Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11628/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 August 2021	**On 12 August 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SOHAIL AKHTAR
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Harshaka Kannangara of Counsel, instructed by Wise Legal Solicitors
For the respondent: Ms Alexandra Everett, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 6 February 2019 to refuse him leave to remain on human rights grounds. The appellant is a citizen of Pakistan.

Background

2. The appellant was born in Pakistan in 1988, in a village in Khyber Pakhtunkhwa Province. He came to the United Kingdom on 24 January 2011 as a Tier 4 Student. He was 23 years old then, and is now 33.

3. The appellant's home village is in Khyber Pakhtunkhwa Province (abbreviated to KPK Province), formerly known as the North-West Frontier Province, on the Afghan-Pakistan border. The appellant's family still live in the village in KPK Province, but one of his brothers now lives in Islamabad, much closer to the border with the Indian state of Punjab.

4. The sponsor grew up in Pakistan, where she and her twin sister lived with their grandparents in Karachi, some 800 miles from the appellant's home area. Karachi, the sponsor's home area, is in the south east of Pakistan, near the mouths of the Indus river, on the Arabian Sea.

5. In September 2015, the sponsor and her sister applied to come to the United Kingdom and rejoin their parents, their three younger siblings, and their father's two brothers and extended family here. They were both still minors. Their father was settled in the United Kingdom, but their mother was not yet settled. The respondent refused, but in an appeal decision on 8 January 2018, First-tier Judge Manyarara allowed the appeals and the sponsor came to the United Kingdom in May 2018. She was given leave in line with her non-settled mother.

6. The appellant continued to have leave to remain as a student until 25 May 2016. On 24 May 2016, a day before his leave expired, the appellant applied for leave to remain outside the Rules, which was refused on 27 October 2016.

7. On 15 August 2016, the appellant made an application which he subsequently varied to seek leave to remain outside the Rules: the respondent refused on 13 November 2017.

8. On 2 February 2017, while the earlier application was pending, the appellant applied for leave to remain on the basis of long residence, which he also varied to seek leave outside the Rules, but that application was rejected as void on 27 April 2018. Another decision rejecting his application for leave outside the Rules was varied on 11 October 2018.

9. It was the sponsor's evidence that the couple's relationship began in December 2017, six months before she entered the United Kingdom. On 27 October 2018, the appellant and sponsor entered into an Islamic marriage and began living together in her parents' extended family home in the United Kingdom. The appellant's evidence is that his family are displeased with the marriage and he would be unable to return to them, or to his home province. He has not made an asylum claim and does not wish to do so, as he confirmed to the First-tier Judge and to me today.

10. At the date of the refusal letter, the sponsor was expecting the couple's first child, a son, who was born in December 2019. The couple's relationship is accepted to be genuine and subsisting, but the parties have not contracted a civil marriage.

11. One of the sponsor's paternal uncles lives with and looks after the grandparents in Karachi, along with his wife and 5 children. The sponsor's grandmother is blind, and her grandfather is aged. There was no evidence before the First-tier Judge about what sort of accommodation the grandparents have, beyond an assertion that their home is small.

12. The respondent in her refusal letter treated the sponsor as a British citizen and parts of her decision are erroneous for that reason. The sponsor is not and never has been either settled in the United Kingdom or naturalised as a British citizen.

13. The respondent refused leave to remain and the appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

14. The respondent was represented at the hearing in the First-tier Tribunal, as was the appellant.

15. The First-tier Judge heard evidence from the appellant, the sponsor, and the sponsor's father, in whose home they all live. There was also a witness statement from one of the appellant's paternal uncles, who lives in the United Kingdom. There was no evidence from the wife's grandparents, or her paternal uncle who lives with them in Karachi.

16. The First-tier Judge on 4 March 2020 dismissed the appeal, giving reasons from [18] in his decision. He accepted that the relationship was genuine and subsisting, but also noted the evidence of the sponsor that she was not British, or settled, and neither was her child. He made a finding of fact to that effect, noting that GEN.1.2 was therefore inapplicable, the parties not having lived together for two years in a relationship akin to marriage at that date. In fact, when the application was made on 22 January 2019, the period of cohabitation was less than 6 months.

17. The First-tier Judge considered whether the appellant had demonstrated that there would be very significant obstacles to his reintegration in Pakistan: see paragraph 276ADE(vi), the only sub-section of paragraph 276ADE available to the appellant on the facts. The First-tier Judge found as a fact that such obstacles had not been shown: even if the appellant had fallen out with his family in northern Pakistan, his brother had been able to relocate away from the village, and Pakistan was a country of over 300 million people, with many large cities where the appellant could go.

18. The judge accepted that the appellant had established a private life with the sponsor, her parents, and her extended family, and that Article 8 ECHR was engaged. The appellant would either have to move alone to Pakistan

without his wife and child, or else separate the sponsor from her extended family so that they could move to Pakistan together. However, the judge found that the proposed interference was proportionate: on the facts.

19. The judge accepted that there was family life between the appellant, the sponsor, and their baby son. The best interests of the baby were to remain with his parents: he was not a British citizen. The sponsor had not been long in the United Kingdom: she had been here for less than 2 years at the date of decision, having grown up in Pakistan without her father. The evidence was that there was an extended family of at least nine people in Karachi, and that the sponsor had understated that part of her evidence. The judge found that there was 'a measure of family life' between the sponsor and her father which had to be respected, but that 'the focus of her family life is inevitably turning towards her husband and child'.

20. The First-tier Judge found that the respondent had discharged the burden of proving that removal of the appellant would be proportionate and dismissed the appeal.

21. The appellant appealed to the Upper Tribunal.

Permission to appeal

22. Permission to appeal was granted on the basis that:

> "It is arguable that the judge materially erred in going behind a concession made by the Secretary of State as to the nationality of the sponsor, and further arguable that the judge misunderstood the background affecting the sponsor's status and that this arguably has affected the reasoning overall of the judge in relation to the eventual decision in this appeal."

Respondent's position

23. On 3 August 2020, Ms Isherwood, a Senior Home Office Presenting Officer, settled a Rule 24 Reply, the operative passages of which were as follows:

> "2. The respondent does not oppose the appellant's application for permission to appeal in accordance with the grant of permission, and given that the refusal letter accepts that the appellant's partner is British, and that is not the case, and it does not appear that the appellant or his partner had an opportunity to respond.
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> 3. For completeness, it is submitted that according to the system, the appellant's partner was granted limited leave [as a minor] in line with her parents. In addition to this, she has an outstanding application for leave under ECHR on the basis of her relationship with the appellant and her child. This application was submitted on 29 February 2020. Therefore, it is clear that the partner is not entitled to settlement.
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> 3. Given the identified issues above, this is an appeal suitable for remittal to the First-tier Tribunal."

24. On 30 September 2020, Upper Tribunal Judge Kekić gave triage directions with reference to the Covid pandemic. On 21 October 2020, having thought better of the respondent's position, Ms Isherwood clarified it by withdrawing the concession in the refusal letter that the appellant's partner was a British citizen or settled, and the Rule 24 Reply acceptance that the decision contained a material error of law such that it should be set aside and remade in the First-tier Tribunal.

25. Her Clarification continued:

> "5. A further ground of challenge appears to be that the status of [the sponsor] in the light of her allowed appeal entitled her, along with this miscategorisation of her nationality, to be treated as if she were settled. This is misconceived. As will be apparent from her appeal decision, [First-tier Judge] Manyarara was considering a human rights appeal [by the sponsor and her twin sister] as the application and decision fell after 6 April 2015. The reference to the appeal being allowed 'under the Immigration Rules' (Notice of decision, page 14) is thus unhelpful. Additionally, it having been established that the correct rule was paragraph 301, it was acknowledged that [the sponsor] was eligible for no more than limited leave, in line with her (then) not settled mother. This is what was granted. Whilst she may thus have been en route to settlement, she was not settled. …
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> 6. On further reflection, it appears that the grounds do not make out a basis on which the First-tier Tribunal erred in law, such that the determination should be set aside. The position may change once [the sponsor's] outstanding application is decided, but at present the First-tier Tribunal was properly entitled to conclude that no case was made out under Appendix FM or Article 8. The Secretary of State is not bound by the initial Rule 24 response, as it is for the Tribunal to decide, with the assistance of the parties, whether the decision of the First-tier Tribunal was such that it should be set aside. "

26. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

27. There were no skeleton arguments. In oral submissions, and with frequent consultation with the appellant, the sponsor, and the sponsor's father, all of whom were in court (together with the child of the family), Mr Kannangara said that his main argument was that the sponsor had been admitted to the United Kingdom for the purposes of settlement and that had she been granted entry clearance when she applied for it, she would have been here two years earlier than she was, together with her twin sister.

28. The present application was valid, by operation of section 3C and paragraph 39E of the Rules. Accordingly, the relationship had not been commenced when the appellant was unlawfully in the United Kingdom and section 117B(4)(b) was inapplicable. Mr Kannangara asked me to allow the appeal.

29. For the respondent, Ms Everett contended that there was no material error of law in the decision. It might be that the Article 8 ECHR claim was stronger than the First-tier Judge realised, but that was speculative. The First-tier Judge had given proper consideration at [31] in his decision and it was adequately reasoned.

30. The grounds of appeal, and Mr kannangara's submissions, were in reality no more than an attempt to reargue the case in the Upper Tribunal and the appeal should be dismissed.

Analysis

31. The grounds of appeal are diffusely and badly drafted. They are unsigned, and were not settled by Mr Kannangara. After some discussion, we were able to agree on the following summary of the matters under challenge:

(1) The sponsor may in future be able to obtain indefinite leave to remain: when the grounds were settled she had a pending application for settlement;

(2) It was an error of law to find that there were no 'very significant obstacles' to the appellant's reintegration in Pakistan. The couple were not an independent family but lived in a family unit with the sponsor's father. It would breach the Article 8 ECHR rights of the appellant, the sponsor, and her father to split up the extended family unit. Nor was it factually correct to say that the appellant and sponsor could live with her family members in Karachi;

(3) The couple now had a child, born 10 October 2019, and a second son on the way. The appellant was not currently permitted to work and the extended family was supported by his father-in-law. During the preceding period, when he was allowed to work, the appellant told me today that he worked as a sales adviser in Marks and Spencer's for over 9 years.

(4) The appellant does not rely on ground (iv), which related to the non-settled, non-citizen status of the sponsor; and

(5) The appellant did not begin his relationship with the sponsor when he had no leave. He had 3C leave until 21 December 2018. Mr Kannangara acknowledged that the present application was made after the 3C leave expired, though within the disregard window set in paragraph 39E.

32. The appellant had written to the respondent setting out that he had received threats from his family, but Mr Kannangara was instructed that he had not, and would not, claim asylum.

33. I begin with the vexed question of the citizenship status of the sponsor. The respondent made a plain error in relation to that status: the sponsor has never been settled or naturalised as a British citizen. That evidence came from the sponsor herself at the First-tier Tribunal hearing and it is unarguable that the judge was entitled to rely upon her evidence and to consider the appeal on that basis. That was a proper reason to depart from the concession/error in the refusal letter.

34. That being so, the assertion that the sponsor (who now has 30 months' leave to remain) is on the route to settlement and may be settled in future does not avail the appellant at present and is not capable of being a material error of law in the decision of the First-tier Tribunal, which was predicated on the facts as they stood at the date of hearing.

35. The First-tier Judge did give consideration to the best interests of the couple's baby son. No material error of law in that consideration has been identified.

36. Similarly on the evidence before the judge, it was open to him to conclude that the appellant, if returned alone, could live elsewhere in Pakistan, away from his family, and if returning with his wife and baby son, would be able to relocate to Karachi, where she has extended family.

37. These grounds of appeal are in reality principally disagreements with the First-tier Judge's findings of fact and credibility. I remind myself of the narrow circumstances in which it is appropriate to interfere with a finding of fact by a First-tier Judge who has heard the parties give oral evidence: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed. That standard is not reached here and accordingly, it is not open to the Upper Tribunal to re-examine the factual matrix in this appeal.

38. The grounds of appeal disclose no material error of law in the decision of the First-tier Tribunal, which is upheld.

DECISION

39. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law

    I do not set aside the decision but order that it shall stand.

Signed Judith AJC Gleeson Date: 6 August 2021
Upper Tribunal Judge Gleeson