Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11725/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on:**
On 26 April 2021	**On 30 April 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NOOR UL HUDA QURESHI
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the respondent: Ms Shamim Sher, Counsel instructed by Farani Taylor Sols

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against the respondent's decision on 26 June 2019 to refuse him leave to remain on human rights grounds. The appellant is a citizen of Pakistan.

Background

2. The claimant came to the United Kingdom as a student on 19 April 2011 with a Tier 4 (General) Student Migrant visa, which was curtailed to expire on 15 June 2013. He was successful in finding another educational

provider and was granted further leave to remain valid until 26 January 2015.

3. On 26 January 2015, the claimant applied for further leave to remain on the basis of private and family life. That was refused and certified under section 94 of the Nationality, Immigration and Asylum Act 2002 (as amended). The claimant remained in the United Kingdom unlawfully.

4. The claimant met his wife, a British citizen, of Vietnamese heritage, in 2017. On 5 April 2018, the claimant had made a private and family life application based on his relationship with the sponsor, who was not yet his wife. The respondent accepts that the marriage is genuine and subsisting. The parties married on 2 August 2018: theirs is an interfaith marriage since the claimant is Muslim, while the sponsor is Christian and has not converted to Islam. The claimant speaks English and Punjabi, while his wife speaks English and Vietnamese.

5. The Secretary of State considered his application under paragraphs R-LTRP.1.1(a), (b) and (d) of Appendix FM (the 10-year partner route). She was not satisfied that there were insurmountable obstacles to this couple continuing their family life in Pakistan if the claimant were to be removed. She also considered under GEN.3.2 whether there were exceptional circumstances for which leave to remain should be given outside the Immigration Rules HC 395 (as amended) but concluded that no such circumstances existed. The Secretary of State refused the claimant's application for leave to remain.

First-tier Tribunal decision

6. First-tier Judge Abdar also found that the claimant could not bring himself within the Immigration Rules.

> "23. On the evidence and on balance, I find that the sponsor would face some difficulties in joining the [claimant] in Pakistan, mainly owing to the sponsor's non-Pakistani heritage, medical diagnoses, Christian faith and lack of Urdu language skills. However, an holistic view of the evidence before me does not persuade me to find that there would be insurmountable obstacles to the [claimant] or the sponsor continuing their family life in Pakistan. For these reasons, I find that the [claimant] does not meet the requirements of the Rules."

7. He allowed the appeal on exceptionality grounds outside the Rules. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

8. First-tier Judge Boyes granted permission to appeal on the basis that the First-tier Judge's decision arguably misunderstood the ratio decidendi of *Chikwamba* and that Article 8 ECHR is not a general dispensing power for judges to allow appeals.

Rule 24 Reply

9. There has been no Rule 24 Reply from the claimant.

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

Upper Tribunal proceedings

11. On 18 September 2020, following triage submissions, I decided to set aside the First-tier Tribunal decision and remake the decision in the Upper Tribunal. My decision was not communicated to the respondent by the Tribunal. A remaking hearing was listed for 22 December 2020. At the hearing on 22 December 2020, Mr Melvin came prepared for an error of law hearing while for the claimant, Ms Sher had prepared for a remaking hearing.

12. In the light of the decision in *Joint Council for the Welfare of Immigrants, R (on the application of) v Secretary of State for the Home Department* [2010] EWHC 3524 (Admin) (17 December 2010), it was agreed that the hearing should be adjourned, to allow for oral argument on error of law and remaking, if appropriate, either on the day or at a further hearing, in the ordinary way.

Upper Tribunal hearing

13. On 21 December 2020, a document headed 'Respondent's written submissions/Rule 24 Reply' dated 21 December 2020 was received from Mr Melvin on behalf of the Secretary of State. It was followed, on the same date, by a longer document from Mr Melvin entitled 'Respondent's additional written submissions'. The Secretary of State is not the respondent before the Upper Tribunal: she is the appellant.

14. For today's hearing, I received two documents both purporting to be the respondent's skeleton argument. The document signed by Mr Melvin is the Secretary of State's skeleton argument (and thus, that of the appellant before the Upper Tribunal). The document signed by Ms Sher is the claimant's skeleton argument and he is indeed the respondent before the Upper Tribunal.

15. For the Secretary of State, despite the multiple submissions on file, the issue is really rather narrow: at [11]-[12] of the latest submissions, Mr Melvin said this:

> "11. Having found that the [claimant] could not meet the requirements of the Immigration Rules, that there are no serious obstacles to integration for the [claimant] and sponsor enjoying their family life in Pakistan, the [First-tier Judge] without sufficient reasoning concludes that there are exceptional circumstances that warrant allowing the appeal outside of the Rules.

> 12. The [Secretary of State] seeks to argue that the [First-tier Judge] has misdirected himself to the importance of the statue, has failed adequately to reason his decision on exceptionality, misunderstood the refusal notice and drawn a perverse conclusion on exceptionality."

16. For the claimant, Ms Sher noted the finding of no insurmountable obstacles. She argued that the judge had considered all relevant factors in the proportionality balancing exercise, relying on *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630, arguing that the difficulties the sponsor would experience in living in Pakistan were among those which the judge was required to consider. The appeal had been allowed 'exceptionally' on that basis. Her skeleton argument concluded:

> "7. It is respectfully submitted that the judge considered all the evidence, including the oral evidence of the [claimant] and his wife, and applied the law correctly and that thus he was entitled to come to the conclusion that he reached. There is no material error of law disclosed in the Secretary of State's appeal.
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> 8. With respect to the judge's reference to *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, it is submitted that the considers this in respect to the public interest requirements that he is required to do. Coming to the conclusion that little purpose is served by requiring the [claimant] to leave the United Kingdom, face the difficulties that will entail for the [claimant] and sponsor, only to apply for entry clearance and re-enter the United Kingdom in the same category as the application that was refused.
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> 9. The Tribunal is invited to dismiss the Secretary of State's appeal as there was no material error of law in the decision. The decision of the First-tier Tribunal is a structured and carefully made decision. The First-tier Judge was entitled to allow the appeal. "

17. In oral argument, Ms Sher observed that the judge had referred to section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) at [13] and that his self-direction was correct. She acknowledged that there was no reference to section 117B in the part of the decision relating to Article 8 outside the Rules, but asked me to infer that the judge had applied it. She acknowledged that no exceptional circumstances were set out in that part of the decision, but argued that on the facts, the judge's conclusion was open to him.

18. I did not call on Mr Melvin, as the Secretary of State's arguments were set out at length in the documents already mentioned, as well as in triage submissions by Ms Rhona Petterson.

Analysis

19. The First-tier Judge's reasoning on exceptionality and Article 8 ECHR outside the Rules was as follows:

> "26. There are a number of considerations against the [claimant] that I must and do give due weight to, starting with effective immigration control, which is carried out via the Rules. The [claimant does not meet the requirements of the Rules and it is trite law that I must give that consideration significant weight, which I do, in assessing proportionality.
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> 27. The [claimant] and the sponsor's relationship dates back to 2017. However, their relationship started when the claimant was in the United Kingdom unlawfully. Accordingly, I tamper [sic] the weight I place on the relationship.
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> 28. The [claimant's] English language skills are not challenged and [he] is financially independent of the state. However, both are neutral factors in the balance.
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> 29. It is not only the [claimant's] but I must also take into account the sponsor's rights under Article 8; *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, which I do by giving due deference to the sponsor's rights as a British citizen.
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> 30. I take my findings on the [claimant] and the sponsor's background and relationship into consideration, together with the difficulties the sponsor will face in joining the [claimant] in Pakistan. I also weigh in the [claimant's] favour the fact of the [claimant's] application in an attempt to regularise the [claimant's] status in the United Kingdom, albeit without giving it undue weight.
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> 31. The respondent has not argued any, and I find no barriers to the [claimant] seeking entry clearance from outside the United Kingdom. The [claimant] would then meet the requirements of the Rules, particularly as the only requirement which the [claimant] does not currently meet is that of having extant leave, thus giving rise to consideration of EX.1, would not be applicable to such an application. As such, I find that the *Chikwamba* principle applies … in that, in the circumstances, little purpose is served by requiring the [claimant] to leave the United Kingdom, face the difficulties that will entail for the [claimant] and the sponsor, only to apply for entry clearance and re-enter the United Kingdom in the same category as the application that was refused.
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> 32. On the totality of the evidence and on balance, having carried out an holistic balancing exercise with due weight given to the mandated and important public interest factors. I find, exceptionally, particularly in consideration of the above and the consequences for the [claimant] and the sponsor, the balance lies with the [claimant] and it would be disproportionate in all the circumstances to refuse the [claimant's] application."

20. 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.

21. However, in this case, I am satisfied that the finding of exceptional circumstances is one with which the Upper Tribunal must interfere. The reasoning above is confused, wrong in law, and the conclusion one the reasons for which I as the reviewing judge cannot understand (see *R (Iran)* at [90.3] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed).

22. There are three principal areas of concern:

    (1) The judge failed to apply section 117B of the 2002 Act correctly. It is not a question of tampering or tempering the weight placed on a relationship with a British citizen, when it was developed entirely while the claimant was in the United Kingdom unlawfully. By section 117B(4)(b) of the 2002 Act, he is required to give that relationship little weight.

    (2) The second point is that no exceptional circumstances are identified in the First-tier Judge's decision on Article 8 ECHR outside the Rules. He relies on matters which have already been considered within the Rules, which are a complete code, save for exceptional circumstances. There is nothing exceptional about a British citizen wife having difficulty adjusting to life in the country of her Pakistani spouse. The sponsor's separation anxiety disorder, referred to at [20], was not considered to amount to insurmountable obstacles when considering Article 8 within the Rules. Her medication is available in Pakistan, and as the judge states in that paragraph, she would have the claimant's support if she joined him in Pakistan.

    (3) Finally, there is the *Chikwamba* question. The judge's finding that the claimant, who is a long-term overstayer, would be certain to be re-admitted as his wife's spouse if he applied for entry clearance from outside the United Kingdom, is completely unreasoned. There was no evidence, for example, about the wife's income, or the effect that the claimant's poor immigration history would have on the suitability requirements for entry clearance as a spouse.

23. This decision cannot be sustained. There are no exceptional circumstances for the grant of leave to remain outside the Rules.

24. I set aside the decision of the First-tier Judge and remake it by dismissing the claimant's appeal.

DECISION

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

    The making of the previous decision involved the making of an error on a point of law.
    I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed Judith AJC Gleeson Date: 26 April 2021
Upper Tribunal Judge Gleeson