requirements have evolved and developed considerably between those put to the FTTJ and those before me. In paragraph 12 of the determination the FTTJ records that; "it was accepted by counsel (Ms Naik) that the appellant could not meet the requirements of

the Immigration Rules under, particularly, paragraph 281 because he did not have entry clearance and was not entitled to switch categories while in the UK." I suspect that the reference to paragraph 281 should have been a reference to paragraph 284. On the other hand, in paragraph 13, the FTTJ records Ms Naik's suggestion that there was no justification put forward for the non-switching policy "which would adversely affect the family life which the appellant and his wife had enjoyed since their marriage on 20 March 2012. She said that the respondent had not put forward any "sensible reason" for enforcing that policy in respect of this appellant." I have not been told and I cannot find any reason why the non-switching provisions would be acceptable in relation to the requirements of the Immigration Rules in one context but not the other.

19. I have also studied the skeleton argument which Ms Naik submitted to the FTTJ. Whilst there is reference to and quotations from Zhang there is no clear submission that the non-switching provisions should be treated as invalid. The thrust of the submission as I read it is that Zhang support the proposition that the appellant should not be required to return to Pakistan in order to make an application for settlement and entry clearance from there.

20. I must assess the way in which the FTTJ dealt with the grounds, the skeleton and the oral submissions in the light of those that were before him rather than the substantially different arguments contained in the grounds of appeal to the Upper Tribunal, the skeleton argument before me and Ms Naik's submissions. I find that the FTTJ properly dealt with the issues as they were put to him. He did not decide the appeal on the basis of the appellant's wife remaining here whilst the appellant returned to Pakistan in order to make an entry clearance application but on the basis that it would be reasonable to expect the appellant and his wife to continue their family life together in Pakistan. Furthermore, if the appellant had advanced before the FTTJ the submissions which have been made to me I would have concluded that, even if the appellant had succeeded in an argument that the non-switching provisions should be removed from paragraph 284, he had not shown that he met the other requirements of that paragraph. In that event, even if the FTTJ had been persuaded that the non-switching requirements should have been excluded from the provisions of Appendix FM this would have made no difference to a proper consideration of the Article 8 grounds under the Strasbourg jurisprudence and in particular the conclusion that it was reasonable to expect the husband-and-wife to go and live together in Pakistan. I conclude that in the relation to the non-switching arguments the FTTJ did not err in law.

21. I find that the second ground of appeal disclose is no material error of law. The FTTJ took into account the fact that the appellant was here legally. Nowhere did the FTTJ suggest that he had a bad immigration history. The immigration history is set out in paragraph 6 and there is no indication that the FTTJ failed to take this into account in his findings and conclusions. Similarly, the FTTJ records the appellant's wife's British citizenship in paragraph 6. In paragraph 19, under the heading of "findings and conclusions" the FTTJ takes into account that the wife is a British citizen who has lived all her life in the UK. It is not clear what difficulties may arise because "the appellant's wife does not speak, read or write Urdu, and that she does not write

Punjabi". It is not said that she does not speak Punjabi and I note that before the FTTJ the appellant gave evidence through a Punjabi speaking interpreter. I can find no-fault with the FTTJ's treatment of the evidence relating to the appellant's wife's circumstances in this country as opposed to those which she would encounter in Pakistan including a comparison of the levels of social and familial support in both countries. Ms Naik conceded that the letters from the Department of Work and Pensions made available at the hearing before me were not before the FTTJ. In any event it must be self evident that benefits payable in this country such as Disability Living Allowance and Employment and Support Allowance will not be paid to the appellant's wife in Pakistan.

22. In paragraph 15 of the determination the FTTJ said; "although I heard evidence from both the appellant and from his wife's sister, there is no expert or other technical evidence presented to identify the difficulties and their consequences." In paragraph 16; "the absence of any expert evidence about the wife's learning difficulties makes it very difficult to assess whether the problems identified by the appellant, which will be faced by all residents in Pakistan, are of such seriousness that they might properly be regarded as "insurmountable" for the appellant and his wife" and "because of the generalised nature of the problems identified and without any expert evidence to show that the appellant's wife would find very particular difficulty in adapting, I conclude that the appellant has not shown that there are insurmountable obstacles to his family life continuing in Pakistan." I note that this point the FTTJ is considering; insurmountable obstacles", later he goes on to address the reasonableness of expecting the family life to be continued in Pakistan. I find that the FTTJ was not saying that corroborative expert evidence was a legal requirement; only that he did not have medical evidence in circumstances where it would have been helpful. Whilst the evidence from the appellant's wife's sister was not disputed it was not independent medical evidence. There are differences of emphasis between what she said and the written submissions. Her witness statement before the FTTJ dated 21 September 2013 stated, at paragraph 4 that her sister "suffers from a mild learning disability and also has a speech impediment." The grounds of appeal state, at paragraph 22 that the levels of benefits paid to the appellant's wife are those received by the most severely disabled.

23. I have not been asked to make an anonymity direction but in the light of the evidence about the appellant's wife's learning difficulties I consider it appropriate to do so. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant, his wife, or any member of their families.

24. I find that the FTTJ did not err in law and I uphold his determination.

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Signed Upper Tribunal Judge Moulden Date 10 January 2014