Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26374/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 July 2017	**On 18 July 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AWAIS SHAH
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr P Singh Senior Home Office Presenting Officer
For the Respondent: Miss S Praisoody instructed by Legis Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Maxwell ('the Judge') promulgated on 25 November 2016 in which the Judge allowed the appellant's appeal against the

refusal of his application for leave to remain outside the Immigration Rules.

Background

2. AW is a citizen of Pakistan born in April 1982, who appealed against a decision to refuse his application for leave to remain in the United Kingdom on human rights grounds outside the Immigration Rules. The Secretary of State alleges the use of deception by AW in the taking of an English language test by the use of a proxy. That test was taken in February/March 2012. As the result of analysis undertaken by ETS the results of the test were found to be invalid.
3. The Judge sets out findings of fact from [15] of the decision under challenge which can be summarised in the following terms:

   i. The Judge was satisfied the Secretary of State had discharged the evidential burden of proving deception [18].
   ii. AW attended Anglia Ruskin University an institution it was found it was improbable would have accepted AW if his command of English was poor. AW studied on an MBA on Marketing and Innovation which required a significant degree of skill in communicating in the English language. AW's own command of English was described as 'colloquial' and he gave evidence 'unhesitatingly and without any apparent difficulty in understanding some relatively complex questions and expressing himself idiomatically when answering' [19].
   iii. The Secretary of State was unable to adduce any evidence other than the generic evidence ordinarily relied on a case such as this. It was found that the generic evidence relied upon in the present instance was insufficient to discharge the burden of proving, on a balance of probabilities, the TOEIC was obtained by fraudulent means [20].
   iv. Accordingly, AW was found to meet suitable eligibility requirements of Appendix FM. The Judge finds AW ought to have been granted leave to remained under the Immigration Rules although acknowledged it was necessary to look at the appeal in terms of the limited grounds of Article 8 ECHR [21].
   v. The Judge finds at [22] "It would be difficult to envisage circumstances wherein an appellant who meets the requirements of Appendix FM, which is there to deal with applications relating to family life, could not be regarded as someone whose article 8 rights had been interfered disproportionately."
   vi. At [23] "It follows that I find the appellant does succeed under Article 8, whether within or outside the Immigration Rules."
   vii. The Judge declares in arriving at the decision that he has taken account of the public interest in the balancing exercise, the relevant statutory provisions and one quoted decision referred to at [24 – 27].

viii. At [28]:

> 28. In this instance I have had regard to the need to maintain effective immigration control but find the appellant's circumstances are such that a decision to allow his appeal does not have the effect of undermining this aspect as he would have entitlement under the Immigration Rules. He has demonstrated both his command of English and his ability to be self-sufficient and not a drain on the state. He is a party to a stable marriage with a spouse who has children who were born in the United Kingdom and for whom she has a degree of responsibility. Although his life here has been established whilst his immigration leave has been precarious, the diminution in weight this attracts does not so undermine his case as to render the interference proportionate.

4. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal. The judge granting permission notes:

> 3. However, it does seem to me that at least one strand of the respondent's grounds is arguable - I refer here to the second full paragraph on page 2 of those grounds. Referring to Chen (Appendix FM – Chikwamba - temporary separation – proportionality) IJR [2015] UKUT 000189 (IAC) circulated on 20 April 2015, possibly this is a case where there is apparently no reason why the appellant should not return to his country of nationality (Pakistan) and from there make an application to re-enter the UK as a spouse. On at least that basis, I consider that a grant of permission is appropriate at this stage.

5. The grant of permission is not restricted and all grounds are therefore arguable.

Error of law

6. In *R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)* it was held:

(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.

(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be

proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)). However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules. By way of example, in R (on the application of Zhang) v Secretary of State for the Home Department [2013] EWHC 891 (Admin) the appellant challenged the legality of paragraph 319C(h)(i) which required an applicant applying for leave as the Partner of a Relevant Points Based System Migrant to have leave in that capacity. Mr Justice Turner held that although Chikwamba was concerned with the separation of parent and child, there was no suggestion that the absence of children should mean that it would only be in rare cases that Article 8 rights would prevail. The courts have recognised that the application of Razgar principles, as seen through the lens of Chikwamba, led to the conclusion that an Article 8 compliant requirement for an applicant to leave the UK before making an application was the exception rather than the rule (paras 17 – 19, 26 – 37 and 63 – 69). Save in particular cases, it would be rare that the immigration priorities of the state were such as to give rise to a proportionate answer to Article 8 rights to family life, where requirement (h)(i) was engaged. The application of the blanket requirement to leave the country imposed by paragraph 319C(h)(i) of the immigration rules was unsustainable, albeit that the rule was not actually struck out.

7. Having heard argument by the advocates it was concluded that the point identified in the grant of permission, relating to the decision in *Chen*, was a matter before the First-tier Tribunal that that tribunal were required to properly consider and make findings upon. As no such findings have been made the Upper Tribunal finds the First-tier Tribunal has erred in law in a manner material to the decision to dismiss the appeal as it cannot be established at this stage whether, if the '*Chen*' point had been properly considered the decision was likely to be the same.
8. The determination of the First-tier Tribunal is therefore set aside. The Upper Tribunal is able to hear further submissions relating to the remaking of the decision.

Discussion

9. The dynamics of AW's family unit are noted by the Judge at [14] of the decision under challenge in the following terms:

> "14. The appellant is married and there are two children from the appellant's spouse's previous marriage who live with their father but who spend most weekends with the appellant and his spouse. If the appellant had to live in t would mean that either the appellant's spouse (who is a British citizen) would

> need to remain in the United Kingdom to continue the present level of contact with the children or go to live with the appellant in Pakistan and significantly disrupt her family life with her children."

10. The above self-direction omits the '*Chen*' point which was the option of AW returning to Pakistan to make an application to re-enter the United Kingdom lawfully.
11. AW's immigration history shows he entered the United Kingdom lawfully as a student of 4 July 2007 with leave granted to 31 October 2009. Further leave to remain was granted to 30 June 2011. AW was without leave before a grant as a Tier 1 Highly Skilled Migrant valid from 15 August 2012 to 15 August 2014. A subsequent application for leave as a Tier 4 student was voided as AW sought to withdraw the application.
12. It was not made out on the evidence that AW has a parental relationship with a child although it is accepted that AW's partner will have a degree of responsibility for her children as a result of being a parent and also being responsible for the care of the children when they stay with her at weekends.
13. It is found that during the week the needs of the children are met by their biological father with whom they live.
14. It is accepted that the relationship AW has formed with his partner has been established at a time his leave to remain in the United Kingdom and status has been precarious and that it is known there is a strong possibility that he would have to leave the United Kingdom unless he was able to secure a grant of leave to remain.
15. It is accepted that AW and his partner will have a family life together recognised by Article 8 and that AW may have a relationship with children who, when staying with their mother, will stay within the family unit of which AW forms part, indicating that they too may form part of AW's family/private life, and AW of theirs, but only to the limited extent permitted by applicable circumstances.
16. In *Rhuppiah [2016] EWCA Civ 803* it was held that the concept of precariousness in immigration status in section 117B(5) was distinct from the concept of unlawful presence in the UK in subsection (4). Even if the two concepts could be said to overlap, subsection (5) would be redundant if they were the same. The concept of precariousness extended more widely, to include people who had leave to enter or remain which was qualified to a degree such that they knew from the outset that their permission to be in the UK could be described as precarious. The extension and re-extension of limited leave to remain did not mean that the person's status was not still precarious. In the context of section 117B, the relevance of precariousness of immigration status was the effect it had on the extent of protection which should be afforded to private life for the purposes of the Article 8 proportionality balancing exercise. The more that an immigrant should be taken to have understood that his or her time in the host country would be comparatively short or would be liable to termination, the more the host State was able to say that a fair balance between the rights of the individual and the general

public interest in the firm and fair enforcement of immigration controls should come down in favour of removal when the leave expired (paras 30 – 34).

17. In *Rajendran (s117B - family life) [2016] UKUT 138 (IAC)* it was held that (i) “precariousness" is a criterion of relevance to family life as well as private life cases is an established part of Article 8 jurisprudence: see e.g. R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Jeunesse v Netherlands, app.no.12738/10 (GC). (ii) The "little weight" provisions of s.117B(4)(a) and (5) of the Nationality, Immigration and Asylum Act 2002 are confined to " private life" established by a person at a time when their immigration status is unlawful or precarious. However, this does not mean that when answering the "public interest question" posed by s117A(2)-(3) a court or tribunal should disregard "precarious family life" criteria set out in established Article 8 jurisprudence. Given that ss.117A-D considerations are not exhaustive, in certain cases it may be an error of law for a court or tribunal to disregard relevant public interest considerations.

18. It is accepted AW was found to speak good English and to have been self-sufficient but such attributes are neutral in relation to the weight attached to them as part of the proportionality assessment – see *AM (S 117B) Malawi [2015] UKUT 260 (IAC)* in which the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

19. The assertion by Miss Praisoody that AW had married and taken responsibility for his wife and children is found to be too generalised a statement if it is meant to infer AW cares for the children as if they were living with him in the family unit on a permanent basis and he had assumed a key paternal role for them. The extent of any connection must be assessed in relation to the factual findings that can be properly made concerning the position of the children, as set out above.

20. It is accepted AW works full-time and his partner works part-time but it was not made out the partner could not increase her working hours or available income, especially she was required to demonstrate an ability to satisfy the minimum income requirement set out in Appendix FM. It was not made out that any delay in AW returning to the United Kingdom whilst his partner made such arrangements would make the decision disproportionate.

21. It was submitted on AW’s behalf there was no guarantee he will be able to return after a short period of time but no evidence was provided to the Upper Tribunal to establish how long visa applications take to be assessed in Pakistan, although the Tribunal has judicial notice that the published targets set out on the High Commission website indicate that a relatively short period of time will be required provided it is established that the necessary requirements of the Rules have been met.

22. It was submitted the proposal was not proportionate as the best interests of the children need to be with their mother and father and stepfather but other than a generalised submission to this effect no evidence was submitted to show expecting AW to return to make an application, and his not being available for however many weekends contact may be required, was contrary to the best interests of the children who will still have their mother and father available to them.
23. It was submitted on AW's behalf that although the Judge erred in failing to consider the *Chikwamba* issue, in light of the submissions made, expecting AW to return is not proportionate.
24. The submission that if AW was sent back to Pakistan to apply his partner may have to fall back on public funding for support is noted. If this is so it may be temporary whilst she establishes the minimum level of available income, which would take her off public support as she would earn too much in any event. It is also the case that the Secretary of State for the Home Department is the government representative seeking dismissal who is fully aware there may be a temporary increase in public funds. In this respect, such point is neutral. It has not been established that any additional funds AW's partner might seek, based upon her entitlement to the same as a British national and if she establishes a lawful entitlement to the same, will result in a disproportionate consequence to either the partner or the finances of the United Kingdom.
25. The submission that it would be more trouble for AW to have to go back to Pakistan than to remain in the United Kingdom may be the case, but Article 8 does not give a person the right to choose where they wish to live and is not there to minimise any disruption to individuals, per se, but to prevent unwarranted interference with a protected right.
26. Reference was made to AW's partner having her own medical problems but the only evidence provided in the bundle is a letter from the Crisp Street Health Centre in London, undated, indicating an individual takes Ibuprofen 400 mg three times a day and paracetamol four times a day with the addition wording of '1-2 weeks' and '6 weeks' none of which indicates whether this is a prescription or over-the-counter medication or who is taking the general painkillers or for why.
27. There is within the bundle a letter of the 25 October 2016 written by AW indicating he slipped on 21 October 2016 as a result which he injured his back and legs and that his GP prescribed medication and bed rest for 4-6 weeks indicating they may relate to the appellant as the Crisp Street Health Centre is given as the address of his GP.
28. It is noted AW's partner has been through the family courts who clearly found the best interests of the children are represented by the arrangement in which they live with their father during the week and stay with their mother at weekends. There is no evidence to suggest the impact of removing AW to enable him to apply lawfully will have any adverse impact upon the children sufficient to make the decision disproportionate.

29. In relation to the finding by the First-tier Tribunal Judge that AW will be able to satisfy the requirements of the Immigration Rules, it must be noted the application made by AW was for leave to remain outside the Rules based on his marriage to a British citizen. Although it was considered by the decision-maker under the Rules there is no right of appeal against a refusal under the Rules and on the information provided it cannot be said that this is a decision in relation to which AW would succeed under the Rules in any event. The evidence provided of the use of a proxy was not just the generic evidence referred to by the First-tier Tribunal Judge but also the ETS Source Data, the 'look-up-tool' specific to AW. The fact the voice recording was declared "invalid" imports a specific meaning that there was evidence of the use of a proxy. Similarly, whether AW's ability to speak English at a hearing on 3 November 2016 has any bearing upon whether a proxy was used to sit an English language test on 13 December 2011 was not properly considered by the Judge. There is also a discrepancy in the original decision where the Judge finds at [18] the respondent has discharged the evidential burden of proving deception but then at [20] that the only evidence adduced was the generic evidence and that based upon that evidence it was not found the Secretary of State to discharge the burden of proving the certificate was obtained by fraudulent means. This is an element would have to be considered further and properly analysed a fresh application is made. There are more than the two witness statements more commonly referred to as the 'generic evidence' identified in the case law.
30. AW can make an application for leave to remain under the Rules which he can do from abroad.
31. As found in *Chen,* "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". In this case AW has failed to produce sufficient evidence to establish that temporary separation between him and his partner will interfere disproportionately with the protected rights of them or relevant others.
32. I therefore find that the Secretary of State has discharged the burden of proof upon her to the required standard to establish that any interference with the family and/or private life of AW occasioned by his removal to Pakistan, to enable him to make an application to re-enter the United Kingdom lawfully, is proportionate to the legitimate aim relied upon which is the effective maintenance and application of immigration controls. This is not a Kafkaesque stance adopted by the Secretary of State based on inflexible policy but a decision properly arrived at having weighed the competing interests.

Decision

33. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

34. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 18 July 2017