IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30213/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th July 2015	**On 3rd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MR TANVIR HUSSAIN MIRZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Shah – Solicitor of 786 Law Associates
For the Respondent: Mr P Nath – Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Tanvir Hussain Mirza, a citizen of Pakistan born 13th January 1963. He appeals against the decision of the Respondent made on 8th July 2014 to refuse leave to remain in the United Kingdom as the unmarried partner of a British citizen.

2. The Appellant appealed against that decision and his appeal was allowed on 18th November 2014 by First-tier Tribunal Judge Lowe. The Secretary of State appealed against the decision of Judge Lowe and on 24th March 2015, having heard

submissions I found that there was a material error of law in the determination of Judge Lowe in that she failed to consider the evidence in the round and to take account of relevant factors in assessing proportionality. She had allowed the appeal under paragraph 276ADE(vi) of the Immigration Rues and under Article 8 ECHR. I set her decision aside.

3. I now proceed to remake the decision.

4. The Appellant's immigration history as set out by the Secretary of State is as follows. He applied for asylum on 18th December 2001 and his application was refused on 10th March 2004 due to non-compliance. He was served with an IS151A on 17th March 2004 and lodged an appeal on 2nd April 2004. His appeal was dismissed on 27th July 2004 and permission to appeal was refused. He became appeal rights exhausted on 21st December 2004. He lodged further submissions on 29th August 2008 which were rejected with no right of appeal on 10th March 2011. He made an application for leave to remain as an unmarried partner on 7th February 2012 which was refused with no right of appeal in June 2012. A reconsideration was requested on 11th July 2012 and the decision which is the subject of this appeal was made on 8th July 2014.

5. The Secretary of State found that the Appellant meets the suitability requirements of Appendix FM of the Immigration Rules. She accepted that he meets the relationship requirements of Appendix FM on the basis of his relationship with Mrs Summira Hussain Mirza, a British citizen. The Secretary of State did not accept that the Appellant can meet the criteria of paragraph EX.1 of Appendix FM, taking the view that there are no insurmountable obstacles to the Appellant's wife returning to Pakistan with him. He has children there. His father is there. He was educated there and speaks the language. He and his spouse had a traditional Islamic wedding on 3rd June 2010 and they could relocate to Pakistan together to continue their family life there. Alternatively he could return to Pakistan to apply for entry clearance.

6. The Secretary of State went on to consider the application in terms of paragraph 276ADE of the Immigration Rules but found that none of the criteria of that provision are met. In particular with regard to paragraph 276ADE(vi) the Secretary of State took into account that the Appellant is now 51 years of age and was 38 when he arrived here, having spent his life up to that point in Pakistan. The version of paragraph 276ADE applicable to the Appellant's claim in light of the date of decision is the original one:

> "(vi) Subject to subparagraph 2, (the applicant) is aged 18 years or above, has lived continuously in the UK for less than twenty years discounting any period of imprisonment but has no ties including social, cultural or family with the country to which he would have to go if required to leave the UK."

7. The Secretary of State went on to consider whether there are compassionate and compelling circumstances in this case but concluded that there are none.

8. The Secretary of State said in the refusal letter that the Appellant entered the UK on a false passport but it was conceded by Mr Nath that that is not so.

9. I have a statement from the Appellant dated 22nd September 2014 in which he states that he came to the UK in 2001 with valid entry clearance as a visitor. He was married in Pakistan but his wife died. He has five children there all grown up. He has not seen them for the last fourteen years. He met his current wife in 2006. She worked in a restaurant owned by a friend of his. He moved in with her in February 2009 and they married in 2010. He is not working in the UK but his wife is. She has parents and a brother here.

10. I have a statement from the Appellant's wife dated 17th September 2014. She describes how they met. They registered their marriage in Scotland on 23rd April 2014. She has family in the UK. I have the Islamic and the Scottish marriage certificates. I have a letter from the Appellant's GP dated 8th July 2015 confirming that he takes regular medication for diabetes, hypertension and high cholesterol.

11. No evidence was led and I heard submissions initially from Mr Shah. He said that it is not the case as claimed by the Secretary of State that the Appellant came to the UK illegally. He entered legally. This has now been accepted by the Respondent. The Appellant was not represented at his appeal against the refusal of asylum. His appeal was dismissed. He met his wife while he was awaiting a decision from the Home Office. She is working full-time. She is financially able to maintain herself and the Appellant. She owns a house. The Appellant has adopted the British way of life. He has some medical problems. He has been disowned by his family in Pakistan. There is no point in him having to go back to Pakistan to seek entry clearance. He would be unable to cope without his wife in Pakistan.

12. Mr Nath submitted that the Immigration Rules exist for a reason. The Appellant cannot meet the requirements of the Rules. The meat of this case is the issue of whether there are insurmountable obstacles. The Appellant's leave was precarious for some time. He said he would rely on **SS Congo [2015] EWCA Civ 387 (23 April 2015)** and **Dube (ss.117A to 117D) [2015] UKUT 90**. There are no compassionate circumstances in this case. It is not unreasonable that the Appellant be expected to return to Pakistan to make an application for entry clearance. He relied too on **Asif, R (on the application of) v Secretary of State for the Home Department [2015] EWHC 1007 (Admin) (17 April 2015)** in which the High Court said,

> "In summary, therefore, there will be cases where it is clear that consideration under the Rules has fully addressed any family or private life issues arising under Article 8 , and where that is so it would be sufficient for the SSHD to say so (and the SSHD would need to expressly say so in that situation), but where after consideration under the Rules there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

13. Mr Shah responded to these submissions saying that the Appellant "remained in the eye" of the authorities during all the time he was here. He was making applications. He was law-abiding. He has no criminal convictions. His wife is working. He has no money, no family, no job in Pakistan and so could not access the medication that he needs.

My findings

14. So far as the Immigration Rules are concerned the burden of proof is on the Appellant and the standard of proof is on the balance of probabilities.

15. It seems that the Appellant does not meet the financial requirements of Appendix FM. His evidence was that his wife earns around £900 per month. So far as the exception set out at paragraph EX is concerned the question is whether there are insurmountable obstacles to the Appellant's wife moving with him to Pakistan. There is nothing before me to support a submission that there are insurmountable obstacles to the Appellant and his wife continuing their family life in Pakistan. The evidence of the Appellant's wife before Judge Lowe was that she was frightened of going to a country like Pakistan. She would lose her way of life in the UK. She would lose her home and her job. The Appellant's wife is a mature woman. I accept that the culture in Pakistan is different to that in the UK and that it would not be easy for her to adapt to that. The climate will be different. She presumably does not speak Urdu. She has a house and a job in the UK. She has a mother in the UK whom she sees regularly but there is no suggestion or evidence of dependency. None of the concerns she has raised or the reasons she has given for not wanting to accompany her husband to Pakistan can in my view be said to be insurmountable. None of them would cause serious hardship. There is no evidence to support a submission that she would be at risk in Pakistan. She would be with her husband and they could build a new life in his home country. I appreciate that she does not want to go to Pakistan and that she would lose her current way of life. The fact is however that she chose to marry the Appellant in the knowledge that he was from a different country and practised a different religion. She married him in an Islamic ceremony. She could not reasonably have assumed he would be allowed to remain here. When two people from different countries form a relationship it is inevitable that one of them will to some extent lose the way of life they are accustomed to and will have to endure changes and compromises. Such changes or compromises are rarely insurmountable and I do not accept that they are in this case.

16. The private life of the Appellant falls to be considered in terms of paragraph 276ADE of the Rules. He does not meet the criteria set out in sub –paragraphs (i) to (v). It was not submitted that he does. I have already set out the version of 276ADE(vi) that is applicable in this case. I find that he does not meet the requirements of 276ADE(vi). He lived for 38 years in Pakistan. He was educated there. He claims to have no family there but that is not so. He has children albeit estranged. I find it highly unlikely that having lived there for so long and having been educated there he has no friends or extended family there. He underwent an Islamic marriage ceremony in this country so is presumably a practising Muslim. The culture of Pakistan would be familiar to him. He speaks the language. It seems to me that it cannot be said that he has no ties there. Bearing in mind the findings of the Tribunal in **Ogundimu (Article 8 – new rules) Nigeria[2013] UKUT 60 (IAC)** and having considered the facts and circumstances in the round I find that the Appellant has not established that he meets the criteria set out in paragraph 276ADE (vi) of the Immigration Rules.

17. The Appellant does not therefore meet the requirements of the Immigration Rules. It was submitted by Mr Shah that Article 8 is engaged in this case and that the interference with the Appellant's family life which would result from his removal from the UK would be disproportionate to the need for effective immigration control in the UK. Having found that there are no insurmountable obstacles to the Appellant's wife going with him to Pakistan there is arguably no need for me to consider Article 8 because there need be no interference with family life. There are no compelling or compassionate circumstances in this case. The fact that the Appellant's wife does not want to go to Pakistan is not sufficient. I shall however, for completeness and in light of the expressed position of the Appellant's wife, deal briefly with Article 8 which I shall consider in line with the guidance set out in **Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 (17 June 2004).**

18. Paragraph 117B is applicable to this case. It sets out he public interest considerations applicable to all cases in which Article 8 is an issue. It states:

> b Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> b) are better able to integrate into society
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

19. It seems that the Appellant was in the UK unlawfully between December 2004 and August 2008, his appeal rights having been exhausted on 21st December 2004 and no

further application having been made until August 2008, so little weight is to be given to his relationship with his wife. Even if I have misinterpreted his immigration history, which was not relied upon by Mr Nath, I do not accept that the Appellant's removal would be disproportionate. He claims that he would not be able to work in Pakistan or obtain housing. He claims that he would not be able to access the medication he needs because he would have no money. I do not accept that. His wife has a job and a house. There is no evidence to suggest he would not be able to get work in Pakistan where he lived and supported himself for many years. He came to the UK in 2001 with a visa as a visitor. His application for asylum was refused but he did not leave the UK. Further applications were refused. He still did not leave. He chose to marry in the knowledge that he had no leave to be here. There are no insurmountable obstacles to his wife going with him to Pakistan. In all the circumstances I find that any interference with his family life would not be disproportionate to the need for effective immigration control in the UK.

20. Simply for completeness and in response to the submissions that were made at the hearing I do not accept that it would be disproportionate to expect the Appellant to return to Pakistan to seek entry clearance. In **R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 189 (IAC)** the Tribunal said,

> (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.
>
> (iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made) will be successful. Accordingly, her silence on this issue does not mean that it is accepted that the requirements for entry clearance to be granted are satisfied.

21. I find that there would be no such disproportionate interference in this case.

Notice of Decision

The decision of the First-tier Tribunal having been set aside is replaced with this decision.

The appeal is dismissed under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed Date: 28th August 2015

N A Baird
Deputy Judge of the Upper Tribunal Judge Baird