IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15935/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th July 2015	**On 23rd July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

TARIQ ZAFAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Islam, Citylink Solicitors, Luton
For the Respondent: Ms Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 7th February 1988. He appealed against the decision of the Respondent dated 20th March 2014 refusing to vary his leave to remain in the UK and seeking to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. His appeal was heard by Judge of the First-tier Tribunal R L Meates on 9th October 2014. The appeal was dismissed in a determination promulgated on 28th October 2014.

2. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal Juliet Grant Hutchison on 14th January 2015. Further grounds were lodged to the Upper Tribunal and permission was granted by Deputy Upper Tribunal Judge McGinty on 24th April 2015. The permission states that although it was indicated to the First-tier Judge that Article 8 would be relied on, the Immigration Rules have been amended to include considerations of Article 8 so there is an arguable error of law at paragraph 14 of the determination as the judge simply concluded that the Appellant did not meet the requirements of paragraph 276ADE or Appendix FM without giving consideration to the same, or any reasons for his decision in this regard. No considerations as to which parts of Appendix FM were satisfied or not have been given and no considerations have been given to whether or not paragraph EX.1 was engaged.

3. The permission goes on to state that it is an arguable material error of law for the First-tier Judge to have failed to consider the line authority following **Chikwamba** and in particular the case of **MA Pakistan [2009] EWCA Civ 953.** It states that he should have done this rather than simply finding that the Appellant can return to Pakistan to make an application as a spouse or fiancé. The grounds go on to state that it is an arguable material error of law for the First-tier Judge to have had in mind questions as to whether or not there are insurmountable objects to family life continuing, for the purposes of determining proportionality under the fifth stage of the **Razgar** test, at paragraph 19. In such circumstances the permission states that all the Grounds of Appeal raised are arguable.

4. There is a Rule 24 response from the Respondent dated 4th June 2015. This states that the First-tier Tribunal Judge directed himself appropriately. With regard to the EX.1 situation, the Rule 24 response states that even if there was an obligation on the Judge to have considered this, assuming the Appellant was able to reach consideration of EX.1 as per current case law, there was no prospect of the Appellant ever succeeding. The case of **Agyarko & Others, (R on the application of) v The Secretary of State for the Home Department [2015] Civ 440** showing that the submission based on Section EX.1 should be rejected. This case states at paragraph 21, that the phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant, for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. The response goes on to consider the **Chikwamba** point and refers to paragraphs 27 to 31 of the said case of **Agyarko**. This states that in a case involving precarious family life it is necessary to establish that there were exceptional circumstances to warrant the conclusion that there would be a violation of Article 8 if the Appellant seeking leave to remain were removed from the United Kingdom and forced to make an out-of-country application for leave to enter. The response goes on to state that there was no evidence that the requirements of Appendix FM-SE were satisfied. The case of **SS v (Congo) & Others [2015] EWCA Civ 387** states that the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. The same general position applies, that compelling circumstances

would have to apply to justify a grant of leave to enter or leave to remain where the Immigration Rules are not complied with.

The Hearing

5. The Appellant's representative submitted that all the terms of Appendix FM of the Immigration Rules can now be satisfied as the Appellant has been the partner of a British citizen for two years now and the income threshold can be met. I was asked to make a new decision even if I find there to be no error of law in the First-tier Judge's determination.

6. The Presenting Officer submitted that the bundle provided for this error of law hearing contains a lot of documents which were not before the First-tier Judge. I was referred to the original bundle and she submitted that there has been no Rule 15A application to submit these additional documents and that this error of law hearing should be dealt with based on the original bundle.

7. The Appellant's representative submitted that the new documentation should be considered as this claim can now succeed under Appendix FM of the Rules. I was referred to the skeleton argument and the grounds of application. He submitted that the only reason it was found that the Appellant could not meet the terms of Appendix FM, relying on EX.1, was that the relationship had not been standing for two years. The representative submitted that when the judge stated that paragraph 276ADE could not be satisfied no reason was given for this. At paragraph 14 of the determination, in which the judge refers to the Appellant's Article 8 claim, reasons should have been given for the judge's findings. The judge finds that the requirements of Appendix FM have not been satisfied because the income threshold cannot be met, the couple is not married and they have not been together for two years. The representative submitted that EX.1 must apply and he submitted that there are insurmountable obstacles to the Appellant and his girlfriend relocating to Pakistan. The representative submitted that the Respondent is wrong to rely on the case of **Agyarko** as in that case neither Appellant had leave to remain in the United Kingdom. They were overstayers and that is not the case here.

8. The representative referred to the case of **Chikwamba** submitting that it would not be reasonable to expect the Appellant to return to Pakistan, only to make an application to return to the United Kingdom. The representative submitted that the insurmountable obstacles are, that the Appellant's partner is British and has never been to Pakistan. She works full-time and is dependent on him financing her. I put to the representative that the Appellant and his wife both work so the Appellant's girlfriend is not dependent on the Appellant financially. He submitted that they are dependent on each other. The evidence on file indicates that the Appellant's girlfriend earns £23,000 per annum. The representative then submitted that it would be disproportionate to remove the Appellant to Pakistan and that insurmountable obstacles is too high a test, the test is reasonableness. He submitted that it should not be necessary for the Appellant's girlfriend to have to go to Pakistan with the Appellant to help him to make an application to return to the United Kingdom as a

partner. He submitted that the Appellant will be at risk in Pakistan and I was referred to his statement. He submitted that the Judge has not considered the facts and the evidence adequately.

9. The representative submitted that the requirements of paragraph 276ADE can be satisfied based on the terms of that paragraph when the appeal was decided.

10. I put to the representative that a condition of paragraph 276ADE is that the Appellant requires to be in the United Kingdom for twenty years and have no ties to his country of origin. The representative submitted that the Appellant has lost his ties to Pakistan because of his relationship with his girlfriend. He submitted that the Appellant's ties are now in the United Kingdom. He is employed here and his family and private life are here. I put to him that his parents and the rest of his family are all in Pakistan. He submitted that the Appellant has fewer connections in Pakistan than in the United Kingdom and he has now been in the United Kingdom for more than five years and his ties are to his partner.

11. I was asked to find that there is an error of law in the judge's determination and that the decision should be set aside.

12. The Presenting Officer made her submissions first of all referring to Appendix FM of the Rules. She submitted that at paragraph 14 of the determination when the judge states that paragraph 276ADE and Appendix FM of the Rules cannot be satisfied this is a **Robinson** obvious point. When the decision was made the Appellant and his girlfriend had not been cohabiting for two years. She submitted that as Appendix FM could not be satisfied there was no route to EX.1. She submitted that EX.1 cannot be considered in the circumstances of this claim and the appellant's application could not have succeeded, even as a fiancé.

13. The Presenting Officer submitted that an application for leave as a partner excludes an in-country application. I was referred to E-LRTP.1.12 and she submitted that this is the relevant section of the Rules. This Appellant did not obtain entry clearance as the fiancé or proposed civil partner of a British citizen, he obtained entry as a student. The Presenting Officer submitted that it is irrelevant whether EX.1 was considered by the judge as the route to EX.1 is not available in this case.

14. The Presenting Officer submitted that at the date of the hearing the financial requirements had not been satisfied as the relevant evidence was not produced. The terms of Appendix FM-SE were not satisfied. There were no pay slips or bank statements and nothing from the Appellant's girlfriend's employer and I was referred to paragraph 2 of Appendix FM-SE.

15. She submitted that these documents may have been supplied in the new bundle but they were not before the judge. She submitted that I should not give these additional documents consideration today as this is purely an error of law hearing.

16. The Presenting Officer submitted that even if I find that EX.1 is applicable the requirement of insurmountable obstacles has not been met. I was referred to

paragraph 21 of **Agyarko** which refers to insurmountable obstacles imposing a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. She submitted that the reasoning in this paragraph is not fact specific.

17. I was then referred to the Home Office's Immigration Directorate Instruction (IDI) re Family Migration. This deals with insurmountable obstacles and paragraph FM. It refers to a British citizen partner, (which is the Appellant's girlfriend in this case) who has lived in the UK all their life, has friends and family here, works here and speaks only English, not wishing to uproot and relocate half way across the world and it states that it may be difficult for them to do so but the IDI states that a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle and Article 8 of ECHR does not oblige the UK to accept the choice of a couple, as to which country they would prefer to reside in. She submitted therefore that EX.1 cannot be satisfied.

18. I was referred to the said case of **SS Congo** on this point.

19. The Presenting Officer then referred to paragraph 276ADE of the Rules. She submitted that the Appellant has not been in the United Kingdom for twenty years and clearly still has ties to Pakistan. He comes from a middleclass family there. His parents work and in his statement he states that he wants to work in the United Kingdom to support his family in Pakistan, so paragraph 276ADE cannot be satisfied.

20. The Presenting Officer referred to paragraph 14 of the determination. She submitted that the judge took the correct approach when he dealt with Article 8 outside the Rules which is the only basis on which this claim can succeed. Paragraph 33 of the said case of **SS Congo** makes it clear that there must be compelling circumstances for a claim outside the Rules to succeed. She submitted that the proper approach is to consider the Article 8 aspect of the Rules and if the terms of the Rules cannot be satisfied, then Article 8 can be considered outside the Rules. She submitted that the Appellant in this case did not have a good arguable case for having his claim considered outside the Rules when all the relevant factors were taken into account. At paragraph 19 the judge finds there to be no insurmountable obstacles to this couple going to live in Pakistan. He also finds it would not be unreasonable to expect the Appellant to return to Pakistan on his own and immediately make an application to return to the United Kingdom as a fiancé or spouse. His girlfriend would not require to go with him.

21. Again the case of **Agyarko** was referred to. Paragraph 24 refers to "insurmountable obstacles", stating that this criterion is used in the Rules to define one of the preconditions set out in Section EX.1(b) which needs to be satisfied before an applicant can claim to be entitled to a grant of leave to remain under the Rules. The paragraph goes on to state that in that the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account although not an

absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8. At paragraph 30 of **Agyarko** it is stated that "insurmountable obstacles to relocation" has to be taken into account. It is a material factor and she submitted that the judge has made no error by referring to "insurmountable obstacles to the Appellant's family life continuing in Pakistan."

22. She referred me to paragraphs 18 and 19 of the determination in which the judge refers to private life and to the appellant's relationship with a British citizen. The judge states that it would not be necessary for the Appellant's girlfriend to go with the Appellant to Pakistan while he makes an application to return. The judge finds there are no insurmountable obstacles in the Appellant's case. The Presenting Officer submitted that the judge has covered all the bases in his determination.

23. The Presenting Officer then referred to the case of **Hiahong Chen IJR [2015] UKUT 189 (IAC)** and paragraph 39 thereof. This refers to there being two requirements under the **Chikwamba** principle. The Appellant has to show that entry clearance abroad would be granted and he has to show that there will be a significant interference to his life and his girlfriend's life if he has to leave the United Kingdom temporarily to make an application to return. She submitted that the required documents under Appendix FM-SE were not before the judge. This in effect means that for a claim outside the Rules to be successful compelling circumstances have to pertain to the application. She submitted that the case law and the Rules make it clear that fairness and equality apply to all applicants and in this case the Appellant is looking for preferential treatment. She submitted that there is nothing unusual about this case and preferential treatment should not be given. She submitted that as stated by the judge at the First-tier hearing, temporary removal of the Appellant to Pakistan, so that he can apply to return to the United Kingdom as a fiancé or partner does not meet the requirements of compelling circumstances.

24. I was asked to dismiss this appeal.

25. The Appellant's representative referred to the Presenting Officer's reasoning that EX.1 is only applicable if considered after the terms of Appendix FM have been satisfied. He submitted that in this case it is clear that the Appellant and his girlfriend have a genuine and subsisting relationship so EX.1 must apply. He submitted that if EX.1 applies the First-tier judge's decision must contain an error. He submitted that the cases put forward by the Presenting Officer are cases in which the Appellants overstayed. He submitted that that is not the case here. The Appellant came to the United Kingdom on a visa and stayed here within the law. the representative submitted that the threshold relating to income has now been satisfied and if the case of **Chikwamba** is considered, to remove the Appellant would not be proportionate. I was referred to the reasonableness test and I was referred to the Home Office IDI. The representative submitted that this is a policy, it is not the law.

26. I was referred to the case of **VW Uganda (2009) EWCA Civ 5** and the representative submitted that this Appellant is not an overstayer and now meets the requirements

of the Rules. He submitted that there are significant obstacles to him going back to Pakistan and that the said case of **Agyarko** is not relevant.

27. I was asked to consider proportionality and find that it would not be proportionate to expect the Appellant to return to Pakistan. He has a strong family life with his partner in the United Kingdom and he submitted that if he is removed this will be an unjustified interference with his family and private life. He again submitted that the Appellant has lost his ties with Pakistan and that based on the evidence before me I should find that the terms of Appendix FM can be satisfied.

28. He submitted that in the new evidence there are P60s for the Appellant and his partner and I was asked to find that the judge has made an error of law in his determination and that his decision should be set aside.

Determination

29. This is an error of law hearing. No Rule 15A application was made and I am not considering the additional evidence now supplied by the Appellant's representative. I am considering the evidence that was before the judge when he heard the case.

30. EX.1 is not freestanding. It is true that the judge has not explained why he finds Appendix FM cannot be satisfied and there are no clear reasons in the determination as to what part or parts of Appendix FM were not satisfied. Because of this finding EX.1 was not considered. The requirements of Appendix FM are that the Appellant and his partner have to have been in a relationship akin to marriage or civil partnership for two years prior to the date of the application. That is not the case. The Appellant had not made a valid application for leave to remain in the United Kingdom as a partner. An application on this basis has to be made out of country. It is therefore clear that the terms of Appendix FM could not be satisfied. The way the judge dealt with this may have been an error but it was not a material error. As the terms of Appendix FM could not be satisfied EX.1 could not be considered.

31. With regard to paragraph 276ADE of the Rules again the judge did not explain why its terms could not be satisfied but the Appellant has not lived continuously in the United Kingdom for at least twenty years which is one of the requirements of this paragraph. The Appellant clearly has ties to Pakistan. He is in touch with his family there and in his statement he states that he wants to work in the United Kingdom so he can send money to Pakistan to support his family and so again although this may have been an error by the First-tier Judge it was not a material error.

32. As the terms of the Immigration Rules could not be satisfied the First-tier Judge had to consider Article 8, the Article 8 aspect of the Rules and whether Article 8 should be considered outside the Rules. The First-tier Judge accepted that the Appellant has private and family life in the United Kingdom. The Appellant's application was made with the wrong occupation code and the determination states that the Appellant is in the process of submitting a fresh application using the correct occupation code. The judge therefore only had to consider Article 8. The judge accepts that there could be difficulties if the Appellant's partner has to go to stay

with him in Pakistan but at paragraph 19 the judge refers to the Appellant returning to Pakistan himself and making an application to return as a fiancé. Because there is this option he finds that there are no insurmountable obstacles to the couple's family life continuing. The Home Office IDI supports this.

33. At paragraph 14 the judge states that he has to consider whether there are good grounds for granting the appellant leave to remain outside the Rules. He refers to paragraph 5A of the Nationality, Immigration and Asylum Act 2002 and Section 117B thereof. Public interest has to be considered when proportionality is assessed. The representative has mentioned the **Chikwamba** point however as the Appellant came to the United Kingdom on a student visa and not as a partner it is clear that he has to return to Pakistan to make an application to return to the United Kingdom as a partner, otherwise the Appellant would be gaining an advantage over other Appellants in the same situation. There is nothing unusual in this situation. At paragraph 16 the judge refers to the maintenance of effective immigration control which of course is in the public interest.

34. The judge accepts that there is a genuine relationship between the Appellant and his partner. He notes that their relationship at the date of the application was not of 2 years standing.

35. Based on what was before the judge, the IDI, the case of **Agyarko & Others** and the case of **Chikwamba** the judge's determination does contain minor errors of law but none of these are material. This is a case where the relationship began when one of the parties had precarious private life in the United Kingdom. One of the terms of the appellant's visa was that he had to return to his own country when the visa came to an end. He had no legitimate expectation of being able to remain in the UK. As his being able to stay depended on him obtaining another visa, his stay in the UK can be described as precarious.

36. Compelling circumstances would have to apply to justify a grant of leave to remain where the Immigration Rules cannot be satisfied. That is not the case here. There are no compelling circumstances.

Notice of Decision

37. I find that there is no material error of law in the judge's determination and that his decision must stand.

38. The Appellant's appeal against the refusal of leave to remain under the Immigration Rules and Article 8 of ECHR falls to be dismissed.

39. No anonymity direction has been made.

Signed Date

Deputy Upper Tribunal Judge Murray