Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01693/2018

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 29 March 2019	**On: 23 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SHABANA SHARIF
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr I Khan, Counsel, instructed by SH Solicitors Ltd

DECISION AND REASONS

1. This is an appeal brought on behalf of the Secretary of State, having been given permission by First-tier Tribunal Judge Saffer on 3 August 2018.

2. In short, this appeal concerns a national of Pakistan, born on 16 February 1989, who applied for leave to remain in the UK on the basis of her family life with her British national husband, Mohammed Sohail ('the sponsor').

3. The matter was listed before First-tier Tribunal Judge Fox on 15 June 2018. The application was considered under the partner route, and in particular whether the appellant and her sponsor had met the financial requirement in accordance with E-LTRP.3.1 to 3.4 of Appendix FM of the Immigration Rules.

4. The Home Office asserted that the appellant had failed to provide evidence or documentation relating to the sponsor's income for the next 12-month period from the date of application. The evidence did not reach the required £18,600 income figure (see the letter of refusal, dated 13 December 2017). In particular, there was a question mark over the amount the sponsor received in rental income.

5. Judge Fox upheld that element of the decision. He concluded that the sponsor had not provided a reliable account of his circumstances in terms of his rental income and tax liability (paragraph 26 of the Judge's determination).

6. Further, the Home Office found there would be no insurmountable obstacles to prevent the appellant and sponsor continuing their family life together outside of the UK and that as a result paragraph EX.1.(b) and EX.2. of Appendix FM did not apply.

7. Confirming the above, Judge Fox found that the appellant did not satisfy the Immigration Rules in accordance with Appendix FM – SE, and that it therefore followed that the appellant was unable to satisfy the Article 8 European Convention on Human Rights ('ECHR') criteria within those Rules.

8. It is important to note that the above elements of the decision are not subject to this appeal, no cross-appeal having been lodged and no permission to appeal having been given on the above points. Mr Khan, on behalf of the appellant, accepted that there was no cross-appeal and that any cross-appeal would have, in any event, been difficult to argue because the evidence was not there. The above parts of the decision therefore stand.

9. Thereafter, Judge Fox considered Article 8 of the ECHR *outside* of the Immigration Rules.

10. In that regard, the judge found that to require the appellant to return to Pakistan or the sponsor to join her there was a disproportionate interference with Article 8, on the basis that the sponsor was a British citizen and he had a well-established private life.

11. This element of the appeal was therefore allowed by Judge Fox.

12. . On 19 July 2018 the Secretary of State lodged an appeal against that part of the decision. The grounds of appeal maintain that the judge at first instance failed to take into account and/or resolve conflicts of fact or opinion on material matters, and had thereby misdirected himself in law by failing to give reasons or any adequate reasons for the decision. In particular, it was suggested that the First-tier Tribunal judge had failed to consider the public interest fully when conducting the proportionality assessment against the other relevant factors, rendering his reasoning inadequate.

13. In granting permission to appeal, Judge Saffer stated that it was arguable that the judge had failed to give adequate reasons for allowing the appeal on Article 8 grounds.

14. It is against that background that this matter was listed before me.

15. The judge's reasons for allowing this appeal on Article 8 grounds outside of the Immigration Rules were as follows:

> 34. … it is well established that an alternative route to settlement exists for those who cannot satisfy the Immigration Rules in these circumstances. The respondent has facilitated family life between the appellant and the sponsor in the UK and there is no reason why this cannot continue. The respondent's codification of Article 8 ECHR includes provision for migrants in the appellant's circumstances.
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> 35. In the circumstances it is a disproportionate interference with Article 8 ECHR to require the appellant to return to Pakistan or to require the sponsor to join her there. The sponsor is a British citizen and he has a well-established private life as documented by the evidence relied upon to support the substance of the appeal.

16. I must confess to finding the above two paragraphs somewhat difficult to follow and they appear to sit somewhat in a vacuum when contrasted with the judge's previous findings, both in terms of the Immigration Rules and in terms of insurmountable obstacles to returning.

17. The onus is on the appellant to demonstrate that there is a family and private life, so as to engage the operation of Article 8. While the judge makes a clear finding that there was no dispute that family life existed between the appellant and the sponsor, the notion that the Home Office has in some way facilitated family life between the appellant and the sponsor is misplaced. The judge should have been considering whether there were unjustifiably harsh consequences in terms of the refusal; and further, the public interest considerations that relate to Article 8, as part of the overall assessment. The reasoning given is significantly lacking and the proportionality assessment is in my view very limited.

18. I am taking the above matters briefly, because Mr Khan, on behalf of the appellant, accepted that the judges reasoning was 'thin'. Mr Khan, in my view understandably, made little attempt to defend this appeal.

19. In my judgement, the judge has not made any proper attempt to apply and balance the public interest considerations against the criteria set out in *Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar* [2004] UKHL 27 or under section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) (hereafter, 'the NIAA'), including regarding financial independence and not being a drain on the state. The judge has failed to show which evidence he had in mind to demonstrate that it would be in the public interest to allow the appellant to remain. Nor does the judge's findings explain why

requiring the appellant to leave the UK until the sponsor has provided the required information would be disproportionate. Furthermore, the judge has failed to incorporate his previous reasoning in terms of the appellant's failure to meet the Immigration Rules before considering the wider application of Article 8 outside of the Rules and whether there were exceptional factors, so as to render the refusal a disproportionate interference in the appellant's case and where to do so would be unjustifiably harsh.

20. The judge's lack of reasoning amounts to a material error of law and it is on that basis that I set aside the judge's decision in relation to Article 8 outside of the Immigration Rules. The rest of the substantive decision stands, because as I have already indicated, that element of the decision was not subject to the appeal before me.

The Secretary of State's appeal is allowed.
The decision of First tier Tribunal Judge Fox to allow this appeal under Article 8 outside of the Immigration Rules, dated 2 July 2018, is set aside.

Rehearing of the Article 8 matter outside of the Immigration Rules

21. Both parties indicated that they were content for me to proceed to redecide this element of the appeal afresh, focusing solely on the decision outside of the Immigration Rules.

Preliminary matters

22. My first concern was whether the appellant would require an interpreter. Mr Khan confirmed that while the appellant was not fluent in English, she understood sufficiently and was able to give evidence in English. I gave both Mr Khan and the appellant the opportunity to discuss this with the sponsor beforehand, and they were all in agreement that an interpreter was not required. The Home Office did not raise any concern. In the event, there were no problems with the appellant giving evidence. She appeared to understand the questions and answered in good English without assistance.

23. There was no formal application to admit further evidence. The appellant's representative was content to proceed on the evidence available and previously lodged. I was however provided with 2 printouts concerning the sponsor's tax return for 2016/17 and 2017/18, to demonstrate that it was now 100% complete. There was no objection from the Home Office to me admitting this further document. I was satisfied it was appropriate to do so under rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended).

The evidence

24. I received prior to the hearing a bundle on behalf of the Home Office, that included the case management history of this matter; the appellant's immigration history; her marriage

certificate; English-language certificates; employment letters; bank statements and wage slips; and the appellant's application form; together with the reasons for refusal letter, dated 13 November 2017. In addition to the above, I considered the bundles produced on behalf of the appellant, including the witness statements of the appellant and sponsor; a helpful chronology, and the extensive wage slip, rental income and bank statement evidence.

25. I heard evidence from both the appellant, who adopted her witness statement (dated 15 June 2018) and gave an oral update; and from the appellant's husband, Mr Sohail, who also adopted his witness statement, dated 15 June 2018, and provided answers to further questions.

26. I am bound to be selective in my references to the evidence when explaining the reasons for this decision. I nevertheless wish to emphasise that I considered all the evidence in the round before reaching my conclusions.

The law

27. The test for exceptional circumstances is set out under paragraphs GEN.3.1. and GEN.3.2. of Appendix FM. This requires the tribunal to consider whether there are exceptional circumstances, that would render refusal of leave to remain a breach of Article 8 because it could or would result in unjustifiably harsh consequences for the appellant and her husband/sponsor. Both parties were in agreement that this was the central question to be decided.

28. In determining the public interest in Article 8 cases, the tribunal must have regard to the considerations listed in section 117B of the NIAA. This provides as follows:

> **117B Article 8: public interest considerations applicable in all cases**
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) ...

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) …

Findings of fact

29. The judge at first instance had already established the following factual findings, which I do not propose to go behind:

a. The appellant is a national of Pakistan.
b. The sponsor is a British citizen.
c. There is no dispute that family life exists between the appellant and her sponsor. They are married.
d. The sponsor's income from salary is not in issue and is well documented. That has been provided to the respondent's satisfaction.

30. In addition to the above, the Secretary of State accepts and I find accordingly:

a. On 19 September 2017, the appellant made a human rights claim in an application for leave to remain in the UK on the basis of her family life with her partner, the sponsor.
b. There are no children in the relationship.
c. The appellant entered the United Kingdom on 15 February 2015; and was granted leave to remain from 16 January 2015 until 16 October 2017.
d. The appellant meets the eligibility, immigration status and English language requirements of the relevant sections of Appendix FM (but not the financial requirement).

31. I further find the following facts, based upon the chronology provided to me by the appellant's representative, which I do not understand to be in dispute:

a. The sponsor was born in the UK on 31 July 1992.
b. In February 2013, the appellant and sponsor met in Pakistan.
c. On 30 June 2013, the appellant and sponsor married in Pakistan.

32. The issue that I must decide is whether or not there would be unjustifiably harsh consequences for the appellant and the sponsor, if this application were refused.

The appellant's case

33. In the original grounds of appeal, and in reply to the assertion that there were no insurmountable obstacles or unjustifiably harsh consequences, the appellant stated as follows:

> 14. The Secretary of State has stated there are no insurmountable obstacles in the appellant returning to Pakistan when there clearly are as the sponsor is British, settled in the UK, has his family here and has work and other commitments here.
>
> 15. Furthermore, recently his mother passed away suddenly, whilst this application was being considered. The Secretary of State/immigration judge is to take into account the compassionate and compelling circumstances that exist on this case.

34. The burden of demonstrating the above case is upon the appellant.

35. The reasons the appellant gave in evidence for not being able to return to Pakistan was that she was a student who had started to study 3 years ago and could not leave her course. Secondly, she said that her husband had lost his mother 2 years ago, and that she was now the only woman at home who could do the washing and cooking (I make clear, her words, not mine). Her concern was that any refusal would mean that she would be forced off her course when she only had one year left (she is currently on a level II health and social care course at Sandwell College in Birmingham. She hoped after level II to go on to university).

36. The sponsor accepted that he had lodged his HMRC returns late. He said that he had been in contact with his accountant on many occasions because he had wanted to pay all of his taxes. He put down any delay to his accountant and his working 7 days week. The reason he gave for why his wife should not return to Pakistan was that his mother had passed away, so his wife was now effectively the head of the family and there were things he could not do for himself. He accepted that his grandmother was in Pakistan and that he had visited her there and that he had also been to his mother's grave in Pakistan in 2018. He said he was not aware he had to pay tax on rental income and this had led to 'a glitch' in his tax affairs. He said he had learned his lesson in this regard.

My finding on Article 8 outside of the Immigration Rules/unjustifiably harsh consequences

37. I was less than impressed by the sponsor's evidence. He appeared both vague and evasive and reluctant to accept responsibility when it came to the duties he had as a taxpayer. I found his assertion that he was not aware that he had to pay tax on rental income to be one of convenience and unlikely. This diminished his credibility. I was not persuaded he had made any real efforts to address the situation with his accountant until it became clear he had to do so as a result of his wife's application for leave to remain. Even at that point, he appeared to rely on the advice of a family friend, while also suggesting he had approached another accountant because he thought 'they would

understand why HMRC were not replying to his accountant'. His reasoning behind this appeared confused. He seemed to want to transfer the responsibility for his tax affairs onto others rather than take ownership of the situation that had developed.

38. Had it not been for the appellant's application, I was left in some doubt as to whether the tax matter would ever have been addressed unless and until the tax authorities had caught up with the sponsor. In answer to his counsel, he accepted that it was his responsibility to sort this out and he had realised that he may have been liable to some form of offence.

39. The presenting officer advanced that there was little to suggest the sponsor had been strenuous in his attempts to deal with his tax and the notion that he should attract some form of Article 8 protection did not sit with the account he had given in terms of his financial affairs.

40. Notwithstanding the two documents suggesting his tax for the previous two financial years was now '100% complete', it was accepted, rightly in my view, by Mr Khan that the explanation the sponsor had given in relation to his tax affairs was vague.

41. I was not satisfied that I had had a full account from the sponsor in terms of his financial affairs or the reliability of his income. As a result, I was not satisfied that they would have financial independence. It is important that I take into account that the judge at first instance was also not satisfied that the appellant and sponsor had demonstrated his income for the next 12 months. I had substantial reservations about the sponsors tax affairs. He appeared to accept that he had not followed UK tax law or adhered to the requirements to submit his tax returns appropriately. He has not demonstrated the minimum income threshold and I cannot say that he and his wife would be self-sufficient or would not have recourse to public funds. In terms of the public interest, I was not satisfied that the appellant and sponsor had demonstrated they were financially independent or would not be a burden to the tax payer.

42. Furthermore, the claim that the appellant had to remain in the UK to look after the sponsor's 52-year-old father appeared somewhat hollow. Whilst I take fully into account what may be described as the cultural responsibilities given to the appellant, the sponsor's father has no disability and there was no special requirement for him to have a carer.

43. In my judgement, the appellant did not come close to substantiating, even to the lower standard, why she was required to remain to look after him. Taking the appellant's account at its highest, it also appeared to me to be one of convenience. There was no evidence from the husband's father. There was no evidence from the college. The appellant had made no proper attempt to find out whether her course could be put on hold while she sorted out her immigration status. There had been no obvious attempt by the appellant to improve aspects of the evidence in this regard, notwithstanding the passage of time while this appeal has been waiting to be listed. The appellant had not asserted that she would be unable to find work in Pakistan. The new qualifications she had gained in the UK would be likely to assist in that regard. She accepted she had

accommodation that she could stay in with her parents and where her husband could stay if he elected to join her.

44. In terms of proportionality, I could not see any proper reason why she would not be able to return to Pakistan, if only for the period while her partners income and tax affairs were put in order. She has lived outside of the UK for some 26 years and has only resided in the UK for 4 years. She has family and friends in Pakistan, speaks the language, and she that she had relatively recently been back to Pakistan and stayed with her parents. She had also visited in 2016 with her husband to see her grandmother. Neither of them were strangers to the culture and community in Pakistan, where they had first met and where they were married. It appeared to me through modern methods of communication the appellant should be able to keep in contact with anyone remaining in the UK and could resubmit any application at that stage.

45. I was unpersuaded that the compassionate and compelling circumstances claimed by the appellant were in any way made out. While I was of course sorry to hear about the sponsor's mother, that in itself did not amount to unduly harsh circumstances in terms of the test I was considering.

46. Further, it was apparent to me that the sponsor did have at least one relation in Pakistan, and was familiar with the country as a result of visits. While I accept that it would be something of a wrench for both of them to relocate to Pakistan while matters were sorted out, I could find nothing insurmountable in such a suggestion.

47. As a result, I cannot say that there is anything disproportionate nor a disproportionate interference with Article 8 for the appellant to return to Pakistan or for the sponsor to join her there if he chooses to do so. The onus is on the appellant to make her case and she has neither satisfied me about the public interest or unduly harsh consequences. The sponsor's rental income would presumably continue whether he was inside or outside of the UK. While I understand he has other work here, that did not preclude the possibility he could work elsewhere if he elected to do so. I was entirely unpersuaded that there would be the type of very significant difficulties faced by the appellant or her husband in continuing their family life together outside the UK that could not be overcome or would entail very serious hardship for them, as envisaged by the test in *R (Agyarko) v Secretary of state for the Home Department; R (Ikuga) v Secretary of state for the Home Department* [2017] UKSC 11.

48. Mr Khan's acceptance that if the sponsor was to put his affairs in order any further application was likely to be successful left open the question as to why they had not done so already.

49. Ultimately, the appellant has not demonstrated why she qualifies for leave to remain at this stage. I could not find an interference with the exercise of the right to respect for private or family life, on the basis it could continue to be exercised in Pakistan; and as a result, I could not find that the operation of Article 8 was engaged. Even if I was wrong about that, any such interference is in accordance with the law and necessary and proportionate in terms of the public interest (*Razgar*, supra.)

NOTICE OF DECISION

The Secretary of State's appeal is allowed.

The decision of the First-tier Tribunal, dated 2 July 2018, is in error of law and is set aside.

The appeal is dismissed.

Signed 

Date 16 April 2019

Deputy Upper Tribunal Judge Sutherland Williams