Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03834/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Wednesday 12 January 2022	**On Monday 31 January 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR WAJID MEHMOOD

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Dhanji, Counsel instructed by ATM Law Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Kaler promulgated on 14 May 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 27 February 2020 refusing his human rights claim. That decision was made in response to the Appellant's application to remain as the spouse of a British Citizen, Ms Azimah Nisa.

2. The Appellant is a national of Pakistan. He entered the UK as a visitor on 16 February 2011. He has overstayed since the expiry of his leave in that category. Having been refused leave to remain based on his private life in 2014 and had an asylum claim and appeal refused and dismissed in 2016 and 2019, he sought to remain based on his marriage to Ms Nisa. He married her under Islamic law on 11 November 2018 and in a civil ceremony on 2 May 2019.

3. The Respondent has not disputed the genuineness of the relationship. Neither is there any issue regarding the Appellant's ability to meet the English language and financial requirements of the Immigration Rules ("the Rules"). However, due to the Appellant's immigration status, he cannot meet the Rules unless he satisfies paragraph EX.1. of Appendix FM to the Rules ("Paragraph EX.1."). Mr Dhanji confirmed that the Appellant had not sought to argue that he could succeed within the Rules based on his private life under paragraph 276ADE(1) of the Rules ("Paragraph 276ADE"). The only issue within the Rules which the Judge had to resolve therefore was whether the Appellant met Paragraph EX.1. In the alternative, the Appellant also argued that he could succeed outside the Rules.

4. The Judge dismissed the appeal, finding against the Appellant both under the Rules and outside them. I will deal with the substance of her decision under the Rules which forms the basis of the appeal below. Suffice it to say for the present, the Judge when rejecting the appeal within the Rules, referred to Paragraph 276ADE in three places rather than to Paragraph EX.1.

5. That error is the central complaint made by the Appellant in his grounds. The grounds raised challenging the Decision are in summary as follows:

> Ground 1: the Judge materially erred when applying the test in Paragraph EX.1.
>
> Ground 2: the Judge failed to resolve the issue in Paragraph EX.1.
>
> Ground 3: the Judge made findings that had no evidential basis.

6. Permission to appeal was granted by First-tier Tribunal Judge Ford on 15 June 2021 in the following terms so far as relevant:

> "… 3. It is arguable that the Tribunal may have erred in its consideration of EX1(b) and possibly conflated paragraph 276ADE(1)(vi) with EX1(b). It is arguable that the failure to consider whether the rate of Covid in Pakistan and the FCO advice to British nationals to avoid all but essential travel meant the threshold under EX(1)(b) was met. Grounds 1 and 2 are arguable. Ground 3 is not arguable. There is an arguable material error of law."

7. The matter comes before me to determine whether the Decision contains an error of law. If I conclude that it does, I may set aside the Decision and, if I do so, I may either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

8. The hearing was conducted via Microsoft Teams, the hearing being attended remotely by the Appellant and his wife also. There were no technical difficulties affecting the conduct of the hearing. I had before me the Appellant's bundle before the First-tier Tribunal and a core bundle of documents relating to the appeal including the Respondent's bundle. Given the nature of the challenge, it has not been necessary to refer below to the documents in those bundles. Having heard oral submissions from Mr Dhanji and Mrs Aboni, I indicated that I would reserve my decision and issue that in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

9. Although permission was not refused on the Appellant's third ground in the operative part of the decision granting permission to appeal, Mr Dhanji indicated at the outset of the hearing that he did not pursue that ground having regard to the views expressed by Judge Ford. For her part, having regard to the references to Paragraph 276ADE as I come to below, Mrs Aboni accepted that the Judge had made an error by referring to that paragraph but argued that the error was not material. Given the overlap between the first and second grounds both of which challenge the Judge's approach to the appeal within the Rules, I consider those two grounds together.

10. I begin by setting out what I consider to be the parts of the Decision relevant to the Appellant's grounds challenging it as follows:

> "6. Mr Beer [the Respondent's representative] adopted the refusal letter and made additional submissions. The Respondent accepts that this is a genuine marriage and there is a subsisting relationship. The application meets the English language and financial requirements. However the eligibility requirements of E-LTRP.2.1 to 2.2 have not been met. This is because the Appellant's previous leave ended on 3 May 2011 and he has been in the UK without valid leave for 3188 days. 39E, relating to extant leave, did not apply.
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> 7. There were no exceptional circumstances. The Appellant claimed to have a fear of returning to Pakistan but those matters had been considered and dismissed in his asylum claim. It was pleaded that the spouse was a British national and settled in her way of life in the UK. She was of Pakistani heritage, had visited the country, spoke the Urdu language and had extended family members living there. She could be expected to adapt to the way of life there. The couple had not explored the possibility of getting fertility treatment in Pakistan. They may have to pay for that, but that was not a relevant factor. There was no barrier to her going to Pakistan. The Appellant had a poor immigration history and the relationship had commenced in the full knowledge that family life may not be able to continue in the UK. The ongoing Coronavirus situation was fluid and should not be a relevant consideration.
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> 8. Mr Raza [the Appellant's representative] relied on the skeleton argument and the bundle of 221 pages. He argued that there were insurmountable obstacles to the relationship continuing outside the UK. The Sponsor was British born and had very little exposure to life in Pakistan. She was engaged in a caring role in her employment and

people like her were of much need in the UIK. There was misogyny in Pakistan and this limited her ability to live and work there. A British citizen was not at present permitted to enter Pakistan under the present Covid restrictions of that country and was contrary to FCO advice. The requirements of EX1 had been met.

…

14. Paragraph 276ADE(1) sets out certain requirements which, if satisfied, lead to the applicant being granted leave to remain. Leave may be granted if there are 'insurmountable obstacles'; this means that very significant difficulties would be faced by the Appellant or his Sponsor partner which could not be overcome or would entail very serious hardship.

Assessment

15. It is clear that although the entry clearance requirements of the Immigration Rules can be met, the eligibility requirements of E-LTRP.2.1 to 2.2 have not been met. The Appellant has remained in the UK without leave. The published policy for applicants for extensions of leave applies to those whose leave has just or is due to expire, not to longstanding overstayers. The requirements of the Immigration Rules for leave to remain as a spouse have not been met.

16. I consider paragraph 276ADE. My assessment also takes into account sections 117A and 117B are found in part 5A of The Nationality, Immigration and Asylum Act 2002 which is headed 'Article 8 ECHR: Public Interest Considerations', since the matters I need to consider overlap with factors in 276ADE.

> [Section 117B of the 2002 Act ("Section 117B") is then there set out]

17. The facts are undisputed. The Appellant and his wife have a subsisting marriage and the entry clearance requirements for entry as a spouse have been met. The reason the application failed was because the Appellant was an overstayer and so did not meet the requirements for leave to remain under the Immigration Rules.

18. The Appellant and Sponsor have known each other for a relatively short period of time. They are married, live together and have established family life. There are no qualifying children. The Sponsor was born in the UK. She is immersed in British and Pakistani culture and has visited Pakistan twice where she has relatives.

19. There are no insurmountable obstacles to reintegration to Pakistan. The Appellant is from Pakistan and his wife is familiar with Pakistani culture. She is culturally integrated into British society, having been born here, but she is very familiar with the cultural norms in Pakistani families. She dresses in traditional Muslim clothing, speaks the language and she has visited relatives there. That she is undergoing fertility treatment or that there are restrictions on travel at present is not an insurmountable obstacle to the couple living in Pakistan. The couple has not explored the availability of fertility treatment there, although the Appellant did concede that it may be available at a cost. That is not an insurmountable obstacle nor is it unduly harsh."

11. The Judge thereafter considered the Appellant's claim outside the Rules including based both on his private and family life. There is no criticism of that part of the Decision.

12. I begin my analysis of the Judge's reasoning within the Rules by rejecting one short point made by Mr Dhanji. He submitted that the Judge had impermissibly taken into account Section 117B when considering the claim within the Rules. My reading of [16] of the Decision is a recognition by the Judge that there is an overlap between the factual findings needed within the Rules and those to be made when considering the claim outside the Rules. I am fortified in that reading by the fact that Mr Dhanji was unable to point me to anything in the following paragraphs prior to [20] (where the Judge begins her consideration outside the Rules) which suggests that the Judge took into account any of the factors in Section 117B.

13. The most that Mr Dhanji could point to is the reference at [17] to the Appellant having overstayed and his family life having commenced at a time when both partners knew that he had no status. That though is in the context of the facts of the case. There is no finding in this part of the Decision that this makes any difference to the weight to be given to the Appellant's family life (under Section 117B(4)(b)) or to the public interest in removal of the Appellant based on his lack of status (Section 117B(1)). In other words, there is nothing to suggest that the Judge had any regard to Section 117B when considering the claim within the Rules. The findings at [18] and [19] have to be compared to [21] and [22] of the Decision where the Judge recognises that Section 117B is relevant to the weight to be given to the Appellant's article 8 rights and that the Appellant's immigration status is also relevant to the consideration outside the Rules (which begins at [20] of the Decision)

14. Turning then to the central complaint, I am bound to accept (as did Mrs Aboni) that the references to Paragraph 276ADE are in error. The Appellant could not put forward a case under Paragraph 276ADE based on length of residence. The only basis for any claim founded on his private life within the Rules would be under Paragraph 276ADE(1)(vi). That would be on the basis of there being very significant obstacles to the Appellant's integration in Pakistan. That was not a case being advanced by the Appellant.

15. The issue then arises though whether the Judge either conflated the two issues as is suggested in the grounds and grant of permission to appeal or misled herself as to the test in substance. I have concluded that she did not err in either respect for the following reasons.

16. First, the Judge was clearly aware based on what is said at [7] and [8] of the Decision of the competing submissions of the parties on what was seen as the central issue within the Rules. The Judge's use of terminology at certain points in the Decision is unfortunate in that she suggests that the Appellant could not meet the Rules based on his family life because of his immigration status. However, that infelicitous use of

language is cured by what is said at [14] of the Decision. The Judge clearly there understood that the Appellant could be granted leave under the Rules if the relevant test were met.

17. Second, although the Judge there refers to Paragraph 276ADE, it is clear that this is simply a wrong reference. The use of the words "insurmountable obstacles" and to the meaning of that phrase is lifted from Paragraph EX.1 (and Paragraph EX.2). The Judge clearly therefore understood the test which applies even if she there made reference to the wrong paragraph of the Rules.

18. Third, I have already dealt with the point about what is meant at [18] of the Decision by "overlap" between Section 117B and the Rules. Although the Judge again there refers to Paragraph 276ADE when she means Paragraph EX.1, that paragraph has to be read with [14] of the Decision which sets out the right test.

19. Fourth, there is no error either in the way in which the Judge applied the test. Mr Dhanji submitted that the use of the word "reintegration" at [19] of the Decision suggested that the Judge did have in mind Paragraph 276ADE. Again, the use of that word was perhaps unfortunate given the reference to Paragraph 276ADE elsewhere. However, the use of the word "insurmountable obstacles" in the same sentence has also to be read with [14] of the Decision where the Judge recognises that what is to be considered is the difficulty for the Appellant and the Sponsor of continuing their relationship in Pakistan.

20. Fifth, and in that context, if the focus of [19] of the Decision had been only on the difficulties for the Appellant of returning to Pakistan, it might have been possible to argue that the Judge had indeed muddled the tests in Paragraph 276ADE and Paragraph EX.1 (or conflated the two). However, with the exception of the reference in that paragraph to the Appellant being from Pakistan (which is an undisputed fact) the remainder of the findings there made relate to the difficulties for the Appellant's wife. It is clear therefore that the Judge had in mind the family life claim and not one based on private life. That also has to be read in the context of [18] which sets out the facts relating to the Appellant's family life and the position of the Appellant's wife and not those relating to the Appellant himself.

21. Nor can it be said that the Judge was there considering only the integration of the Appellant's wife in Pakistan. The difficulties of integration for her are clearly a relevant factor when considering whether family life can be continued abroad. However, the Judge clearly understood within that paragraph that the test was whether there would be any "insurmountable obstacle to the couple living in Pakistan". I do not place any weight on the use of the word "reintegration" at the start of that paragraph. The Judge clearly understood that the Appellant's wife was born in the UK and had visited Pakistan only twice (see [18] of the Decision). The use of the word "reintegration" does not therefore reflect

any misunderstanding that this was a case of return for the Appellant's wife.

22. For the foregoing reasons, although the use of the wrong reference shows a certain lack of care in her preparation of the Decision, the Judge understood the correct test relating only to the Appellant's family life under the Rules, set out that test in the correct terms and applied it. In substance, therefore, there is no misdirection and no application of the wrong paragraph of the Rules. Put another way, there is an error made by reference to the wrong paragraph of the Rules but nothing to suggest that the Judge applied the wrong paragraph. Any error is therefore immaterial.

23. That then disposes of the central complaint brought by the Appellant. Mr Dhanji also argued that the Judge had wrongly failed to consider the Appellant's case that his family life could not be continued in Pakistan due to the Covid regulations at the time of the hearing. That is the submission recorded in the penultimate sentence of [8] of the Decision.

24. The first difficulty with that submission is that the Judge has in fact considered the point. In the fifth sentence of [19] of the Decision, the Judge expressly finds "that there are restrictions on travel at present is not an insurmountable obstacle to the couple living in Pakistan".

25. Second, as Mrs Aboni pointed out, the Judge also dealt with this at [30] of the Decision in more detail. That this is in the section of the Decision dealing with the claim outside the Rules is nothing to the point. The factual findings and assessment overall have to be read holistically, particularly since the central issue for the Judge to determine was whether the Respondent's decision refusing the human rights claim is in breach of Article 8 ECHR. At [30] of the Decision, the Judge said this:

> "The Pakistani authorities have not banned their citizens from returning to Pakistan, and indeed the ban on foreign visitors has been lifted. The UK government does not prevent foreign national from travelling abroad. There are no restrictions on those who may enter the UK but entrants are required to quarantine. The UK advice on visa entrants and extensions apply to all those who already have leave that is due to expire, and not to those who have remained in the UK unlawfully for many years."

26. For those reasons, I conclude that the Judge has not made any error of law which impacts the substance of her assessment or conclusion. Any error made by use of the wrong reference makes no difference to the substance of the Decision and is therefore immaterial. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

CONCLUSION

27. The Appellant's grounds do not disclose errors of law in the Decision which are capable of affecting the substance of the Decision. I therefore uphold the Decision. The Appellant's appeal remains dismissed.

DECISION

I am satisfied that the Decision does not involve the making of a material error on a point of law. I uphold the Decision of First-tier Tribunal Judge Kaler promulgated on 14 May 2020. The Appellant's appeal therefore remains dismissed.

Signed L K Smith Dated: 18 January 2022
Upper Tribunal Judge Smith