Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25746/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 13 January 2015	**On 16 January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SAJID HUSSAIN SHAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Byrne, Advocate, instructed by McGill & Co, Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan. He came to the UK as a visitor in 2006 and overstayed. Since March 2010 he has been involved in various unsuccessful applications and appeals with a view to remaining as the unmarried partner and since 18 May 2011 as the spouse of the sponsor, a UK citizen. On 21 June 2013

he made a further such application. The respondent refused it for reasons explained in a letter dated 9 June 2014.

2. Designated Judge Murray dismissed the appellant's appeal to the First-tier Tribunal by determination promulgated on 8 September 2014.

3. The appellant's first ground of appeal to the Upper Tribunal is that the judge erred in relation to *Hayat* [2012] EWCA Civ 1054 by failing to note that there needs to be a sensible reason for requiring an appellant to re-apply from another country, peculiar to the facts and circumstances of the case, and that the public interest does not require that as a generality.

4. Mr Byrne submitted that the error could be described as failing to embark on a crucially fact-sensitive analysis. There was no reasoned finding on where the appellant fell on the spectrum of possible cases as illustrated between the appellant in *Chikwamba* [2008] UKHL 40 (with nothing against her except the formal requirement to apply from abroad) and the appellant *Ekinci* (mentioned in *Chikwamba* as an example of an appalling immigration history). He said that the judge's overall approach to proportionality was confused.

5. The second ground of appeal proposes that the test of insurmountable obstacles in paragraph EX1 of Appendix FM of the Rules is correctly one of whether it would be reasonable for parties to carry on their family life in the appellant's country. It also proposes (perhaps in the alternative?) that the Rules in this respect are not a complete code, and that if the judge applied only the Rules on insurmountable obstacles, there was an error of not going on to consider the case outside the Rules.

6. The further submission on this ground was that EX1 as to insurmountable obstacles does not provide for the full scope of Article 8 and that the judge should have asked, outside the Rules, whether it was reasonable to expect the appellant's wife to move to Pakistan for family life to be carried on there.

7. Mr Byrne said that the first ground identified a specific error on the basis of *Hayat* and the second a more general error of failing to ask and answer an overall question of what it was reasonable (or proportional) to expect. If error were to be found, the Upper Tribunal should not proceed to make a fresh decision, but should remit to the First-tier Tribunal for a fresh hearing. The full nature of an appellant's evidence could not be reflected in a determination and an appellant should have the advantage of all stages of procedure.

8. The respondent's Rule 24 response to the grounds of appeal makes the following points. The judge applied the correct test, derived from case law, to the question of insurmountable obstacles and made sound findings of fact on the ability of the parties to live in Pakistan. It was open to her to find no good arguable case for further consideration. *Hayat* predates codification of Article 8. There are no compelling circumstances in the case. It has been open to the appellant to return and apply for some time. It appears that the major reason for not doing so is inadequacy of income to support the application.

9. Mrs Pettersen submitted further that the criticisms made are of the form not the substance of the judge's decision. From paragraph 77 on, she made clear findings on the actual circumstances. At paragraph 81 she correctly took the outcome of a previous appeal as her starting point. That determination had been outside the Rules as EX1 did not then exist. The judge correctly gave insurmountable obstacles a wider than literal interpretation. There was then nothing to take the case beyond the codification of article 8 in the Rules. The judge reached a clear conclusion both on the appellant returning to apply and on the alternative of the parties moving to Pakistan to stay. She found that despite the difficulties involved that would not be disproportionate. Her conclusions were open to her and properly explained. The determination should not be set aside.

10. If the determination were to be set aside for any error of legal approach, Mrs Pettersen pointed out that no complaint had been made about any factual findings and no question of further evidence or change of circumstances had been raised. The facts were clear. Any further decision should be to dismiss the appeal. This could be reinforced by reference to section 117B of the 2002 Act.

11. I reserved my determination.

12. As to applying from abroad, the judge noted that was sometimes the proportionate course and found no reason to differ from the previous determination (paragraph 83). I see no misconception that the public interest generally requires application from abroad. There is no in error in holding that with his poor immigration history the appellant is a person who should comply with the formalities prescribed.

13. In any event, although the judge was led on behalf of the appellant into considering *Chikwamba / Hayat* matters in a way rather muddled with the real issues, I do not think such points could be of any eventual importance. The appellant made no case that he could satisfy the requirements of the Rules but for the formality of applying from abroad.

14. The judge did not take insurmountable obstacles as a literal test. She put this at paragraph 80 in terms of "very significant difficulties" and "very serious hardship". She analysed the particular difficulties contended for at paragraphs 81, 84, 89 and 90. No criticism was directed at any part of that consideration. Although the judge says at the end, paragraph 92, that she finds no good arguable case for going outside the Rules that is a final wrapping of a quite fully explained proportionality conclusion. I agree with the submission that the criticisms made at best go to the form rather than the substance of the decision. They do not show any error on the basis of which the Upper Tribunal ought to interfere.

15. The determination of the First-tier Tribunal **shall stand**.

16. No anonymity direction has been requested or made.

14th January 2015
Upper Tribunal Judge Macleman