Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/17076/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 23 March 2021 **On 31 March 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SMAS

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr D Balroop, instructed by Whitefield Solicitors Ltd

For the Respondent: Mr A McVeety, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the

conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Pakistani national with date of birth given as 5.6.82, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 27.8.20 (Judge Dainty), dismissing on immigration and human rights grounds his appeal against the decision of the Secretary of State, dated 19.6.18, to refuse his application made on 14.12.18 for Leave to Remain in the UK as the partner of Mrs NN, who has been granted refugee status, and their daughter, born on 21.12.19. It is relevant that both partner and child are also citizens of Pakistan.

2. In summary, the grounds assert that (1) that as the judge found that family life could not be enjoyed outside the UK, the appeal should have been allowed on grounds of exceptional circumstances rendering the decision unjustifiably harsh. (2), the First-tier Tribunal Judge erred in law in finding that the appellant could return to Pakistan without his partner and daughter as he would not be able to apply for Entry Clearance as his partner does not meet the financial requirements.

3. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 10.9.20, on the basis that it is arguable that the judge did not properly apply EX1 of Appendix FM. In fact, as Mr Balroop accepted, that was never the appellant's case. It was accepted that EX1 is parasitic on the Rules and if the Rules could not be met, there was no purpose in considering EX1 and insurmountable obstacles. It follows that the permission was granted on a misconception. Although Mr Balroop referred me to exceptional circumstances under GEN 3.2, he accepted my point that as the Rules could not be met, we have to look to exceptional circumstances outside the Rules which would render removal unjustifiably harsh and, therefore, disproportionate.

4. I have carefully considered the decision of the First-tier Tribunal in the light of the oral and written submissions and the grounds of application for permission to appeal to the Upper Tribunal.

5. The respondent's Rule 24 reply, dated 6.11.20, points out that at the First-tier Tribunal appeal hearing, as noted at [19] and again at [23] of the impugned decision, the appellant conceded, and the judge accepted, that he was unable to meet the Immigration Rules, which would include consideration of EX1 and the issue of insurmountable obstacles to family life continuing in Pakistan.

6. It is further submitted that it was entirely open to the judge to find that the appellant could leave the UK and make a proper Entry Clearance application in line with *R (on the application of Chen) v Secretary of State (Appendix FM – Chikwamba v SSHD* [2008] UKHL 40 – temporary separation – proportionality) [2015] UKUT 00189. The respondent argues that there is nothing in the evidence to suggest that there would be a disproportionate impact on either the partner or the child. "*The fact that the separation may well be extended whilst his sponsor finds work to meet the requirements does*

not suggest that the separation will be indefinite. If this was the case then evidence to that effect should have been adduced."

7. The Upper Tribunal has recently received the appellant's bundle of documents, including what is said to have been the initial bundle and four supplementary bundles. However, Mr Balroop indicated that only the fourth supplementary bundle was relevant to the Upper Tribunal hearing at this stage, and the material therein pulls together all the relevant documents dealing with the appeal and grounds. I have in fact considered all the bundles in addressing the issues set out below.

8. As set out above, the appellant's primary case is that at [27] of the decision the judge found that his partner would be unable to join him in Pakistan, amounting to exceptional circumstances on the basis that it would be unjustifiably harsh and, therefore, renders the respondent's refusal decision disproportionate. The secondary case is that given her circumstances, without other family support in the UK and with limited earning potential, the sponsoring partner would not be able to meet the financial income threshold to enable the appellant to make a successful application for Entry Clearance as a spouse. It is submitted that this also amounts to exceptional circumstances, which would render his removal permanent and, therefore, unjustifiably harsh as it would effectively terminate the family life he presently enjoys with partner and daughter in the UK.

9. Mr Balroop particularly directed my attention to the extract from the respondent's policy, set out at [4] of his grounds. In essence, the Home Office policy is that in consideration as to whether there are exceptional circumstances which would unjustifiably harsh consequences, the decision maker must consider "*all relevant factors raised by the appellant*". Such relevant factors as stated in the policy include circumstances which would present a very serious obstacle to family life being pursued in the country of return. "*You should consider the effect on the UK partner and the degree of difficulty that the family would face living in that country*." Mr Balroop submitted that given the finding that family life could not continue in Pakistan, this in and of itself sufficient to amount to exceptional circumstances and there was, therefore, no need to go to consider the *Chikwamba v SSHD* [2008] UKHL 40 point of a temporary separation.

10. The Rule 24 response refers to *Chen,* and the grant of permission also pointed out that "*ordinarily the fact that an appellant could not meet the Immigration Rules would not enhance an article 8 claim Ekinci [2003], paragraph 17, and a person can be expected to return to make the appropriate application, Younas [2020].*"

11. Mr McVeety relied on *Chen* and the Rule 24 response. The respondent's position as advanced in his oral submissions were that if the appellant had been able to demonstrate that the separation from his wife and daughter would effectively be permanent, because his sponsoring partner could not meet the financial requirements for a successful Appendix FM Entry Clearance application, that *could* amount to exceptional circumstances rendering the decision unjustifiably harsh. However, he submitted that the burden was on the appellant to adduce evidence that the

sponsoring partner could not be reasonably expected to find employment sufficient to meet those stringent financial requirements, and that the evidence before the First-tier Tribunal failed to discharge that burden. In response, Mr Balroop pointed to the evidence put before the First-tier Tribunal as to the sponsor's earning potential, including her P60. The grounds helpfully explain the evidence placed before the First-tier Tribunal, which appears between 50-248 of the main appellant's bundle. This includes the sponsor's P60, payslips, employer contract and bank statement. Mr Balroop relied on this evidence to support the claim that the appellant (through the income of his sponsoring partner) would be unable to meet the Entry Clearance requirements of the Immigration Rules. She does not earn £18,600. Mr Balroop also pointed out that she has a very young child and no family support to help her look after the child.

12. In relation to *Chen*, relied on by the respondent, Mr Balroop directed my attention to [40] and [41] of that decision which demonstrates that that case did not address and is not authority for what was described as the converse position (to where an Entry Clearance application would be successful), whether, where the Secretary of State took the view that an application for Entry Clearance would be unlikely to succeed, the *Chikwamba* principle could apply.

13. Mr Balroop also drew my attention to [59] of the Supreme Court's decision in *Agyarko* [2017] UKSC 11, where it was held that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. If refusal of (leave to remain) in circumstances where family life could not reasonably be expected to be enjoyed elsewhere, taking full account of the considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8, the refusal was unlawful.

14. It is clear from [27] of the decision that the First-tier Tribunal Judge accepted that the appellant was in a genuine and subsisting relationship with a person with refugee status (granted on the basis of sexual orientation) who would not be able to return with or join the appellant in Pakistan. Given the very young age of their daughter, it follows that despite being citizens of Pakistan, neither partner nor daughter could continue family life with the appellant in Pakistan. There would be a separation. On that basis, within the same paragraph, the judge went on to ask whether there were exceptional circumstances which would make it unjustifiably harsh for the appellant to return to Pakistan without his wife and daughter and make an Entry Clearance application from there.

15. The judge accepted that the appellant was bonded to his daughter and that he enjoyed family life with both partner and daughter. At [34] the judge accepted that it was in the child's best interests for him to continue living with her in the UK. However, at [28] the judge considered that the child's needs (then 8 months old) could be met solely by her mother remaining in the UK. The judge also considered the appellant's immigration history, applied the s117B public interest considerations,

and pointed out that he entered into the relationship with NN whilst he was in the UK unlawfully with no legitimate expectation of being able to remain. Effectively, the judge conducted a proportionality balancing exercise, which was found to fall in favour of maintaining immigration control and that the appellant could and should return to Pakistan and make application for entry clearance from there.

16. The House of Lords' judgment in *Chikwamba v SSHD* [2008] UKHL 40, held that there is no public interest in removing a person from the UK in order to make an entry clearance from abroad that would be certain to succeed (now referred to as the "*Chikwamba* principle"). In that decision, Lord Brown stated, "*[I]t seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad*."

17. However, in *Secretary of State for the Home Department v Hayat (Pakistan)* [2012] EWCA Civ 1054, the Court of Appeal upheld a First-tier Tribunal decision that removal would be proportionate, even though an entry clearance application would succeed. In *Chen*, the Upper Tribunal concluded that that 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, and that in all cases it will be for the individual to demonstrate, through evidence, and based on his or her individual circumstances, that temporary removal would be disproportionate.

18. In *Ekinci* [2003] the Court of Appeal held that a failure to meet the Immigration Rules does not improve the appellant's argument under Article 8 ECHR. Generally, the fact that he cannot do so is highly relevant to the article 8 proportionality balancing exercise. *Ekinci*, held it was proportionate to remove the appellant, who had an appalling immigration history and who would only be required to travel to Germany and wait for one month for a decision on his application.

19. The recent Upper Tribunal case of *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129 (IAC), involved somewhat similar circumstances to those advanced by Mr Balroop in the present appeal. In that case, the respondent accepted that there were insurmountable obstacles to enjoying family life outside the UK and that it would not be reasonable or proportionate for the family unit to be indefinitely separated. The respondent conceded that it would be disproportionate for the appellant to be removed unless she would be able to re-enter the UK but argued that a temporary separation whilst the appellant applied for Entry Clearance to re-join her partner in the UK was proportionate.

20. The appellant submitted that that respondent's assumption that she would be able to re-enter the UK from Pakistan was mistaken as she would be unable to satisfy the financial eligibility requirements for entry as a partner. Her partner gave evidence that it would be impossible for him to meet the minimum financial threshold. It was argued that because the consequence of her removal would be permanent, or at least

long-term, exclusion from the UK, which the respondent has conceded is not reasonable or proportionate, the appeal should be allowed.

21. The Upper Tribunal rejected the claimed inability of the partner to earn sufficient to meet the threshold and found that she would be able to re-enter the UK within 4-9 months, so that there would not be a lengthy or infinite separation. It was held that neither *Chikwamba* nor *Agyarko* support the contention that there cannot be a public interest in removing a person from the UK who would succeed in an entry clearance application. In the light of that appellant's immigration history the Upper Tribunal concluded that there was a strong public interest in requiring the appellant's removal, even though she would be able to re-enter in due course. "*Requiring the appellant, in these circumstances, to leave the UK in order to make a valid entry clearance application as a partner, far from being merely a disruptive formality, serves the important public interest of the maintenance of effective immigration controls*." Ultimately, after applying the public interest considerations under s117B of the 2002 Act, the Upper Tribunal concluded that removal was proportionate despite the likely period of separation from her partner (finding she would take her young daughter with her).

22. On an assessment of the cases relied on by the parties, I do not accept Mr Balroop's submission that the inability of the appellant to enjoy family life outside the UK is sufficient alone to amount to exceptional circumstances on the basis that it would have an unjustifiably harsh impact on him and on his family members. There still has to be consideration of the period of potential separation, balanced against the public interest in enforcing immigration control in a proportionality assessment, taking the public interest considerations of s117B into account. Effectively, that is what the judge went on to do.

23. In light of the case authorities referred to above, the remaining issue is whether the appellant's separation from his partner and daughter would likely be permanent or at least so lengthy as to amount to unjustifiably harsh consequences for any or all of the family members so that his removal would be disproportionate. However, I am not satisfied that this point was taken at the First-tier Tribunal. At [27] the judge stated that "*From the position of being settled and working in Pakistan he can then apply for entry clearance under the relevant Immigration Rules*." At [28] the judge also stated, "*The separation need only be temporary if the appellant applies for entry clearance on return*." It is clear from these paragraphs and the conclusions drawn at [34] that the judge proceeded on the assumption that the appellant would be able to return to the UK following an Entry Clearance application. Nowhere in the decision is there any record of a submission that the appellant would be unable to succeed in such an Entry Clearance application because of the sponsoring partner's limited earning potential. Neither does such an argument appear in the grounds of appeal to the First-tier Tribunal against the respondent's decision, nor in the lengthy skeleton argument put before the First-tier Tribunal, nor in any of the witness statements of the appellant and his partner. I am satisfied that the force of Mr Balroop's submissions before the First-tier Tribunal, as recorded at [27] of the decision, was that there were exceptional circumstances rendering removal unjustifiably harsh, "*in*

that the appellant was in a relationship with an asylum seeker who also came from Pakistan so could not join the appellant."

24. Although Mr Balroop now relies on the argument that the appellant could not successfully apply for Entry Clearance, relying on the financial information contained within the appellant's bundles as put before the First-tier Tribunal, I am not satisfied that this evidence in fact demonstrates that the sponsoring partner would be unable to find employment producing an income sufficient for the appellant to meet the Entry Clearance financial threshold requirement. However, as Mr McVeety pointed out, it is for the appellant to demonstrate this to be the case. In any event, as the point was not taken before the First-tier Tribunal, the appellant can hardly expect the judge to make a decision on such an issue.

25. In the premises, and for the reasons explained above, I reject the primary argument that merely because family life cannot be enjoyed outside the UK, this of itself amounts to exceptional circumstances having an unjustifiably harsh effect on the appellant and/or his family members. I also reject the secondary argument, advanced to the Upper Tribunal but evidently not put before the First-tier Tribunal, that the appellant would be unable to meet the financial requirements for Entry Clearance to join his partner and child in the UK. Not only was that not raised before the First-tier Tribunal, but the evidence in support did not demonstrate that the sponsor would be unable to find employment to meet the minimum income threshold under Appendix FM.

26. It follows that no error of law is disclosed by either ground of appeal.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands, and the appeal remains dismissed on human rights grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 23 March 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 23 March 2021