Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06669/2019 (V)**

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business	**Decision & Reasons Promulgated**
On the 9 December 2020	**On the 17 December 2020**

Before
UPPER TRIBUNAL JUDGE REEDS

Between

M R
(ANONYMITY DIRECTION MADE)

AND

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E. Daykin, Counsel instructed on behalf of the appellant

For the Respondent: Ms A. Everett, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Monaghan (hereinafter referred to as the "FtTJ") promulgated on the 25 September 2019, in which the appellant's appeal against the decision to refuse his human rights application dated 4 March 2019 was dismissed.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of his spouse and her mental health. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 9 December 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the appellant who was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. I am grateful to Ms Daykin and Ms Everett for their clear oral submissions.

Background:

5. The appellant is a national of Pakistan. He entered the UK on 13 to 2011 with leave to enter granted as a Tier 4 student valid from January 2011 until 19 January 2015.

6. On 12 January 2015, the appellant applied for leave to remain as a tearful student and was granted leave until 31 December 2016.

7. On 23rd December 2016 he applied for leave to remain performance to complete his studies. On 5 September 2017 he requested to vary his application so that he could attend his graduation ceremony and then return back to his home country. That application was refused on 8 November 2017.

8. On 22 November 2017, the appellant applied for leave to remain on the basis of his family life and private life for six months to help secure a place for a doctorate study at university to then allow him to make a Tier 4 application.

9. On 3 April 2018, the appellant varied his application on the basis of his relationship with SN which he claims started in October 2013, but they were not living together. His application was refused on 27 July 2018 and the decision was certified to give an out of country right of appeal.

10. Following that refusal, the appellant's representatives submitted pre-action protocol letters and responses were made in 2018 on behalf of the Secretary of State where it was agreed to reconsider the application.

11. That reconsideration was undertaken and on 4 March 2019 his application was refused.

The decision letter:

12. The reasons given for refusing the application can be summarised as follows. The respondent considered his application under paragraphs R-LTRP of Appendix FM but considered that he could not meet the eligibility immigration requirements (E-LTRP 2.1 of Appendix FM) because he was in the UK in breach of immigration laws and paragraph EX1 did not apply.

13. The respondent considered whether the appellant would be exempt from meeting certain eligibility requirements of Appendix FM because paragraph EX1 applied. It was accepted that the appellant had a genuine and subsisting relationship with his partner who was a British national and it was noted that his partner was a carer for mother, she works in the UK, his partner's previous relationship has caused her to be dishonest to her parents and by his partner refusing to marry someone in Pakistan her family had arranged resulted in threats to kill. The appellant's partner also claimed that she could not settle in Pakistan and therefore could not leave the UK. However there was no evidence provided from independent sources to corroborate the claims made by the appellant's partner. Therefore the respondent did not accept that there were any insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means a very significant difficulties which will be faced by the appellant or her partner in continuing their family life together outside of the UK, and which could not be overcome or entail very serious hardship for her and her partner.

14. His application was considered under the private life rules under paragraph 276 ADE, where it was noted that the appellant was a national of Pakistan who had entered the UK in 2011; it was not accepted that he lived in the UK continuously for 20 years, he was not between the ages of 18 and under 25 having lived in the UK for more than half his life and was over the age of 18 and therefore could not meet the requirements of paragraph 276 ADE(1 (iii)(iv) and (v). As to paragraph 276 ADE(1) (vi) the respondent did not accept that there would be very significant obstacles to his integration into Pakistan if

required to leave the UK because he resided there for at least 19 years of his life. He has stated that he spoke Urdu which is widely spoken in Pakistan and would help him adapt to life, socially and culturally. Consequently, he failed to meet the requirements of that part of the rule.

15. The respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain and considered the issues that had been raised as to why it would be unjustifiably harsh for him to return to Pakistan. The respondent took into account the basis of the application and that the relationship with the sponsor started and developed in full knowledge that his immigration status was not permanent. He then married his sponsor on 9 July 2018, nearly 2 years after his lawful leave to remain expired. It was considered the appellant and the sponsor were fully aware of his immigration status and would have been aware that they may not be able to continue to live in the United Kingdom. No evidence had been provided to show that the appellant sponsor could not return to Pakistan lawfully live there.

16. The decision noted that the appellant had previously shown that he was able to adapt to a different culture when he entered the United Kingdom and it was considered that having previously done so he would be well equipped to do this again to a country where he had spent the majority of his life.

17. Furthermore whilst a British citizen partner who has lived in the United Kingdom for all of their life and may only speak English and may not wish to uproot and relocate halfway across the world, a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle.

18. The decision letter also made reference to entry clearance and that it would be open to the appellant's partner to remain in the United Kingdom to support any application he could make from abroad.

19. The respondent did not find that there was any evidence to demonstrate that there were any" exceptional circumstances" established in his case.

<u>The appeal before the First-tier Tribunal:</u>

20. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge Monaghan) on the 16 September 2019.

21. In a determination promulgated on the 25 September 2019, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rule in question and on Article 8 grounds.

22. The First-tier Tribunal set out the issues at paragraph [19]:

(1) whether the appellant has established that he has a genuine and subsisting relationship with a partner who was in the United Kingdom and is a British citizen and there are insurmountable obstacles family life with that partner continuing outside the United Kingdom and therefore paragraph EX(1) (b) applies;

(2) whether there are very significant obstacles to the appellant's integration to Pakistan if he is required to go there;

(3) whether the public interest (considered under Article 8) does not require the removal of the appellant, as the decision to remove it would result in unjustifiably harsh consequences and therefore be a disproportionate interference with his article 8 rights.

23. The FtTJ's assessment of the issues are set out at [20]-[97]. He considered a number of issues, including the care of the sponsor's mother and between paragraphs [83-88] the claim that the appellant and the sponsor would be at risk of harm in Pakistan. The judge did not accept that there were any insurmountable obstacles under appendix FM and that their relationship could continue in Pakistan if the sponsor chose to follow a husband he was removed. The reasons he gave are summarised at [91]-[93];

- that he had rejected the claim that the sponsor is a carer for her mother to the extent claimed or any alternative the care can be provided from other sources.
- He did not accept the extent of the sponsor's mental health problems and find that if they exist at all they are mild;
- it had not been substantiated that she or the appellant are or will be subject to threats to harm or kill in Pakistan on account of their marriage.
- He accepted that there would be a period of adjustment of the sponsor who has always lived in the United Kingdom, but she would have the support of the appellant and several close family members of his who are residing in Pakistan to do this.
- The sponsor could remain in contact with their own family by modern means of communication and visits United Kingdom by her to them of visits made Pakistan by her family.
- The appellant has the qualifications and experience gained in the United Kingdom to be able to find work and support them both in Pakistan.
- The sponsor has purchased a house in United Kingdom, but this could be sold to help provide funds for accommodation Pakistan if required.
- The sponsor can speak and understand Punjabi as she confesses in that language of her mother who does not speak English (at [89]).

24. As to paragraph 276 ADE(1) (vi) the FtTJ found that there were no very significant obstacles to his integration into Pakistan. The judge found that he resided in Pakistan until the age of 19, he was familiar with the culture, customs, and language. He also had a wide circle of immediate family members living there who could help him adjust and support him until he could find employment there with his qualifications and experience gained the United Kingdom. He could remain in contact with the sponsor by email, Skype, or telephone and by visits made (at [94]).

25. When undertaking an article 8 assessment and considering the issue of proportionality alongside the section 117B public interest considerations, the judge took into account those earlier findings and in addition set out the following at [97]
    - the marriage was entered into at a time when the appellant had no leave to remain. The judge therefore placed little weight on the relationship when considered under article 8 .
    - The appellant can speak English
    - the appellant has the qualifications and experience not to become a burden on the state should be granted leave to remain.

26. He concluded at [98) that the public interest in maintaining a firm and fair immigration control together these findings at the immigration rules were not met tip the balance towards removing the appellant. The judge found that there was nothing disproportionate about the decision to remove and that it would not result in unjustifiably harsh consequences for the appellant or the sponsor for the reasons set out.

27. The FtTJ dismissed the appeal.

28. Permission to appeal was issued and on 4 March 2020, permission to appeal was refused by FtTJ Osbourne. The application was renewed and on the 7 May 2020 Upper Tribunal judge Rintoul granted permission stating:-

    “It is arguable that the First-tier Tribunal made factual errors identified in ground 1 at [9] to [11]. It is also arguable that these are material as they are the apparent basis for the finding at [75] that the medical evidence, presumably including that from Dr Hussain (the expert) was not capable of bearing weight. In the circumstances, it is arguable that the finding at [91] as to the sponsor’s mental health and difficulties she would have if compelled to relocate to Pakistan are unsustainable”.

<u>The hearing before the Upper Tribunal:</u>

29. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 9 June 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take

place on the papers. Following those initial directions the hearing was listed for a Skype hearing. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

30. Ms Daykin on behalf of the appellant relied upon the written grounds of appeal and written submissions which repeated the matters set out in the written grounds.

31. There was a Rule 24 response filed on behalf of the respondent dated 16 June 2020.

32. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions. At the conclusion of the submissions made by Ms Daykin, Ms Everett on behalf of the respondent stated that having heard those submissions and considered them in the light of the evidence as a whole that she accepted that the grounds were made out in the way advanced by Ms Daykin. She submitted that the factual errors made could not be "ringfenced" and that they plainly affected the FtTJ's assessment of the report of Dr Hussain and also the appellant's evidence which ultimately led to the overall decision reached that there were no insurmountable obstacles to family life in Pakistan. It was therefore conceded on behalf of the respondent that the errors were material and that the decision could not stand.

33. Given the position of the parties, and the agreement reached that the decision of the FtTJ involved the making of an error on a point of law it is only necessary for me to set out in brief terms why the Tribunal agrees with that concession.

34. The appellant appeals on three grounds:-

(1) Ground 1, the FtTJ made errors of fact when considering the medical evidence at paragraph 69 – 75 of the decision.

(2) Ground 2, the judge failed to give proper consideration to the medicolegal report.

(3) Ground 3, the judge misapplied the public interest considerations section 117B (4) (b) NIAA 2002.

35. The issue under EX1 and whether there were insurmountable obstacles to family life outside of the UK was addressed by the FtTJ.

36. Paragraph EX.1. reads as follows (so far as relevant):

" EX.1. This paragraph applies if

(a) ...; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

37. As the decision in *Agyarko* sets out, the test is to be understood in a "practical and realistic" sense rather than referring to obstacles which make it literally impossible for the family to live together. The "very significant difficulties" as set out in EX2 means that the appellant's partner would face "very serious difficulties in continuing her family life outside the UK and which could not be overcome or would entail very serious hardship".

38. The decisions in *Agyarko* and *Lal* make it plain when addressing the question there is a need to have regard to the particular characteristics and circumstances of the individuals concerned.

39. Dealing with ground 1, it is submitted that in arguing whether the appellant met the exception in EX1(b) that there were insurmountable obstacles of family life continuing outside the United Kingdom, the appellant relied upon the sponsors for mental health which was said to manifest itself in PTSD, depression, anxiety and panic attacks. In support of the claim there was a report from Dr Hussain and her GP records.

40. The FtTJ considered the medical evidence at [69]-[75] of the decision and concluded "that the medical evidence is so inconsistent in core details relating to the sponsor's mental health" that he could attach "very little weight to it" (see paragraph 75). The reason for this conclusion was that the GP records disclosed by the sponsor had not mentioned mental health problems to her GP until 3 July 2019, after the refusal decision was made and that the sleeping medication the sponsor stated she had been prescribed and the counselling to which she had been referred to had not been recorded in the GP's records (see paragraph 72 and 74).

41. It is submitted that when reaching that conclusion the judge made 2 errors of fact. It is accepted on behalf of the respondent that the FtTJ did make factual errors when addressing the medical evidence.

42. The first error of fact is set out at paragraph 74 and that "the GP does not record the issue of sleeping tablets". That is an error of fact as the GP records disclosed that the sponsor's GP prescribed the medication

which is in fact used for insomnia (see page 35 in the context of the footnote in the grounds). There is also a reference to amitriptyline at page 35 which is also prescribed for issues for anxiety and sleep. Consequently, this was an uncontentious factual error and when looking at the entry for the sponsor's visit to her GP on 3 July 2019, the sponsor was prescribed tablets which she was to take at night. This is a medicine that can be prescribed for purposes to help sleep and prescribed for those suffering with insomnia.

43. The second error is set out at paragraphs [71] and [73]. This relates to the finding made that the GPs records disclosed that the appellant did not raise a mental health problem to the GP until she attended the clinic on 3 July 2019. The GP records disclosed that the first time she sought medical assistance for her mental health problems, specifically having difficulties with her panic disorder was 9 December 2016 (see (AB 30), which records the sponsor attended A&E as a result of her panic disorder. This may not have been clear to the FtTJ from those records, but there is such an entry and that it is support for the claim made by the sponsor and the evidence in the report of Dr Hussain that the sponsor had been suffering from mental health problems prior to 2019.

44. Those errors are material in the context of the evidence and the decision reached and in particular, the report of Dr Hussain, because the FtTJ relied on what he perceived to be inconsistencies between the GP records and Dr Hussain's report which justified his finding that very little weight could be attached the report. This is demonstrated at paragraph [73] where the judge specifically cited her failure to seek medical assistance for mental health problems until July 2019, after the date of the refusal decision as a ground for placing "adverse weight" on the sponsor's late disclosure of her mental health problems.

45. Dealing with ground 2, this also made reference to the medicolegal report of Dr Hussain. It is submitted that the doctor explained the method by which examined the sponsor and outlined his diagnosis of the state of mental health with reference to the tools used to reach that diagnosis and in particular the Istanbul Protocol.

46. He summarised the report from Dr Hussain, consultant psychiatrist (report dated 26 July 2019) between paragraphs [64]-[70].

47. Dr Hussain stated that in his opinion the sponsor was suffering from PTSD arising from the traumatic experience the sponsor suffered as a result of her brother's death when she herself was a young child. She also suffers from depressive episodes. She had been diagnosed with acute anxiety state. She has been prescribed sleeping tablets and referred for counselling (at [68]).

48. The doctor stated that the sponsor should receive psychological treatment such as CBT or EMD are for PTSD. CBT is not available in Pakistan. The sponsor's risk of suicide is high. In his opinion she would be at greater risk of attempting suicide if she lost all hope of being allowed to stay in United Kingdom with the appellant.

49. In the doctor's opinion the sponsor has a marked emotional insecurity in her personality and high dependency needs to her close attachment figure which is the appellant. He stated that the psychological risk of further deterioration in the sponsor's mental health would be highly significant if the appellant was removed. He did not consider that the sponsor would be able cope in her current psychological condition and with an emotionally insecure personality with resettlement in Pakistan which is significantly culturally different.

50. Whilst the judge gave some consideration to the report at paragraphs [68 – 70] of the determination, the judge confined his assessment of the evidence by summarising it and then comparing the instructions stated therein with the judge's own review of the sponsor's GP records. However as the FtTJ had made factual errors in relation to the records that led to him attaching no weight to that report. This also led to a failure to evaluate the reliability of Dr Hussain's report with reference to his expertise and the way he reached his diagnosis.

51. Both advocates agree that the factual errors and the failure to consider the contents of the report in the light of the expert's expertise and diagnosis led to a material error in the assessment of the evidence on what was a central issue of whether there were insurmountable obstacles to family life in Pakistan and the overall Article 8 assessment.

52. For those reasons, the parties agree that the decision reached was undermined by those errors and that the decision should be set aside. In those circumstances, it is not necessary to consider ground 3. However, I would observe that even if the relationship and/or marriage had taken place when the appellant had no leave, to ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: *Rhuppiah* (ibid) paragraphs [36] and [49].

53. Drawing together those matters, I am satisfied that the FtTJ fell into error in his overall assessment for the reasons that I have given and as accepted on behalf of the respondent.

54. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice

Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

55. Both advocates submit that the venue for hearing the appeal should be the FtT. I have considered their submissions in the light of the practice statement recited above. As it will be necessary for the appellant and his spouse to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside and in the light of the relevant documentary evidence and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing. The Tribunal will be seized of the task of undertaking a credibility assessment and will be required to do so on the basis of the evidence as at the date of the hearing.

56. I also preserve as findings of fact paragraphs [83]- [88] where the FtTJ found that the appellant and sponsor are not at risk of harm in Pakistan. Those findings were not challenged in the grounds and are not affected by the error of law as accepted by Ms Daykin.

57. I also note the matters set out in Dr Hussain's report at paragraphs 28-29 and therefore at the remitted hearing consideration should be given to the guidance given in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 in the light of the measures suggested by Dr Hussain. Consideration should also be given as to whether it is necessary for the anonymity direction to continue.

Notice of Decision

58. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside; it shall be remitted to the FtT for a hearing.

Signed Upper Tribunal Judge Reeds

Dated 9 December 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email