



IAC-AH-KRL-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/34709/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> February 2016**

**Decision & Reasons Promulgated  
On 3<sup>rd</sup> March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MUHAMMAD FAHIM ASLAM  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant:

Mr P Nath, Senior Home Office Presenting Officer

For the Respondent:

Mr D Sellwood of Counsel, instructed by Rashid & Rashid  
Solicitors

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State appealed against the decision of Judge E M Simpson of the First-tier Tribunal (the FtT) promulgated on 13<sup>th</sup> May 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the claimant.
3. The claimant is a male citizen of Pakistan, born 1<sup>st</sup> January 1986 who arrived in the United Kingdom on 8<sup>th</sup> April 2010 with leave to enter as a Tier 4 (General) Student, his visa being valid until 29<sup>th</sup> October 2013. On 8<sup>th</sup> October 2013 the claimant applied for leave to remain as the spouse of Faiza Ali (the Sponsor) a British citizen who he had married on 30<sup>th</sup> September 2013.
4. The application was refused on 1<sup>st</sup> August 2014, the Secretary of State making a decision to refuse to vary leave to remain, and a decision to remove the claimant from the United Kingdom. The reason for refusal was that the claimant did not satisfy the financial requirements set out in E-LTRP.3.1 of Appendix FM, which provides that there must be a specified gross annual income of at least £18,600. The Secretary of State contended that the claimant and his spouse had demonstrated an annual income of only £10,545.36 at the date the application for leave to remain was submitted.
5. The claimant appealed to the FtT and the appeal was heard on 31<sup>st</sup> March 2015. The FtT found that the claimant did not satisfy the financial requirements at the date of application, which had been conceded on behalf of the claimant. However the FtT found that the claimant had proved that he met the specified gross annual income requirement of £18,600 at the date that the Secretary of State made the decision to refuse his application, and at the date of the FtT hearing. The appeal was therefore allowed on that basis under the Immigration Rules.
6. The FtT also considered EX.1.(b) of Appendix FM but found that the appeal could not succeed under that provision, as the claimant had not proved that there would be insurmountable obstacles to family life continuing with the Sponsor outside the United Kingdom. In considering this provision, the FtT took into account EX.2 which states that insurmountable obstacles means the very significant difficulties which would be faced by the claimant or his spouse in continuing family life together outside the United Kingdom, which could not be overcome or would entail very serious hardship.
7. It was not suggested to the FtT, on behalf of the claimant, that the appeal could succeed with reference to paragraph 276ADE(1) in relation to private life.
8. The FtT considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules, and found, taking into account that the financial requirements of the Immigration Rules were satisfied at the date of refusal and at the date hearing, that the Secretary of State's decision amounted to a disproportionate interference with family life, and therefore the appeal was allowed on human rights grounds, as well as under the Immigration Rules. The Secretary of State applied for and was granted permission to appeal to the Upper Tribunal.

## Error of Law

9. At the hearing before me on 30<sup>th</sup> November 2015, I heard submissions from both parties regarding error of law. On behalf of the Secretary of State it was argued that the FtT had clearly erred by allowing the appeal under the Immigration Rules, as the rules required the minimum income threshold to have been met and demonstrated by the provision of specified evidence at the date of application, not at the date of refusal or at the date of hearing. It was submitted that the FtT had erred in allowing the appeal outside the Immigration Rules as it had not been demonstrated that there were any exceptional circumstances.
10. On behalf of the claimant it was conceded that the FtT had erred in law in allowing the appeal under the Immigration Rules, but submitted that the FtT had not erred in law by allowing the appeal under Article 8 outside the rules.
11. I set out below my conclusions and reasons for finding an error of law and setting aside the decision of the FtT;
  - “21. It was rightly conceded on behalf of the claimant that the FtT materially erred in law in paragraphs 35 and 36 of the decision in finding that the claimant satisfied the financial requirements of Appendix FM. The claimant did not satisfy the minimum annual income requirements set out in E-ECP.3.1 at the date of application, and the Secretary of State was correct to refuse the application for leave to remain on that basis, and the FtT was wrong to allow the appeal. Therefore the FtT decision to allow the appeal under the Immigration Rules is set aside because of material legal error.
  22. It has not been contended that the FtT erred in law in consideration of EX.1(b) which was considered in paragraphs 38-46. The FtT found no insurmountable obstacles to the claimant and spouse carrying on family life outside the UK.
  23. The issue that I have to decide is whether or not the FtT erred in law in consideration of Article 8 outside the rules. My view is that the challenge in the Secretary of State’s grounds should be interpreted widely, meaning that the challenge is that the FtT erred by considering Article 8 outside the Immigration Rules, but in the alternative, if it was correct to consider Article 8 outside the rules, the FtT erred materially in considering proportionality.
  24. The grant of permission to appeal does not indicate that any aspect of the application for permission to appeal was refused.
  25. The FtT makes no reference to SS (Congo) which was published on 23<sup>rd</sup> April 2015 and therefore had not been published when the FtT hearing took place, but had been published by the time the decision was promulgated on 13<sup>th</sup> May 2015. Guidance is given in SS (Congo) regarding consideration of Article 8 outside the Immigration Rules, and I set out below paragraph 33
    - “33. In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new rules in Appendix FM. In our view, that is a formulation which is not as strict

as a test of exceptionality or a requirement of ‘very compelling reasons’ (as referred to in MF (Nigeria) in the context of the rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State’s formulation of the new rules in Appendix FM. It also reflects the formulation in Nagre at para [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ.”

26. Therefore, in order to consider and grant leave to remain outside the Immigration Rules, under Article 8, when the requirements of Appendix FM cannot be satisfied, it is necessary to identify compelling circumstances, which have not been considered adequately under the rules.
27. In this appeal, the FtT found no very significant difficulties for the claimant and spouse to continue family life outside the UK. The Upper Tribunal in R (on the application of Chen) (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) decided that 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 rejoin a family member in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK 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.
28. The error of the FtT in considering Article 8 was not to identify compelling circumstances over and above what had been considered under the Immigration Rules. In my view the FtT erred in law in paragraph 59 in considering as relevant the difficulties that the claimant may have in succeeding with a fresh application. The Upper Tribunal in paragraph 33 of Sabir [2014] UKUT 63 (IAC) when considering whether an individual should return to their home country and make an application for entry clearance stated;
 

“The likelihood or otherwise of her being able to meet the requirements of the rules for entry clearance is not a relevant consideration – see SB (Bangladesh) v SSHD [2007] EWCA Civ 28.”
29. For the above reasons, I conclude that the FtT erred in law in allowing the appeal under Article 8 outside the Immigration Rules.”
12. The hearing was adjourned to enable the claimant to provide up-to-date evidence, taking into account the length of time that had elapsed since the FtT hearing which took place on 31<sup>st</sup> March 2015. As the findings of the FtT in relation to EX.1(b) had not been challenged, those findings were preserved. It was accepted on behalf of the claimant that the financial requirements of Appendix FM could not be satisfied, and that the appeal could not succeed with reference to paragraph 276ADE(1), and therefore the issue to be decided at the adjourned hearing related to Article 8 outside the Immigration Rules, and whether there are compelling circumstances to justify allowing the appeal under Article 8 outside the Immigration Rules.

## **Re-Making the Decision - Upper Tribunal Hearing 16<sup>th</sup> February 2016**

### **Preliminary Issues**

13. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. At the commencement of the hearing Mr Sellwood submitted some Tesco pay slips for the claimant covering a period between 10<sup>th</sup> April 2015 and 12<sup>th</sup> February 2016, and some pay slips issued by Search in relation to the Sponsor, covering a period between 20<sup>th</sup> November 2015 and 1<sup>st</sup> January 2016, together with a letter dated 27<sup>th</sup> January 2016 confirming the Sponsor had been offered new employment as a customer service agent at London Gatwick Airport to commence on 21<sup>st</sup> March 2016, and documentary confirmation that she had registered with BPP University as a law student.
14. In addition I had the documentation that had been before the FtT, comprising the Home Office bundle with Annexes A-I, the claimant's bundle comprising 616 pages and the claimant's skeleton argument dated 30<sup>th</sup> March 2015. I also had a further bundle submitted on behalf of the claimant, in preparation for the hearing on 30<sup>th</sup> November 2015 comprising 125 pages.
15. Both representatives confirmed that they had seen my error of law decision which was promulgated on 18<sup>th</sup> December 2015 and it was agreed that the only issue to be decided by the Upper Tribunal, was whether there were compelling circumstances which justified allowing the appeal under Article 8 outside the Immigration Rules.
16. Mr Sellwood indicated that the claimant and Sponsor would give oral evidence.
17. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

### **The Claimant's Oral Evidence**

18. The claimant gave evidence in English and did not require an interpreter. I set out below a summary of his evidence.
19. When questioned by Mr Sellwood the claimant confirmed that he was still employed by Tesco. It was put to him that he would be able to make a fresh application for further leave to remain if his appeal did not succeed, and his response was that his employer would not keep his employment open for him. He said that he had asked his employer about this following the hearing in November 2015.
20. When questioned by Mr Nath the claimant said it would be very difficult for him to find employment if he had to return to Pakistan because he had no experience of employment there. He confirmed that he had been awarded a BA honours degree in Applied Accounting in this country but stated that notwithstanding this qualification, he would still find it very difficult to find employment in Pakistan. He said he had spoken to his friends about this, who have studied more than himself,

and they had not been able to find employment in Pakistan. The claimant had not returned to Pakistan since coming to the United Kingdom in April 2010. This is because he had been busy with his studies.

21. The claimant confirmed that his parents live in Pakistan as do his two brothers and two sisters. His sisters are married but his brothers still live with his parents. He said that if he and the Sponsor return to Pakistan it would be very difficult to stay with his family because the family home only had two bedrooms.

### **The Sponsor's Oral Evidence**

22. The Sponsor gave her evidence in English and her evidence is summarised below.
23. The Sponsor left her employment in January 2016, and is to commence new employment in March 2016. She is now studying for a law degree at university having enrolled in May 2015. It is a full-time degree, and her new employment will be for twenty hours per week although she is guaranteed overtime.
24. The Sponsor confirmed that her mother is still not aware of her marriage. When asked whether she could manage financially if the claimant returned to Pakistan to apply for entry clearance she said that she could not but if the claimant stayed in the United Kingdom and made his application, but had no employment, she said that somehow they would manage financially by asking family and friends, although they could not do that indefinitely.
25. When questioned by Mr Nath the Sponsor said that she had been married for two or three years. She confirmed that she would be able to ask her mother for money but would not tell her mother that she is married. She said that she would tell her about her marriage once the claimant's visa was sorted out.
26. The Sponsor is a British citizen and in addition to her mother, her older sister and three younger brothers live in this country. Her father has passed away.
27. The Sponsor did not think that the claimant had made any enquiries about working in Pakistan but commented that if he went back to Pakistan he would find work there.

### **The Secretary of State's Submissions**

28. Mr Nath submitted that the appeal should be dismissed. I was asked to note that the claimant had made no enquiries about finding work in Pakistan, and that he has family members there, who have a home. The claimant has the option of making a fresh application for leave to remain, in order to prove that he can satisfy the Immigration Rules. Alternatively, the Sponsor could return to Pakistan with him.

### **The Claimant's Submissions**

29. Mr Sellwood submitted that compelling circumstances exist in this appeal, which would justify allowing the appeal under Article 8 outside the Immigration Rules.

30. I was asked to find that evidence had been submitted that the couple had an income in excess of £18,600 although it was accepted that they had been unable to provide the specified evidence to prove this at the date of application.
31. I was asked to find that the claimant and Sponsor are financially independent.
32. Mr Sellwood submitted that the claimant had established family life with the Sponsor, and a private life in the United Kingdom. The claimant has an adult brother in the United Kingdom, but it was not contended that he had family life with his brother that would engage Article 8, although his relationship with his brother formed part of his private life.
33. I was asked to note that the Sponsor is a British citizen and had lived in this country all her life. She had only visited Pakistan for brief periods. She did not speak fluent Urdu or Punjabi. Her family in this country are not aware of her marriage.
34. I was asked to note that the claimant had always had leave to be in the United Kingdom and had not remained here unlawfully. Mr Sellwood submitted that it was highly relevant that the claimant has not been and would not be a financial burden on the state.
35. I was asked to find that if the claimant returned to Pakistan this would be problematic, because his employer would not keep his employment open. He would not be able to meet the minimum income threshold as he is now the main earner.
36. If the claimant made a fresh application from within the United Kingdom, which he could do, if this appeal was refused, provided that his application was made within 28 days of refusal, the claimant would still be unable to continue with his employment, until the Secretary of State had made a decision on his application.
37. Mr Sellwood submitted that on the facts of this case, it could not be reasonable to expect the Sponsor to relocate to Pakistan.
38. I was therefore asked to find that compelling circumstances exist and the appeal should be allowed under Article 8 outside the Immigration Rules.
39. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

40. It is common ground that this appeal cannot succeed under the Immigration Rules. This is because the claimant cannot satisfy the financial requirements of Appendix FM, and the FtT finding that there are no insurmountable obstacles to family life continuing outside the United Kingdom was not challenged, and means that the appeal cannot succeed with reference to EX.1.(b). It has also been expressly conceded that the claimant cannot succeed in relation to his private life claim, with reference to paragraph 276ADE(1).

41. In considering Article 8, the burden of proof is on the claimant to establish that he has a family and/or private life that engages Article 8. If that is established, the Secretary of State must show that the decision is lawful, necessary for one of the reasons set out in Article 8(2), and proportionate. For ease of reference I set out Article 8;
- '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
42. In considering Article 8 I have adopted the five stage approach advocated by the House of Lords in Razgar [2004] UKHL 27 which involves answering the following questions;
- “(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?
  - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
  - (iii) If so, is such interference in accordance with the law?
  - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
  - (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?”
43. The decision in Beoku-Betts [2008] UKHL 39 means that I must consider the family and private life of the Sponsor as well as the claimant.
44. I conclude that the claimant and Sponsor have established a family life together since their marriage on 30<sup>th</sup> September 2013. The Sponsor’s private life is clearly based in this country, and I accept that the claimant has established a private life here since his arrival on 8<sup>th</sup> April 2010. I conclude that the claimant’s proposed removal would be an interference with both private and family life with consequences of such gravity as to engage Article 8.
45. I find that the proposed interference is in accordance with the law, on the basis that the claimant cannot satisfy the Immigration Rules in relation to his application for leave to remain.



46. I then consider whether the proposed interference is necessary for one of the reasons set out in Article 8(2) and proportionate.
47. I remind myself of the principles in SS (Congo) in that compelling circumstances need to be identified to support a claim for a grant of leave to remain outside the Immigration Rules. Guidance was given in SS (Congo) in relation to the evidence rules contained in Appendix FM-SE and I set out below paragraphs 51, and 52, and the first sentence of paragraph 53 of SS (Congo);
- “51. In our judgment, the approach to Article 8 in the light of the rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence rules are not complied with.
52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.
53. Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy.”
48. I also remind myself of the Supreme Court decision Patel and Others [2013] UKSC 72 in which it was stated at paragraph 57;
- “57. It is important to remember that Article 8 is not a general dispensing power.”
49. The Court of Appeal considered Article 8 in Agyarko [2015] EWCA Civ 440, commenting in paragraph 28 that an individual who claimed a right to remain pursuant to Article 8 outside the Immigration Rules, had to show that her case was exceptional for some reason, because her family life had been established in the knowledge that she had no right to be in the United Kingdom and was therefore precarious. In this appeal, it is not the case that the claimant had no right to remain in the United Kingdom, when he married the Sponsor, but his immigration status was precarious, in that he only had limited leave to remain granted to him on the basis that he was a student.
50. At paragraph 30 of Agyarko Sales LJ commented that in relation to precarious family life cases, the gap between section EX.1 of Appendix FM and the requirements of Article 8 is likely to be small.
51. Sales LJ went on to state in paragraph 33 that the fact that a Sponsor is a British citizen does not amount to exceptional circumstances.

52. In this appeal, there are no health issues, and there are no children. The Sponsor is a British citizen who has visited Pakistan but never resided there. Her family are in the United Kingdom.
53. The claimant has only ever had limited leave to remain as a student, and married in that knowledge.
54. In considering proportionality under Article 8, I must take into account section 117B of the Nationality, Immigration and Asylum Act 2002 which specifically states that the maintenance of effective immigration controls is in the public interest. I conclude that significant weight must be attached to that public interest, and weight must be attached to the fact that the claimant could not satisfy the financial requirements of the Immigration Rules, in that he could not prove a minimum annual income of £18,600, and could not satisfy the evidential requirements set out in Appendix FM-SE.
55. I take into account section 117B(2) in which it states that it is in the public interest that a person seeking leave to remain can speak English, and (3) which states that it is in the public interest that a person seeking to remain is financially independent.
56. The claimant is financially independent and can speak English, but I must also take into account AM (Malawi) [2015] UKUT 0260 (IAC) in which it is stated that an individual can obtain no positive right to a grant of leave to remain from either section 117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.
57. I also take into account section 117B(5) which states that little weight should be given to a private life established by a person at a time when his immigration status is precarious. The claimant has always had a precarious immigration status since his arrival in the United Kingdom, because he has always had limited leave to remain.
58. If this appeal does not succeed the claimant has the option of returning to Pakistan with the Sponsor. I do not accept the claimant's account that he would be unable to find employment in Pakistan. I find that he has made no significant attempts to enquire about employment. I do not accept his evidence that the qualification that he has obtained in the United Kingdom would not be of assistance to him. The claimant's purpose in coming to the United Kingdom was to study and obtain a qualification here, and in my view he would have indicated when he came to study in the United Kingdom, that he did not intend to stay here permanently. It would be difficult for the Sponsor to relocate to Pakistan, although her family originate from that country and she has a grandmother there and she has visited. It would mean leaving her studies and employment in the United Kingdom, but no satisfactory evidence has been submitted to indicate that the Sponsor could not study or work in Pakistan. I accept that she would rather not, but that is not the point at issue. If the financial requirements of the Immigration Rules cannot be satisfied, and the Sponsor and claimant had to carry on their family life outside the United Kingdom, I do not

find that this would amount to compelling circumstances as to why the appeal should be allowed under Article 8 outside the Immigration Rules.

59. Another alternative would be for the claimant to return to Pakistan and make an application for entry clearance. This would not be a similar case to Chikwamba [2008] UKHL 40, as there would be no requirement for the claimant to return to Pakistan simply for the sake of procedure. The purpose of making an application for entry clearance from abroad would be to make an application supported by the specified required evidence, to prove that the financial requirements of the Immigration Rules can be satisfied. That has not yet been proved. In accordance with Chen, in such a case it would be for the claimant to produce evidence that such temporary separation would interfere disproportionately with protected human rights, and I do not find that any satisfactory evidence to prove this has been submitted.
60. A further alternative if this appeal was not successful would be for the claimant to make a fresh application within 28 days, which application could be made from within the United Kingdom. Thereafter I accept that the claimant would not be able to take up employment until his application had been determined because he would be an overstayer, but the Sponsor confirmed that she would be able to manage financially during this period, and I do not find that this amounts to either exceptional or compelling circumstances to justify allowing this appeal outside the Immigration Rules.
61. I therefore conclude that the weight to be attached to the importance of maintaining effective immigration control, and the importance of satisfying the financial requirements of the Immigration Rules, outweighs the weight to be attached to the wishes of the claimant and Sponsor for the claimant to be granted leave to remain outside the Immigration Rules. The decision of the Secretary of State is not disproportionate and does not breach Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The claimant's appeal is dismissed.

No anonymity direction is made.

Signed

Date 22<sup>nd</sup> February 2016

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date 22<sup>nd</sup> February 2016

Deputy Upper Tribunal Judge M A Hall