Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03899/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 March 2020	**On 15 April 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ABDUL SHAKOOR QURESHI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, instructed by Healys LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born on 1 January 1975. He has been given permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his application for leave to remain on the basis of his family life.

2. The appellant entered the UK on 17 December 2006 with entry clearance as a visitor, valid until 17 May 2007. He remained in the UK unlawfully after the expiry of his visa. On 18 June 2010 he applied for a certificate of approval for marriage to a Romanian national which was refused on 12 March 2011 on the basis that it was not believed that the relationship was a genuine and

subsisting one. He subsequently married a British citizen, Debbie Jane Shakoor (previously Jane Clift), in an Islamic marriage, on 10 July 2011, and in a civil marriage under UK law on 23 December 2011.

3. On 8 February 2012 the appellant applied for leave to remain in the UK on the basis of that marriage. The consideration of that application has since involved a lengthy process and considerable litigation which I have set out below in some detail, given its relevance to the challenges raised in the grounds as made clear in my findings and conclusions.

4. The appellant's application was refused on 19 April 2013. The respondent, in refusing that application, accepted that the appellant had a genuine and subsisting relationship with his British partner, but considered that he could not meet the eligibility requirements of the immigration rules and that he could not benefit from the criteria in EX.1 (b) as there were no insurmountable obstacles preventing him from continuing his relationship in Pakistan. The respondent considered that the appellant could not meet the criteria in paragraph 276ADE of the immigration rules on the basis of his private life. The application was refused without a right of appeal as the appellant had no leave to remain at the time.

5. The appellant then sought to challenge that decision by way of judicial review, on two grounds: that the Secretary of State had acted unlawfully by determining his application under the new rules and Appendix FM which came into force on 9 July 2012, and that the Secretary of State had acted unlawfully by failing to making an immigration decision under section 82(2) of the Nationality Immigration and Asylum Act 2002 which would have given rise to a right of appeal.

6. Permission was granted to the appellant by HHJ David Cooke in the Administrative Court on the first ground, but refused on the second. The matter was settled, and a consent order sealed on 13 June 2014, when the respondent agreed to reconsider the appellant's application of 8 February 2012.

7. The respondent then reconsidered the matter and refused the appellant's application again in a decision of 16 August 2014. In that decision the respondent confirmed that any Article 8 elements of the applicant's claim to remain in the UK would be considered in line with the provisions of Appendix FM and paragraph 276ADE, albeit that the application had been made prior to the changes to the immigration rules on 9 July 2012. The respondent concluded again that there was no evidence from the appellant showing that there were any insurmountable obstacles preventing him and his spouse from continuing his relationship in Pakistan, that the requirements of paragraph 276ADE could not be met and that there were no exceptional circumstances warranting a grant of leave outside the immigration rules on Article 8 grounds. In so concluding, the respondent considered the appellant's claim in relation to his father-in-law's medical condition and the care his wife provided to her father but considered that that did not meet the criteria to justify a grant of leave outside the rules. Again, there was no right of appeal against that decision as the appellant had no valid leave to remain in the UK.

8. The appellant once again sought permission to judicially review that decision on the same two grounds as previously. Permission was refused on the papers in the Upper Tribunal on 18 June 2015 by UTJ Perkins and then at a hearing on a renewed application on the same grounds, but with the additional reference in the grounds to the prevailing political climate in Pakistan and to the fact that the appellant's wife would not be safe in Pakistan as a western woman and would not be able to lead a normal life there. Permission was refused at the oral hearing by UTJ Rintoul on 24 September 2015 on the basis that the appellant had voluntarily left the UK and that the application was therefore academic. The appellant did not appear at the hearing and the UTJ noted that he had previously applied for an adjournment on the basis that he wanted his wife joined as an interested party but had not received a reply and had given no reason for failing to attend.

9. The appellant then applied for permission to appeal to the Court of Appeal against UTJ Rintoul's decision on the basis of the same challenges as previously and also on the basis that the Secretary of State had failed to have regard to Article 15(a), (b) and (c) of the Qualification Directive and had failed to consider his wife's Article 2 and 3 rights. It was also argued that UTJ Rintoul had been wrong to find that he had voluntarily left the UK when he was in fact present in the UK. Further, there was procedural unfairness in UTJ Rintoul's decision as the judge had failed to consider an adjournment request on medical grounds and also failed to consider an application for his wife to be joined as an interested party.

10. The matter was considered by Sir Stephen Silber in the Court of Appeal, who granted permission on 1 December 2016 on the basis that the UTJ had not been aware of, and had therefore not considered, a second adjournment application made by the appellant, supported by medical evidence, on account of health issues. The respondent then sought to settle the matter by consent and to have the matter remitted to the Upper Tribunal. The appellant and his wife objected to that as they wanted the Court of Appeal to consider the merits of the application. However, despite the appellant's objection, the Court of Appeal did not agree to consider the arguability of the application for permission to apply for judicial review themselves and only considered the issue of procedural irregularity. The Court of Appeal agreed that there was a serious procedural irregularity in the permission application having been decided by the Upper Tribunal in the appellant's absence, when the appellant had made a an adjournment request on medical grounds (albeit not known to the judge at the time). In an order of 25 June 2018 the decision of UTJ Rintoul was therefore quashed and the case remitted to the Upper Tribunal to reconsider the oral permission application. The Court of Appeal also ordered that the appellant's wife be joined as a second applicant.

11. The matter then came before UTJ Frances for a hearing in the Upper Tribunal on 8 October 2018, with both the appellant and his wife named as the applicants. Judge Frances refused permission on the appellant's grounds but granted permission on the basis that his wife had since been joined as a party and the respondent had not considered her claim that she could not safely return to Pakistan.

12. By the time the matter came before the Upper Tribunal for the substantive judicial review hearing the respondent had made a new decision on the appellant's application of 8 February 2012, dated 21 December 2018, again refusing the application but giving the appellant an in-country right of appeal. In that decision the respondent concluded again that there was no evidence from the appellant showing that there were any insurmountable obstacles preventing him and his spouse from continuing their relationship in Pakistan, that the requirements of paragraph 276ADE could not be met and that there were no exceptional circumstances warranting a grant of leave outside the immigration rules on Article 8 grounds.

13. At the substantive judicial review hearing the appellant's wife, Mrs Shakoor, confirmed that an appeal had been lodged against that decision in the First-tier Tribunal. On that basis it was considered that the appellant's application for judicial review had been rendered academic since he had an alternative remedy to judicial review. The application was accordingly refused in an order of Mr Justice Waksman dated 13 February 2019.

14. The appellant's appeal against the decision of 21 December 2018 was heard in the First-tier Tribunal on 16 July 2019 by Judge Thapar. The appellant and his wife appeared at the hearing without a legal representative and the appellant's wife, Mrs Shakoor, confirmed that she was representing the appellant. Mrs Shakoor confirmed further that the appellant did not intend to give any evidence and that he sought to rely on the grounds of appeal, and that the appeal would be dealt with on the basis of submissions only. The judge noted the bundle of documents before her from the appellant, which included the grounds of appeal, the further detailed grounds of appeal dated 13 July 2019, the Home Office Country Information and Guidance for Pakistan of November 2015 and the FCO travel advice for Pakistan. The judge also considered the country guidance in AK and SK (Christians: risk) Pakistan CG [2014] UKUT 569. The judge did not accept that the appellant's wife would be at risk in Pakistan and did not accept that there were insurmountable obstacles to family life continuing in Pakistan. She considered that the appellant could return to Pakistan with his wife or make an entry clearance application and concluded that it would not be disproportionate to require him to leave the UK either with or without his wife. The judge accordingly dismissed the appeal.

15. The appellant sought permission to appeal to the Upper Tribunal on three grounds: firstly, that the appellant did not have a fair hearing; secondly, that the judge, when assessing proportionality, failed to consider the 7 year delay by the Home Office in deciding his application; and thirdly, that the judge failed to carry out a proper assessment of the question of insurmountable obstacles.

16. Permission was refused in the First-tier Tribunal, but was subsequently granted in the Upper Tribunal on renewed grounds, on 21 January 2020. The matter then came before me.

Appeal Hearing

17. At the hearing both parties made submissions. Mr Bazini, representing the appellant, submitted that there was a question of the fairness of the proceedings before the judge as the appellant's wife ought to have been asked if she understood the implications of not giving oral evidence. The appellant's wife's father was very ill and in fact he died five days after the hearing, so that at the time of the hearing she was in a bit of a state. The judge ought to have asked her questions about the care she gave to her father. As for the assessment of insurmountable obstacles, the judge's approach was flawed as she considered the question of persecution rather than significant obstacles. The appellant's wife would suffer discrimination because she was white, British and Christian and that should have been considered by the judge as amounting to insurmountable obstacles. The judge erred by relying on the FCO report for 2019 without putting the report to the appellant's wife and inviting comments. The report post-dated the hearing and therefore should not have been considered by the judge. In any event the report explained the risks to foreigners and showed that there were insurmountable obstacles to her moving to Pakistan. With regard to the third ground of appeal, the judge erred in her proportionality assessment as she failed to give weight to the 7 year delay in the respondent making a decision on the appellant's application. The judge erred by failing to refer to section 117B of the 2002 Act.

18. Ms Cunha responded to the appellant's grounds and submitted that the judge had properly found there to be no insurmountable obstacles to family life continuing in Pakistan. The fact that she had regard to the FCO report of 2019 was not material. The delay in consideration of the appellant's application added weight to his family life and did not prejudice him. The evidence did not show that there would be unjustifiably harsh consequences for the appellant and his wife in returning to Pakistan. With regard to section 117B there was nothing the appellant could bring in to outweigh the public interest. As for the unfairness point, the appellant and his wife were aware of what they had to do for the hearing and no adjournment request was made. The appeal was therefore opposed.

19. Mr Bazini, in response, reiterated the points previously made.

Discussion and conclusions

20. Turning to the first ground concerning procedural unfairness, there is simply no merit in this challenge. It is suggested that the judge ought to have done more to ensure that the appellant and his wife gave oral evidence and that she therefore failed to afford the appellant a fair hearing. However the judge's record of the proceedings, as summarised at [3] and [4], confirms that the appellant's wife made it clear that there was no intention of there being any oral evidence and that she wanted the appeal to be dealt with by way of submissions. The judge was therefore acting in accordance with the appellant's wife's specific request in proceeding on the basis that she did.

21. The suggestion that the appellant and his wife did not understand the importance of evidence and did not realise that they should have given oral evidence before the judge, is, in my view, misconceived. Firstly, it is plain that

the appellant and his wife were more than competent to decide how to present the appeal and secondly, it is plain that both were well informed about the nature of the proceedings before the First-tier Tribunal and the benefits of providing supporting evidence.

22. It is plain from the substantial amount of materials in the four sections of the appellant's appeal bundle, which include records of the previous litigation before the Upper Tribunal and Court of Appeal, that much of the litigation was initiated, prepared and even conducted by the appellant's wife who appeared in person before the Court of Appeal (see page 197 and 229 of section 4 of the appeal bundle). Mrs Shakoor also appeared in person before Upper Tribunal Judge Frances at the oral renewal hearing (page 1 of section 2 of the bundle) and before Mr Justice Waksman in the Upper Tribunal in the substantive judicial review proceedings, as appears in the respondent's bundle. At [7] of his judgment, Mr Justice Waksman recorded that Mrs Shakoor had presented the arguments at different stages in the judicial review proceedings and had prepared detailed skeleton arguments, and at [25] he commented upon how eloquently she had made her submissions before him. In regard to the hearing before the First-tier Tribunal, it is clear from Mr Justice Waksman's judgment that he went to great lengths to explain to Mrs Shakoor how those proceedings differed from the judicial review hearing before him, which matters she had to address before the First-tier Tribunal Judge, what evidence she would need to produce ([10] and [28]) and the fact that she would be able to give oral evidence ([26]). It is apparent from First-tier Tribunal Judge Thapar's record at [3] that Mrs Shakoor had prepared bundles of evidence for the hearing before the First-tier Tribunal, which I note included a short statement that she had prepared in 2012 in support of the appellant's application.

23. In such circumstances, it is disingenuous to suggest that Mrs Shakoor did not know what she was doing at the hearing before Judge Thapar in the First-tier Tribunal and I find the assertion that the judge acted unfairly by proceeding with the appeal on the basis that Mrs Shakoor had herself requested to be wholly unmeritorious. There is nothing in the authorities relied upon by the appellant, GM (Sri Lanka) v The Secretary of State for the Home Department (Rev 1) [2019] EWCA Civ 1630 and CL v The Secretary of State for the Home Department [2019] EWCA Civ 1925 which suggests otherwise. The appellant has been put on notice several times in the successive refusal decisions of the nature of the evidence required to support his claim and the fact that the relevant evidence was not presented before Judge Thapar cannot be considered in any way to be the responsibility of the judge and cannot give rise to any suggestion that the proceedings were not fair. They clearly were and the judge was fully and properly entitled to conduct the proceedings as she did.

24. Likewise, I find there to be no merit in the second challenge pursued by Mr Bazini, namely the judge's assessment of insurmountable obstacles to family life continuing in Pakistan. It is asserted that the judge erred by equating insurmountable obstacles with a risk of persecution, but it clear that that is not what she did. The judge considered the risk to the appellant's wife as a white, British, Christian female, because she was responding to those issues having specifically been raised by the appellant and his wife. Indeed, the reason why

the respondent re-considered the appellant's application and made a third decision, following the grant of permission by UTJ Frances, was due to such concerns being raised when Mrs Shakoor was joined as a party to the proceedings. It is plain that the judge considered the question of risk of persecution as part of the assessment of insurmountable obstacles, but not as the sole basis of the assessment. Having found there to be no risk of persecution for the reasons cogently given at [11] to [15], the judge gave proper reasons at [16] and [18], in line with the relevant principles in Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 1, as to why the evidence did not demonstrate insurmountable obstacles to family life continuing in Pakistan. It is apparent from Mr Justice Waksman's judgment that he sought to explain to Mrs Shakoor that it was for the appellant to demonstrate insurmountable obstacles, and not for the Secretary of State to prove that there were no insurmountable obstacles, and in so far as the grounds appear to suggest otherwise, they are plainly mistaken. There is nothing in the authorities relied upon by the appellant to support such a view.

25. With regard to the criticism of the judge's consideration, at [13], of the FCO report without giving the appellant an opportunity to respond, Mr Bazini's submission ignored the fact that the FCO report was actually produced by the appellant in his own bundle. Although the judge considered the later report, post-dating the hearing, that in itself cannot be considered to be a material error when the FCO's own guidance was relied upon by the appellant and when the report before the judge at page 26 of the first section of the appeal bundle differed so marginally from the report for September 2019. In so far as the appellant suggested that the reports of crime, threats of attack and kidnapping in relation to foreigners in the FCO report were sufficient to amount to insurmountable obstacles, the judge was entitled to consider that they were not. As the judge noted at [16], Mrs Shakoor would not be living alone in Pakistan but would be with the appellant who was familiar with life in that country, and further, at [13], that the security situation in Pakistan had improved considerably. The appellant and his wife may disagree with the respondent's and the judge's view of insurmountable obstacles, but the judge's view, that the evidence produced did not reach the threshold set in Agyarko, was one which was fully and properly open to her. Indeed, in the absence of anything other than such generalised background evidence, the judge could not have reached any other conclusion. Accordingly, the ground of appeal in that regard is without any merit.

26. With regard to the third challenge pursued by Mr Bazini, namely the delay in deciding the appellant's application for leave to remain, it seems to me that, like the first ground, the grounds present a distorted view of the circumstances relating to the appellant's application. The assertion in the grounds is simply that the respondent delayed in making a decision on the appellant's application for seven years. However, that completely ignores the fact that the respondent made two previous decisions on the appellant's application, on 19 April 2013 and 16 August 2014. Mr Bazini submitted that that is immaterial when the previous decisions were unlawful ones. However, the previous decisions were never found to be unlawful and were never quashed. A consideration of the

procedural history of this case, as set out above and below, puts the passage of time into context and clearly shows that the delay cannot be attributed to the respondent and, to a large extent, is attributable to the appellant, as can be seen as follows.

27. The challenge to the first decision of 19 April 2013 was based on two grounds, the first of which was rejected by the Administrative Court (page 157 of section 3 of the appeal bundle) and the second of which (a claim that the old rules ought to have applied), albeit allowed to proceed with a grant of permission, was subsequently confirmed as wrong. The respondent's agreement to reconsider the application, leading to a consent order, was not an indication of the initial decision being unlawful. The challenge to the second decision did not succeed on its merits and indeed ultimately did not succeed at all, and the fact that the Upper Tribunal's refusal to grant permission was quashed by the Court of Appeal, was solely on a procedural basis because of the Upper Tribunal Judge proceeding in the appellant's absence believing that he had left the UK and was in Ireland. The proceedings before the Court of Appeal were prolonged by the appellant by 18 months owing to his and his wife's refusal to agree to the respondent's offer to settle and for the matter to be remitted to the Upper Tribunal to be reconsidered, with the outcome of those proceedings being identical to that offered by the respondent in the first place (see pages 203 and 204 of section 4 of the bundle). The grant of permission by UTJ Frances was not as a result of any unlawfulness in the respondent's decision, but was due to the fact that the appellant's wife had requested to be joined as a second applicant and had raised further matters which were to be considered by the respondent and which had not been raised in the initial application.

28. Mr Justice Waksman, quite properly, described the procedural history of the case as "torturous" at [8] and it is clear from his detailed analysis of that history that he was of the view that it was unnecessarily protracted. The appellant has in reality achieved nothing other than the passage of time in his litigation and none of the challenges made to the decision as originally made, or in the decisions made thereafter, have been made out. Whilst he has eventually succeeded in being granted a right of appeal, that is not as a result of successful litigation, but as a result of the change in legislation, as Justice Waksman explained at [6] of his judgment of 10 July 2018.

29. Accordingly, any suggestion that Judge Thapar failed to consider the delay can be explained by the fact that there had undoubtedly not been a delay by the respondent. As for the matter of the passage of time itself, irrespective of the reasons and responsibility for the delay, I cannot find any merit in the suggestion that the judge materially erred in law by failing to consider the matter and it seems to me that the passage of time could not have materially assisted the appellant in accordance with the principles in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41. It was Mr Bazini's submission that the appellant had been prejudiced by the delay, contrary to Ms Cunha's submission, considering the stress of having existed with so many years of uncertainty. However, that could have been avoided by the appellant by making a proper entry clearance application under the immigration rules. It

has always been open to the appellant to return to Pakistan and make an clearance application to join his wife and no explanation has ever been given as to why he has not done that, rather than extending the period of uncertainty by unnecessary and, clearly unsuccessful, litigation over the last eight years.

30. Mr Bazini also raised, as a further error, the judge's failure to consider the relevant factors in section 117B of the 2002 Act. However, whilst the judge did not specifically cite section 117B, her consideration of the weight to be given to the appellant's relationship was properly considered at [19] in accordance with section 117B(4) on the basis of it having commenced when he was in the UK unlawfully and there were otherwise no factors which materially benefitted the appellant.

31. In the circumstances there is no merit in the assertion that the judge failed to give weight to a material matter in assessing proportionality and that her proportionality assessment was flawed. On the contrary, the judge considered all relevant and material matters in her proportionality assessment and had regard to the relevant factors in section 117B in determining the strength of the public interest. It is apparent, from the repeated challenges to the respondent's decision to refuse leave to the appellant and from the observations made by Mr Justice Waksman in his judgment, that Mrs Shakoor strongly disagrees with the respondent's decision and, as observed at [11] of the judgment, has no confidence in any of the decision makers. However, as Mr Justice Waksman was at pains to explain to her, albeit in the context of a judicial review case, there is a legislative and procedural framework which has to be applied. It is not the case that she is being required by the Secretary of State to leave the UK in order to continue her family life with her husband; but rather the Secretary of State is requiring the appellant to make a proper application in accordance with the UK legislative framework. As the judge properly found, the appellant quite simply failed to meet the relevant legal requirements and the respondent was therefore entitled to decide as she did. There was nothing unlawful in the judge's decision to dismiss the appeal on the basis that she did.

32. For all of these reasons I find no merit in the appellant's grounds of challenge. There are no errors of law in the judge's decision. I uphold her decision.

DECISION

33. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed

Upper Tribunal Judge Kebede Dated: 20 March 2020