IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001184

First-tier Tribunal No: HU/00441/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 January 2025

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE FRANTZIS

Between

IRSHAD HUSSAIN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rashid Ahmed, Counsel, Pro Bono.
For the Respondent: Mr Diwnycz, a Senior Home Officer Presenitng Officer.

Heard at Phoenix House (Bradford) on 29 January 2025

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 2 October 1971 who entered the UK legally on 31 July 2005 with leave to enter as a spouse.
2. The Appellant married Azra Bibi, born on 1 January 1965, on 1 December 2003. She naturalised as a British citizen in 2006. They have lived together since the Appellant entered the UK.
3. The Appellant made a further application for leave to remain which was granted outside the Immigration Rules until 27 September 2009 but no further applications were made until 17 October 2018, which was refused on 8 July 2019.
4. An application for leave to remain made on 19 February 2021 was refused in a decision dated 2 February 2022 against which the Appellant appealed to the First-tier Tribunal, which was heard on 9 September 2022. That appeal was dismissed.

5. The Appellant sought permission to appeal to the Upper Tribunal which was granted. In a determination promulgated on 24 July 2024 Upper Tribunal Judge Reeds set the First-tier determination aside but with preserved findings and gave directions for the further hearing of the appeal within the Upper Tribunal.
6. Following the making of a judicial transfer order the appeal comes before the Upper Tribunal today to enable it to substitute a decision to either allow or dismiss the appeal.
7. In relation to the scope of this hearing, Judge Reeds only found an error of law in relation to one issue. This is referred to by her at [33] of her Decision in the following terms:

> 33. However when reaching her overall decision the FtTJ erred in law by not addressing the issue of whether there were insurmountable obstacles to family life for the parties outside of the United Kingdom. The decision letter also set out why the appellant could not meet the eligibility requirements and a consideration of why it was said EX 1 did not apply. The ASA set out in the bundle (dated 5/9/22) expressly referred to EX 1 and set out the submissions upon which this was based at paragraph 18. It appears from the documents provided that this was an issue that remained a "live issue" and required assessment as the claim was not only based on private life but also the family life that he had with his wife, and which had been in existence since 2003 outside of the UK and 2005 when living in the UK. That assessment, if made, would have been factored into the overall article 8 assessment, and the conclusion as to whether the decision to refuse leave was unlawful under section 6 of the Human Rights Act 1998 and as a consequence the decision made to dismiss the appeal without consideration of that issue was a material error of law.

8. Judge Reeds also directed that a number of findings of the First-tier Tribunal shall be preserved. Reference is made to these at [35] of the determination where it is written:

> 35. For the reasons set out, the other grounds do not establish there was any error of law in the facts as found by the FtTJ as set out between paragraphs 20-28 of her decision and those finding of facts are preserved as is her assessment of whether there are very significant obstacles to his integration (see paragraphs 29-31). For the avoidance of doubt paragraphs 29 – 31 are preserved, as is the FtTJ's finding that the appellant is in a genuine and subsisting relationship with his wife (see paragraph 32) and that his wife claims benefits and does not work (paragraph 32).

<u>The preserved findings</u>

9. The relevant preserved findings of the First-tier Tribunal are as follows:

> 21. The appellant married Mrs Bibi in 2003 and they have lived together since July 2005. I accept that the appellant has lived continuously in the UK since entering the UK in July 2005. Mrs Bibi is a British citizen.
>
> 22. Mrs Bibi has a number of health problems including moderate to severe depression, arthralgia, sciatica, osteopenia and urinary problems [AB p.92]. I accept that the appellant has anxiety and depression [AB p.57]. I accept that he requires an operation due to an issue with his knee [AB p.64].
>
> 23. The appellant has family in the UK. He also has family in Pakistan including brothers who live in the family home that the appellant did before coming to the UK. The appellant receives financial support from his cousin. I do not accept that the appellant has demonstrated that this support would not

continue if needed in Pakistan for two reasons. Firstly the appellant has not asked his cousin. Secondly Mrs Bibi said "*out of sight out of mind*" for why she assumed the cousin would not continue his support. However I had no objective basis for attaching weight to this. For example there was no statement from the cousin stating he would no longer support the appellant. The appellant referred to a family feud in his statement but gave no details either in his oral evidence. There is no reference to this in any of the supporting evidence. I do not accept that the appellant has provided sufficient evidence to support this assertion.

24. I accept that the appellant does not work as she does not have permission to do so. He does however have previous work experience working in a restaurant in the UK. He has also worked as a tailor in Pakistan.

25. I find that Mrs Bibi is not working. I considered that the most likely reason for this is due to her health. I accept Ms Smith's submission that Mrs Bibi has not produced up-to-date evidence of her benefits received. However I note that there are historic claims for personal Independence payments, an indication in 2017 that she was eligible for a severe disability payment and in 2020 her doctor certified her as unfit to work. I considered it was more likely than not that Mrs Bibi was not working and was receiving benefits to support her.

26. I accept that the appellant has depression and anxiety. However no evidence was provided to demonstrate that this impacted on his ability to regularise his status or sit the English Language test. The letter from Dr Khan does not confirm that the appellant is unable to sit the English Language test because of his anxiety and depression, rather he reports what the appellant feels/has told him [AB p57]. The appellant gave his evidence in Mirpuri and confirmed that he speaks Punjabi at home. I accept that he does not speak English.

27. I accept that the appellant does help with day-to-day jobs in the home such as chores. However I also find that there are others who do and can assist with these activities including a carer. I remind myself that there is an extensive family network in the UK.

10. Judge Reeds also preserved [29 – 31] and [33] of the First-tier Tribunal determination in which it is written:

29. The appellant has not demonstrated that there are very significant obstacles to his integration on return to Pakistan. He speaks the national language of Pakistan. The appellant lived for over 30 years (more than half his life) in Pakistan so is familiar with the culture there.

30. The appellant's work background in a restaurant and as a tailor in my view means that he has skills to seek employment should he so wish or need to on return to Pakistan. The appellant is supported by his cousin in the UK. There is no evidence to show that the support would not continue if needed if the appellant returned to Pakistan. There are also family members in Pakistan who could provide support to the appellant in Pakistan should he so need.

31. Overall I considered the appellant to be enough of an insider to integrate into life in Pakistan.

…

33. There was no challenge the fact that there was family life between the appellant and Mrs Bibi. Removal would interfere with that family life. The threshold for engagement of article 8 (1) is not high. I considered the decision taken by the respondent was in accordance with the law. The decision was

taken on the basis of the IR and is therefore in accordance with the law. The respondent's decision was also taken in pursuance of legitimate aim of maintaining the economic well-being of the country through immigration control.

Discussion and analysis

11. Appendix FM EX.1. reads:

Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent,

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; 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 protection status, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), or in the UK with permission as a Stateless person, 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.

12. In relation to relevant case law we set out the following below:

a. 'Appendix FM, paragraph EX.1(b) – 'insurmountable obstacles' is to be understood in a practical and realistic sense, as a stringent test' R (Agyarko) v. Secretary of State for the Home Department [2017] UKSC 11 (22 February 2017).

b. 'First decide whether the alleged obstacle to continuing family life outside the United Kingdom amounts to a very significant difficulty. If the threshold is met, the question is whether the difficulty is one which would make it impossible for an applicant and their partner to continue family life together outside the United Kingdom. If not, the decision-maker has to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail

very serious hardship for the applicant or partner, or both. It is relevant and necessary to have regard to the particular characteristics of the individuals concerned' CL v. Secretary of State for the Home Department [2019] EWCA Civ 1925 (8 November 2019).

c. 'An applicant is required to provide an evidential foundation for assertions that there are insurmountable obstacles to their family life continuing outside the United Kingdom' R (Kaur) v Secretary of State for the Home Department [2018] EWCA Civ 1423 (21 June 2018).

13. Judge Reeds referred to the Appellant's skeleton argument in which this issue was raised in the following terms:

> 18. The FtT is also invited to accept that EX.1 R Appendix FM is satisfied, and that there are insurmountable obstacles to the couple's relationship continuing outside the UK. The Supreme Court in Agyarko at [43] held:
>
> 43. It appears that the European Court intended the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned.
>
> 19. The practical difficulties include the couples-joint commitments to the UK.
>
> 20. The A entered the UK lawfully and has now resided in the UK since 31 July 2005, that is more than 17 years in the UK.
>
> 21. He is in a genuine and subsisting relationship with his British spouse (married on 1 December 2003).
>
> 22. The A is not educated, he has provided evidence that he is unable to successfully satisfy the English requirement.
>
> 23. He suffers from health conditions - his spouse is suffering from multiple health conditions and is disabled.
>
> 24. The A and his British spouse are dependent on one another.
>
> 25. In light of the above, it is respectfully submitted that the A's removal would amount to disproportionate breach of his right, and his family members rights under Article 8 ECHR.

14. In relation to this issue the Respondent's position set out in the refusal letter is as follows:

> However, the Secretary of State has not seen any evidence that there are insurmountable obstacles in accordance with paragraph EX.2. of Appendix FM which means the very significant difficulties which would be faced by you or your partner in continuing your family life together outside the UK in Pakistan, and which could not be overcome or would entail very serious hardship for you or your partner:
>
> • You state that your sponsor has health issues for which they receive treatment in the UK. Their condition does not appear to be life-threatening. Pakistan has a health-care system, which we consider to be capable of assisting them if necessary. Further, you have claimed that you care for your sponsor. However you have provided no evidence that the NHS or social services have stated that no one else is available to care for her. It is therefore considered that alternative means of care can be made for your sponsor or other relatives/friends in the UK can care for her;

• You have not provided evidence to suggest that your family and private life cannot continue outside the UK. You have not provided evidence to suggest that your sponsor would not be able to return to Pakistan with you. You would be returning with her and will be able to help her to adjust to life outside the UK. You have also told us that you have close ties in the UK. Whilst it is accepted that you may have made friends and other contacts whilst living in the UK, the fact remains that you are a national of Pakistan and upon your return you can keep in contact with any UK based friends and other associates through modern channels of communication; and

• You claim that you are involved with your local community, there is nothing preventing you returning to Pakistan and assisting your local community. You therefore fail to meet the requirements of EX.1.(b) of Appendix FM of the Immigration Rules so paragraph EX.1. does not apply in your case.

15. The Appellant has provided a number of witness statements all of which we have taken into account even if not specifically referred to in the body of this Decision. In his latest witness statements dated 20 January 2025 he sets out his immigration history, which is not disputed, personal and family circumstances, which are recorded above, states his spouse has been bearing all their expenses including food and other necessities but that due to her disability and illness she is no longer able to continue to support him, before stating at [10 – 12]:

> 10. I face familial disputes in Pakistan have no relatives or support system there. All my relatives, including cousins, nephews, nieces, uncles, and aunties, are settled in the UK and are British citizens. I have no social or economic ties to Pakistan, making relocation untenable.
>
> Emotional and Social Integration
>
> 11. My spouse and I share a deep and loving bond. We cannot bear to live apart and we are unable to spend even a single moment without each other.
>
> 12. I have been fully integrated into British society, having established in private and family life here with my spouse and extended family since my arrival in the UK.

16. The Appellant's wife updated witness statement, also dated 20 January 2025, sets out the Appellant's immigration history, date they were married, that she suffers from health issues and relies on her husband's care for support, that she receive Disability Living Allowance and Employment Support Allowance, that she is the primary provider of essential living support for her husband, that she has no other source of income and is unable to support a husband without the benefit she receives, that her husband is suffering from illness and is unable to work, that she is the owner of the property they live at in Huddersfield, that as an older couple she cannot imagine living without her husband, her husband is fully adapted to British lifestyle and integrated into British society with no social or economic ties to Pakistan having no surviving relatives there, that all her husband's relatives reside in the UK and are British citizens, and that they have a strong bond with each other.
17. There is no updated skeleton argument.
18. There was no attendance by the Appellant's wife at the hearing, but as Mr Diwnycz stated he had no cross-examination for either party we confirmed that the witness statements would be taken into account as the evidence in chief, which allowed the appeal to proceed by way of submissions only.

19. Having considered the material made available to us, and the submissions, we find that it has not been established that there is any basis in law for us to go behind any of the preserved findings; indeed, we were not invited to do so.
20. Under the Immigration Rules in issue before us is paragraph EX.1(b), as noted above. The first questions that we have to answer is whether the Appellant had made out on the evidence that there will be very significant difficulties in family life continuing in Pakistan. We find that the answer this question is that no such difficulties have been made out on the evidence.
21. We accept that the Appellant has been out of Pakistan for a substantial period of time, has established a life in the UK, and that he and his wife wish to remain here. We refer in this respect to the content of their witness statements which we have summarised above and have taken fully into account.
22. We remind ourselves that it is a preserved finding that the Appellant has relatives in Pakistan, despite what he and his wife claim in their recent witness statements, in relation to which there is no additional evidence. It is also a preserved finding that support could be provided from the relatives in the UK and Pakistan if required whilst the Appellant re-establishes himself in Pakistan. We were taken to no evidence that would support a finding that this support could not also extend to the Appellant's wife.
23. We also remind ourselves of the preserved finding that "The appellant's work background *(sic)* a restaurant and as a tailor in my view means that he has skills to seek employment should you *(sic)* wish or need to on return to Pakistan."
24. Whilst Mr Rashid relied upon the requirement of the Appellant's wife to receive professional medical support which he submitted would come to an end should she be required to leave the UK with the Appellant, we note, in the context of the preserved findings, that (i) the Appellant's wife's witness statement is markedly lacking in detail as to her current, specific health complaints and the impact these have upon her daily life (ii) there is no evidence before us – and Mr Rashid made no submissions in relation to – as to the availability of the treatment required by the Appellant's wife in Pakistan and why it would not be sufficient to meet her needs (iii) the Appellant's wife did not attend the appeal hearing before us and there was no application to adjourn the proceedings to enable her to do so.
25. The test of "very significant difficulties" denotes a high threshold which has to be established by credible evidence. Neither party wishes to return to Pakistan, but in light of the lack of such evidence and the preserved findings we find the Appellant has not established that he is entitled to succeed under paragraph EX.1(b).
26. We therefore move on to consider this appeal pursuant to Article 8 ECHR.
27. We agree with the assessment of the First-tier Tribunal that the key issue is that of the proportionality of the decision but differ in relation to the relevant protected right.
28. As we have found there are no very significant difficulties, and thus no insurmountable obstacles, with the family life enjoyed by the Appellant and his wife continuing in Pakistan, there is no interference with their family life caused by the impugned decision. The family life they have enjoyed in the UK can continue in Pakistan.
29. We accept that both the Appellant and his wife have an established private life in the UK.
30. Mr Ahmed and his submissions referred to length of residence in the UK but the Appellant's length of residence is less than the 20 years required for him to succeed under either the rules pursuant to paragraph 276 ADE which were in force at the date of application and decision, or the qualifying period under

Appendix Private Life which replaced the provisions of paragraphs 267A – 276D of the Rules on 11 April 2024, and he cannot succeed on a near miss basis. See Miah and others v Secretary of State for the Home Department [2012] EWCA Civ 261 (7 March 2012) in which the Court of Appeal confirmed that since in order to be administratively workable, the Immigration Rules have to be applied predictably, consistently and fairly, there is no 'near-miss' principle applicable to the Immigration Rules, and failure to comply with the Rules, even by a small margin, does not give rise to a presumption that a person falling just outside the policy should be treated as though he were within it or be given special consideration for that reason.

31. The Supreme Court held in Patel v The Secretary of State for the Home Department [2013] UKSC 72 (20 November 2013) that although the balance drawn by and the context of the Rules might be relevant to the consideration of the proportionality of the interference with article 8 rights involved in removal, there was no principle that the closer a person had come to complying with the Rules the less proportionate such interference would be, and a 'near miss' under the Rules could not provide substance to a Convention rights case which otherwise lacked merit. Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which might be unrelated to any protected human right.
32. Adopting the balance sheet approach there are a number of factors in favour of the appeal being allowed namely the fact the Appellant entered the UK lawfully for the purposes of marriage, the duration of his marriage, the period of time he spent in the UK developing his private life, family connection to the UK with family members in Huddersfield which whilst not sufficient to amount to family life is clearly part of the Appellant's private life, and his home environment. The evidence provided in the witness statements does not, however, expand upon the depth of the particular elements of the private life being relied upon although we have taken into account the totality of social ties between the Appellant and his wife and the community as far as the evidence permits. We recognise and weigh in the balance, in the context of our findings above, that the Appellant and his wife have been receiving medical treatment in the UK.
33. On the Secretary of State's side is the fact that the Appellant cannot meet the requirements of the Immigration Rules which attracts significant weight. We have also considered section 117 Nationality, Immigration Asylum Act 2002.
34. Section 117B (2) states: it is in the public interest, and in particular the interests of the economic well-being of the United Kingdom, that person to seek to enter or remain in the United Kingdom are able to speak English, because a person who can speak English is (a) less of a burden on taxpayers, and (b) are better able to integrate into society. The evidence in this case clearly shows that the Appellant cannot speak English. We find the specific findings of the First-tier Tribunal in relation to this aspect still hold good.
35. Section 117 B (3) states that is in the public interest that a person seeks leave to enter or remain in the United Kingdom is financially independent because such person (a) is not a burden on taxpayers, and (b) are better able to integrate into society. The Appellant was previously employed in the UK but states he has been unable to work for medical reasons. We have considered all the medical evidence relating to both the Appellant and his wife.
36. The Appellant's wife sets out in her statement the benefits that she receives from the UK government, to which she is entitled as a British national, but there is specific comment in the Appellant's statement that the sums being received are no longer sufficient to meet his needs. If that is the case the Appellant is not financially independent even with available third-party support from his wife.

37. Section 117 B (4) states that little weight should be given to a private life or relationship with a qualifying partner that is established by a person at a time that person is in the UK unlawfully, or that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. We have set the immigration history out above which shows that during the period the Appellant has had no leave to remain his presence in the UK has been unlawful but that during the time he has had limited leave to remain, rather than having been granted leave to settle, his status has been precarious. We find that some weight can be attached to his private life as clearly it has been developed over a substantial period of time, rather than little weight, but do not find this element of its own is determinative and remains a point in favour of the Secretary of State.
38. The Appellant cannot rely upon section 117 B (6) as there are no children.
39. It is a preserved finding that the Appellant has relatives in Pakistan, despite what he and his wife claim in their recent witness statements, in relation to which there is no additional evidence. It is also a preserved finding that support could be provided from the relatives in the UK and Pakistan if required whilst the Appellant, and we find his wife, re-establish themselves in Pakistan.
40. We find there is insufficient evidence to show that any interference with the Appellant's or his wife's private life, or that of any other family member in the UK, is sufficient to outweigh the public interest in this case - Beoku-Betts V Secretary of State for the Home Department [2008] UKHL 39 considered.
41. Standing back from the evidential findings we remind ourselves that it is necessary for the decision we make to be compatible with section 6 Human Rights Act 1999. Having done so, especially in the absence of any compassionate, compelling, or exceptional circumstances, warranting a different finding, we are satisfied that any interference in the private life of the Appellant, or others, is proportionate.
42. On that basis the appeal must be dismissed.

Notice of Decision

43. Appeal dismissed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 January 2025