Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00025/2017**

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 5th June 2019	**On 25th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

JAWAD RAFIQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed of Counsel, instructed by Peer & Co
For the Respondent: Mr C Williams, Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge J Robertson (the judge) of the First-tier Tribunal (the FTT) promulgated on 6th February 2018.

2. The Appellant is a male citizen of Pakistan born 30th July 1988. He entered the UK as a student in September 2008. His leave was subsequently extended as a student, and on 19th June 2014 he switched into the spouse category and had leave until 19th December 2016. The Appellant married Zeinab Aslam (the Sponsor) on 26th February 2014.

3. Prior to the expiry of his leave the Appellant applied for further leave to remain as the spouse of a British citizen. The application was refused on 19th December 2016.

4. The application was refused with reference to S-LTR.1.6, the Respondent finding that the presence of the Appellant in the UK is not conducive to the public good because his conduct, character, associations or other reasons make it undesirable to allow him to remain in the UK. This decision was made because when the Appellant had applied for leave to remain in an application dated 28th November 2013 he had submitted a TOEIC certificate issued by Educational Testing Service (ETS). In order to obtain that certificate the Appellant claimed to have undertaken tests on 5th December 2012 and 15th January 2013. The Respondent believed that the Appellant had used a proxy to undertake the tests and ETS had cancelled his certificate.

5. As the Appellant could not satisfy the suitability requirements, the Respondent found that he could not satisfy the requirements of Appendix FM of the Immigration Rules, or paragraph 276ADE(1). The Respondent did not accept that the application raised any exceptional circumstances which would warrant granting leave to remain pursuant to Article 8 of the 1950 European Convention outside the Immigration Rules.

The First-tier Tribunal Hearing

6. It was conceded on behalf of the Appellant that he could not satisfy the Immigration Rules. The appeal was pursued relying upon Article 8 outside the Immigration Rules. The judge noted that the Appellant accepted that he had used a proxy to undertake the English language test. That admission was contained in a recent witness statement made by the Appellant.

7. The judge did not consider that there were any exceptional circumstances. It was accepted that the Appellant and Sponsor are married. They have no children. It was accepted that they wished to undergo IVF treatment in the UK but the judge found that the couple could travel to Pakistan together and pursue IVF treatment there, or the Sponsor could return to the UK as necessary. The judge did not find that there were any insurmountable obstacles to the couple continuing family life outside the UK.

8. The judge considered section 117B of the Nationality, Immigration and Asylum Act 2002 noting that the Appellant had come to the UK as a student and maintained his leave by deception. He entered into a relationship while “his status was at best precarious”, and the judge attached little weight to his private life. The appeal was dismissed as the judge found at paragraph 16 that although family life had been established, the public interest in maintaining an effective immigration policy was a significant countervailing factor. The Respondent’s decision was found to be proportionate.

The Application for Permission to Appeal

9. The grounds were settled by Counsel and are summarised below.

10. It was contended that the judge had failed to take into account a material matter in not properly assessing whether the Appellant and Sponsor could be required to move to Pakistan, and reliance was placed upon Sanade (India) [2012] UKUT 48 (IAC) on the basis that it would not be reasonable to expect the Sponsor to leave the UK as she is a British citizen.

11. The judge had failed to take into account a material matter, by not assessing the impact of the Appellant's actions upon the Sponsor who is blameless.

12. The judge had failed to take into account a material matter in relation to IVF treatment. Both the Appellant and Sponsor would be required for the IVF process, and it would be a significant hardship if they were expected to conduct IVF treatment in the manner suggested by the judge. The judge failed to consider the Appellant is likely to be subject to a ban under paragraph 320 of the Immigration Rules if he leaves the UK and makes an application for entry clearance and reference was made to Chikwamba [2008] UKHL 40.

13. The judge failed to take into account a material matter by failing to give any weight to the Appellant's current English language certificates and degree certificates. The Appellant had produced evidence that he was financially independent.

14. The judge erred by failing to take into account a material matter by not attaching any weight to the fact that the Respondent took no action against the Appellant for a number of years after initially instigating investigations into the ETS certificate. It was contended that this was relevant to proportionality.

Permission to Appeal

15. Permission to appeal was granted by Deputy Upper Tribunal Judge Doyle in the following terms;

> "The judge found that Article 8 family life exists and that the Appellant cannot meet the requirements of the Immigration Rules. His proportionality assessment is set out between [10] and [16]. It is arguable that the judge has not adequately considered the dicta in Chikwamba (FC) v SSHD [2008] UKHL and R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 00189 (IAC)."

The Upper Tribunal Hearing

16. Mr Ahmed, who had not appeared before the FTT, relied upon his skeleton argument. Reliance was placed upon the grounds upon which permission to appeal had been granted but Mr Ahmed's primary point was that the

Appellant wished to withdraw the concession that had been made before the FTT, in which it was conceded that he could not satisfy S-LTR.1.6.

17. Mr Williams observed that the Appellant had not been granted permission to appeal on that point, but nevertheless submitted that even if permission to appeal had been granted, there was no merit in that submission.

18. Mr Williams relied upon a response submitted under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in which, in brief summary, it was contended that the judge had not erred in law, and had given cogent reasons for all findings made.

19. At the conclusion of oral submissions, I reserved my decision.

My Conclusions and Reasons

20. I deal firstly with the new issue raised by Mr Ahmed at the hearing. This was not an issue raised in the initial grounds seeking permission to appeal, nor the renewed grounds. Permission to appeal has therefore not been granted on this point. The concession was raised for the first time in Mr Ahmed's skeleton argument produced just before the commencement of the hearing. It is not appropriate to attempt to raise a new issue in that manner. There has been no application to amend the grounds. I deal with this point as the Respondent did not object. I have to consider whether the judge erred in proceeding to consider the appeal on the basis that it was put by the Appellant's Counsel. It is quite clear that the Appellant's Counsel conceded that the Appellant could not satisfy the Immigration Rules by reason of S-LTR.1.6. I note that Counsel who represented the Appellant before the FTT is experienced in representing in immigration, asylum and human rights cases.

21. It may be the case, as argued by Mr Ahmed, that many representatives would not have made such a concession. However, a clear concession was made by experienced Counsel representing the Appellant, and I find that the judge was fully entitled to accept that concession, and deal with the appeal on the basis suggested by the Appellant's Counsel.

22. The judge recognised that as it was accepted that the Immigration Rules were not satisfied, the Appellant must demonstrate exceptional circumstances to show that unjustifiably harsh consequences would follow if the Appellant was not allowed to remain in the UK. There is reference at paragraph 6 to the submissions made on behalf of the Appellant that compelling and exceptional circumstance exist.

23. Guidance on considering Article 8 cases is given in TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109 and I set out below paragraph 31 of that decision;

> "Where Article 8 is in issue within the Rules there will of necessity have to be a conclusion on the question of whether there are insurmountable

> obstacles to the relocation of the appellant and his or her family. That involves an evaluation or value judgment based upon findings of fact. When a Tribunal goes on to consider an Article 8 claim outside of the Rules (as it will do where Article 8 is engaged, see Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60, [2016] 1 WLR 4799 at [80]), it will factor into its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles – that being a relevant factor both as a matter of policy and on the facts of the case to the question of exceptional circumstances."

24. Although the judge did not specifically refer to TZ, I find that he followed the principles set out therein. The judge considered whether there would be insurmountable obstacles to the Appellant and Sponsor continuing family life in Pakistan, and found at paragraph 12 that there were not. I find that adequate reasons for that conclusion have been given.

25. Dealing specifically with the grounds upon which permission to appeal was granted, I find no merit in the first ground which refers to Sanade. This is not a case where the judge was making a finding that a British citizen should be required to leave the UK. The test to be considered was whether there were insurmountable obstacles to family life continuing outside the UK.

26. I do not accept that the judge erred by not assessing the impact of the Appellant's behaviour on the Sponsor. The judge found at paragraph 12 that if the Appellant returned to Pakistan this would "cause difficulties for the couple, in the light of the above I do not accept that they are significant difficulties or that the obstacles are insurmountable".

27. There is no error of law in relation to consideration of IVF. Both representatives before me referred to Erimako [2008] EWHC 312 (admin). I set out below paragraph 8 of that decision;

> "8. Given the circumstances of this case, Mr Harris accepted that, in effect, his submission was that a person or persons in this country, otherwise without any right to remain in this country, should be entitled to remain in this country in order to undertake fertility treatment. That is a contention that I am unable to accept. It cannot be the case that the Home Secretary is under a duty to grant leave to remain, even for a limited period, in such cases, and, in particular, in a case such as the present where the prospects of Mr and Mrs Erimako are regrettably uncertain."

28. In the case before the judge, the couple stated that they wished to remain in the UK so that they could commence IVF treatment. They had not started the treatment. The judge was fully entitled to find that this was not exceptional, and not an insurmountable obstacle to family life continuing outside the UK.

29. The judge did not err in considering the Appellant's English language certificate and financial independence. It is well-established when

considering the factors in section 117B of the 2002 Act, that if an individual is financially independent and can speak and understand English, this is a neutral factor in the balancing exercise.

30. The judge did not err by failing to find that the Respondent's failure to curtail the Appellant's leave assisted the Appellant's case. The judge was entitled to find at paragraph 10(2);

> "The investigations into the activities of the colleges was ongoing and the Appellant's involvement may not have been apparent. In any event the Appellant himself was aware of his wrongdoing when he decided to enter a relationship. He only chose to be truthful when found out."

31. The principle in Chikwamba does not assist the Appellant. The factual matrix is different. It is not the case that the Appellant would be required to leave the UK and apply for entry clearance simply for the sake of policy. Unlike the Appellant in Chikwamba, it is not a certainty that the Appellant would be granted entry clearance. SB (Bangladesh) [2007] EWCA Civ 28 confirms that it is not appropriate for the FTT to consider and take into account whether or not an Appellant would satisfy the requirements for entry clearance if required to leave the UK.

32. The grounds disclose a disagreement with conclusions reached by the judge. They do not disclose a material error of law. The judge made findings open to make on the evidence, and gave adequate reasons for those findings.

Notice of Decision

The decision of the FTT does not disclose an error of law. I do not set aside the decision. The appeal is dismissed.

There has been no request for anonymity and I see no need to make an anonymity direction.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge M A Hall 13th June 2019

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge M A Hall 13th June 2019