



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: IA/30718/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination Promulgated**

**On 2 July 2014**

**On 17 July 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**SYED RAYAAN HUSSAIN WASTY  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms P Yong counsel instructed by Jein Solicitors

For the Respondent: Mr S Whitwell Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Baldwin promulgated on 15 April 2014 which dismissed the Appellant's appeal on all grounds.

### Background

3. The Appellant was born on 26 January 1984 and is a citizen of Pakistan. The Appellant came to the United Kingdom on 7 October 2012 with a visit visa valid until 2 April 2013. On 25 March 2013 the Appellant applied for leave to remain on the basis of his relationship with his partner and child.
4. On 5 July 2013 the Secretary of State refused the Appellant's application. The refusal letter considered the application under the provisions of the Rules that govern family life and private life namely Appendix FM and paragraph 276 ADE. The Appellant could not meet the requirements of the partner route because he did not meet the mandatory immigration status requirements which provide that an applicant cannot be in the United Kingdom as a visitor. He also could not benefit from EX.1 as he was in the United Kingdom as a visitor. He did not meet the relationship requirements for the parent route as he did not have sole responsibility for the child and was eligible to apply as a partner. He also did not meet the mandatory immigration status requirements for the parental route. Ex.1 did not apply as the Appellant failed to meet the eligibility requirements as he was in the United Kingdom as a visitor. The Appellant did not meet the private life requirements of the Rules because of the period he had lived in the United Kingdom and there was no argument he had lost all ties to Pakistan. No exceptional circumstances were found to exist to warrant a grant of leave outside the Rules.

### The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge Baldwin (hereinafter called "the Judge") dismissed the appeal against the Respondent's decision. The Judge found that the Appellant did not meet the requirements of Appendix FM and paragraph 276 ADE for the reasons set out in the refusal letter. He also found that EX.1 did not apply to the Appellant as he was in the United Kingdom as a visitor. The Judge found that there were

arguable grounds for considering the case outside the Rules but nevertheless concluded that the decision to refuse leave was proportionate.

6. Grounds of appeal were lodged and on 20 May 2014 First-tier tribunal Judge Reed gave permission to appeal stating that the Judge failed to properly explain why the Appellant could not rely on Ex.1 or in the alternative why he did not meet the requirements of EX.1
7. At the hearing I heard submissions from Ms Yong on behalf of the Appellant that in essence:
  - (a) Counsel raised the issue of the interpretation of the mandatory Immigration Status requirements in the grounds of appeal and the skeleton argument and would not have done so had he not intended to advance the same argument before the Judge hearing the appeal.
  - (b) If the Judge did not accept that Ex.1 applied counsel was arguing that Article 8 applied in the alternative.
  - (c) The Judge misdirected himself that EX.1 did not apply to visitors as to accept that meant that someone with no leave was in a better position than someone lawfully in the United Kingdom as a visitor.
  - (d) Where it states in E-LTRP.2.1(c) '(unless paragraph Ex.1. applies)' that relates to both (a) (b) and (c).
  - (e) Therefore the Judge did not make any findings in relation to whether the Appellant met the specific requirements of EX.1.
  - (f) The Judge's assessment under Article 8 was flawed in relation to the reasonableness of relocation.
8. On behalf of the Respondent Mr Whitwell submitted that :
  - (a) At paragraph 23 the Judge had recorded that counsel conceded that this case was a freestanding application under Article 8 outside the Rules.
  - (b) Sabir makes clear that Ex.1 is not a freestanding provision but is parasitic on other provisions.

- (c) The Appellant cannot benefit from Ex.1 if he is in the United Kingdom as a visitor or with leave for less than 6 months: no switching was permitted.
- (d) Mr Solomon had not retained conduct of the case or provided a witness statement to assert that no such submission was made. He may well have said in grounds or a skeleton argument that he intended to argue EX.1 but the decision post dates those documents and the decision records that such a concession was made.
- (e) In relation to Article 8 he relied on the case of Secretary of State for the Home Department v Hayat (Pakistan) [2012] EWCA Civ 1054 : it was proportionate to require the Appellant to return to Pakistan to make a proper application and there were sound reasons for doing so.
- (f) It was not disproportionate to require the Appellant like every other applicant in his situation to meet the requirements of the Rules in relation to maintenance.
- (g) The determination cannot be criticised. All issues that were relevant to the best interests of the child were considered and it was not being suggested that the child should leave the United Kingdom.

9. In reply Ms Yong on behalf of the Appellant submitted:

- a. The rule against switching could not be correct as it meant those without leave were treated better than those with leave.
- b. She relied on Chikwamba and suggested that whether the Appellant met the Rules or not was irrelevant to the assessment made.
- c. Hayat was not applicable as it did not relate to a child so the balancing factors were different.
- d. She suggested that it was relevant that the medical condition the child was suffering from was detected in the United Kingdom although Mr Whitwell did not accept that this was the basis on which the matter was argued for the First-Tier Judge.

## **Finding on Material Error**

10. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

11. The Appellant in this case does not meet the financial requirements of Appendix FM but, it is argued by Ms Yong, could be eligible for leave on the basis of EX.1 as he has both a partner and child in the United Kingdom.

12. The refusal letter had stated that the Appellant could not benefit from EX.1 as he came to the United Kingdom as a visitor and therefore could not meet the mandatory Immigration Status Requirements which provide:

***“Immigration status requirements***

*E-LTRP.2.1. 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).”*

13. Ms Yong quite rightly did not seek to argue that EX.1 was a free standing provision but she argued that the route to it was open to all those in sub paragraphs (a) (b) and (c) whose circumstances were described under the heading Immigration Status requirements.

14. In paragraph 20 of his determination the Judge found as a fact that the Appellant came to the United Kingdom as a visitor and while he records Mr Solomon of counsels observation that it appeared to make little sense that EX.1 applied to those on temporary admission or temporary release but not those here with leave from the outset and goes on the find:

*“However the fact that neither he nor I may be able to understand the logic of this does not mean that , if it is clear from the wording of the provisions that Ex.1 does not apply, that I should take the view that it does apply.”*

15. I am satisfied that the Judge was entitled to reach this conclusion as it is the plain meaning of the section and I am satisfied that no further explanation was required: he was a visitor and there is no switching. Had EX.1 applied to sections (a)-(c) the section would stated that it did.
16. The Judge accepted that there were arguable grounds for a grant of leave outside the Rules and therefore looked at the Appellant's case under Article 8 at paragraph 23 having previously at paragraph 15 set out the questions that he would have to address in making his assessment under Article 8.
17. In essence the Judge found that it was not disproportionate to require the Appellant to return to Pakistan and make an application *if and when* he could meet the requirements of the Rules. He identified that this was not a case where the Appellant could meet the requirements and was simply being asked to make the proper out of country application as he found as a fact that the evidence of a job offer the Appellant had produced was not unequivocal nor was the salary sufficient to meet the requirements of the Rules.
18. He made that finding having heard and accepted evidence from the Appellant's wife who is a British Citizen that she and their children would choose to remain in the United Kingdom as the family felt it was in the best interest of the eldest child who suffered from CDH although the Judge found at paragraph 19 that in fact there was no reason why the family could not arrange to live near a hospital in Pakistan if they so chose and the Appellant is highly educated and could pay for any treatment required. He took into account the best interests of the child and it is implicit in his decision that those interests are not determinative of the appeal. I am satisfied that the Judge had taken into account all of the relevant factors under Article 8 and his conclusion that the Appellant should be required to return to Pakistan make an application when he could meet the requirements of the Rules was one that was open to him on the evidence.
19. The only factors not addressed in the Article 8 assessment are a failure to factor into the assessment the SSHD's interest in maintaining immigration control, the failure of the Appellant to meet the financial and residence requirements of the

Rules as set out in Appendix FM but this was not material to the outcome as they are further factors in favour of the decision.

## **CONCLUSION**

**20. I therefore found that no errors of law have been established and that the Judge's determination should stand.**

## **DECISION**

**21. The appeal is dismissed.**

Signed

Date 16 July 2014

Deputy Upper Tribunal Judge Birrell