IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002749

First-tier Tribunal No: HU/52898/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16 June 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NADEEM AWAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed of 12 Chambers.
For the Respondent: Mr Bates, a Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 31 May 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Thorne ('the Judge'), promulgated following a hearing at Manchester on 19 April 2022, in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom on the basis of his family and private life. The application for leave was made on 19 November 2019 and refused on 14 June 2021.
2. The Judge's findings are set out from [25] of the decision under challenge. At [38] the Judge accepts the appellant has a family life with his partner and a private life in the UK. The Judge identifies the main question in the appeal being the proportionality of the decision which the Judge goes on to consider from [45].
3. The Judge refers to relevant legal provisions, the required test, and undertakes the required proportionality balancing exercise from [49]. The Judge concludes there is inadequate evidence to establish, on the balance of probabilities, there

are insurmountable obstacles to the appellant and his partner enjoying their private and family life together in Pakistan [59]. The Judge concludes there are no exceptional circumstances in relation to the appellant's private life when considered through the prism of paragraph 276ADE of the Immigration Rules [60]. The Judge also concludes there are no exceptional circumstances or other factors which warrant the appeal being allowed either inside or outside the Immigration Rules [63], leading to the following conclusion at [64]:

> 64. The public interest in maintaining a workable, predictable and consistent immigration system which is fair as between one claimant and another, is particularly important. Bearing in mind all of the above factors, I conclude that the human rights of the appellant and S are outweighed by the public interest. There is a strong public interest in maintaining effective and fair immigration control and protecting the economic well-being of the UK. I am driven in light of the matters outlined above to conclude that the public interest does outweigh the human rights of the appellant and S.

4. The appellant sought permission to appeal asserting the Judge erred in law by failing to address the requirements of paragraph EX.1(b), stating the test under EX 1 is different to Article 8 ECHR, yet the determination only focuses on the latter.
5. The grounds also assert the Judge erred when addressing the question of proportionality by failing to have regard to the time the appellant has spent in the United Kingdom, failed to correctly measure the appellant's criminal sentence, failed to note that the period of supervision had expired, failed to note the mental health of the appellant's partner and fear she has in travelling to Pakistan, failed to note the assessment of the sponsor's fear of return and the impact on her mental health, that the sponsor had been granted refugee status on the basis of a fear from her family in Pakistan, and that the Judge was wrong to conclude there will be no impact on the sponsor if removed.
6. The grounds also assert the Judge failed to engage at all with the proportionality of requiring the appellant to leave and apply for clearance, solely focusing upon requiring the sponsor to leave the UK to return to a country from which she obtained protection from which it is claimed expecting her to return there will to be disproportionate and wrong in law.
7. Permission to appeal was granted by another judge of the First-tier Tribunal.
8. In her Rule 24 response, dated 1 July 2022, the respondent opposes the appeal, stating:

> 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
> 3. The grounds complain that the judge failed to have regard to EX.1; was erroneous in considering the partner's status as a refugee and did not appropriately consider the arguments made in relation to the appellant's temporary separation and insurmountable obstacles (Grounds ¶2). With regards to the EX.1 consideration, it will be submitted that in light of the respondent's reliance on S-LTR 1.6 – the appellant would not have the benefit of relying upon the provisions within EX.1, given it is not a free standing provisions and requires an appellant to have satisfied other elements of the rules before it can be engaged (Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063). This would also apply to any consideration under Paragraph 276ADE in light of the requirements at 276ADE (1) (i). Given the nature of the appellant's offences it is the SSHD position that the refusal under suitability was open to her to make.
> 4. The judge correctly notes that Article 8 is the ground available to the appellant in appealing the decision and takes into account the appellant's conviction as a factor of the analysis (Determination ¶50). Having had regard to the appellant's skeleton

argument before the FTT (it will be noted that there was not a presenting officer at the hearing), it can be seen that no challenge was made to the suitability finding, rather issue was taken with the weight given to this in the wider Article 8 ECHR assessment. As such, given no challenge was levied at the suitability finding the appellant has to accept that EX.1 was a route not available to him.

5. Whilst the grounds state the judge did not adequately give consideration as to why the appellant's partner could live in Pakistan given her being recognised as a refugee, it is notable that the judge had no information before him on the issue (Determination ¶ 50 (xi)). Even if, the UT is satisfied that the judge erred in their assessment of family life continuing in Pakistan in the absence of any evidence, it is the SSHD's position that this would not automatically lead to a decision in the appellant's favour given the belt and braces approach taken by the judge who considered the alternative of the sponsor remaining in the UK whilst the appellant returned to Pakistan to apply for entry clearance. It is not clear from the skeleton argument, what exactly within the case of Chikwamba the appellant was seeking to rely upon, but it is submitted that the case on its own would not have assisted the appellant. As highlighted in Chen (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189, the ability to leave the UK and seek entry clearance is not disproportionate within itself in the absence of evidence to demonstrate the specific circumstances which make the situation an unlawful interference. Whilst it is acknowledged that the appellant's sponsor had mental health conditions, there was nothing in the evidence to suggest that she would have faced circumstances in the appellant's absence that would amount to a disproportionate interference. The burden is upon the appellant to establish their case. The judge has given consideration to the evidence and found against the appellant on this point.
6. Whilst a consideration of insurmountable obstacles is relevant to the assessment outside of the Rules, it is noted that exceptional or compelling circumstances would nonetheless need to be demonstrated for the appeal to succeed outside of the requirements of the Rules (Agyarko [2017] UKSC 11). The appellant's evidence before the judge falls far short of attaining this and does not demonstrate the decision of the SSHD was disproportionate given the appellant's precarious status; suitability issues and lucuna of evidence. The determination is one which has been adequately reasoned and is sustainable.

Discussion and analysis

9. It was submitted by Mr Ahmed that the appellants immigration history was relevant to the question of insurmountable obstacles. It was also argued that the Judge's finding that the appellant could return to Pakistan and make an application to re-enter under the Immigration Rules was without merit, as the appellant could not make such an application in light of his criminal conviction as any application would be refused on suitability grounds. Mr Ahmed also raised the issue of the length of time it would take for an application to be made, submitting that he was not sure how long it would be. It was submitted the Judge failed to take such circumstances into account.

10. The Judge notes in the decision that there was no attendance by a Presenting Officer and that it was not Mr Ahmed who represented the appellant. It was submitted by Mr Bates that there was no reference to the current basis on which the decision is challenged or adequate evidence in the sponsor's witness statements in relation to her situation, and why she could not return, before the Judge.

11. The Judge was clearly aware of the appellant's immigration history and sets that out in detail in the initial part of the decision.

12. In his witness statement before the First-tier Tribunal the appellant writes at [10]:

10. My wife Nausheen Swera Cheema, has successfully been granted refugee status by the Home Office on 1 September 2018 in the UK for five years, ending on 23 August 2023. Additionally, I have provided evidence to confirm that I married on 16 August 2019. I marriage to Naureen would make me a family member.

13. In his wife's witness statement it is written:

3 I first entered the UK on 20 December 2017 as a refugee and have remained here continuously since my arrival.

…

10. I have successfully been granted refugee status by the Home Office on 1 September 2018 in the UK for five years, ending on 23 August 2023. Additionally, I have provided evidence to confirm that I married on 16 August 2019. My marriage to Nadeem would make him my family member.

14. The Judge was aware of this information as noted at paragraph (xi) of the section of the determination in which the Judge sets out the various aspects taken into account as part of the balancing exercise, where it is written: *I accept that S was granted asylum on 04/09/18 but her leave to remain ends on 31/08/23*. *Moreover, I have not been provided with any details of why she was granted asylum why the circumstances of that grant would prevent her now from returning to Pakistan with A".*

15. That analysis is correct. Other than identifying that a grant of asylum had been made in the witness statements and other evidence before the Judge there was nothing further to show why the situation attaining date of the hearing before the First-tier Tribunal prevented the appellant's return.

16. Mr Bates in his submissions indicated that the grant refugee status may have been as a result of threat from the appellant's wife's own family. If that is so, the fact she married the appellant and was now a member of his family is a material change, with insufficient evidence before the Judge to show that the appellant and his family will be unable to protect the appellant's wife if they are returned as a family unit. It was not made out they would be required to live in the same home area or that the wife's former husband's family will even be aware if she returned to Pakistan.

17. Even if such evidence had been provided, showing that the circumstances that led to the recognition of the appellant's wife as a refugee from Pakistan still prevail, that does not establish material legal error. The Judge finds, in the alternative, that it would not be disproportionately for the appellant to return to Pakistan on his own to enable him to make an application for leave to remain lawfully [62].

18. The submission in relation to the merit, or otherwise, of an application for leave under the Rules, by reference to the suitability requirements, relied upon by Mr Ahmed, arises as this is an issue recorded in the refusal of the application leading to the current appeal where it is written:

"Under paragraph R-LTRP.1.1.(d)(i), your application falls for refusal on grounds of suitability and the Section S-LTR because your presence in the UK is not conducive to the public good because it is noted that you have previously been convicted of a sexual offence and are currently on the sex offenders register. He therefore failed to meet the requirements for leave to remain because paragraph S-LTR.1.6. of Appendix FM of the Immigration Rules applies. It is not accepted that you meet the requirements of S-LTR in paragraph R-LTRP.1.1.(d)(i) for the following reasons. Paragraph S-LTR.1.6. States that an applicant will normally be refused if "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not

fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

19. The Judge was aware of the appellant's offence, recording at [50 (vii)] that the appellant has a serious criminal conviction for a sexual offence committed in the UK for which she received a suspended prison sentence. In his application form the appellant claimed he had been convicted of an offence against a person for which he received 100 hours community service. The Certificate of Conviction or Finding issued by the Chester Crown Court, pursuant to section 92 of the Sexual Offences Act 2003, shows the offence for which the appellant was convicted was Sexual Assault on a Female – no penetration, for which he received 12 months imprisonment suspended for two years and 100 hours of unpaid work.
20. Although it is now argued the conviction would lead to the refusal of an application on the suitability grounds, in the skeleton argument before the First-tier Tribunal the opposite was argued.
21. The submission in relation to the suitability issue demonstrates that this is not a case in which if the appellant was returned to Pakistan to make an application it was certain that he would be granted leave to enter and reside in the UK lawfully. In Agyarko [2017] UKSC 10, Lord Reed said that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal, and that point was illustrated by Chickwamba. I find on the fact it cannot be said that this is such a case.
22. The application was made for leave on human rights grounds which was refused and is the subject of this appeal. If an application is made under the immigration rules and refused the right of appeal will be on human rights grounds in relation to which all the circumstances appertaining at that time will be taken into account.
23. The Judge was clearly aware of the conviction which was factored into the proportionality exercise as the Judge was required to do. In any application consideration will be given to whether the appellant's conviction prevents him from succeeding with an application under the Immigration Rules and if, as a result of his deliberate criminal activities it does, that in itself does not support the claim that the overall decision is not proportionate.
24. Mr Ahmed was asked during the course of the hearing about whether, even if the appellant fell foul of the suitability requirements under the Immigration Rules, he could make an Article 8 application outside Rules. No satisfactory argument was put forward as to why such an application could not be made. In that the Entry Clearance Officer will consider all relevant factors in determining whether the appellant's continued exclusion from the UK was proportionate to any interference in a protected right. Any application will be determined in accordance with its merits and application of the law. If the facts warrant exclusion for justified reasons that cannot, in itself, establish that the Judges decision on proportionality was not within the range of findings reasonably open to the Judge.
25. The Judge considered the issues of finance and accommodation and noted within the determination the issue of the poor quality of the evidence provided in support of the appellant's appeal.
26. The Judge noted at [50 (iv)] that the evidence did not establish that the appellant could be adequately supported and accommodated in the UK in accordance with the Immigration Rules, that there was inadequate evidence of the appellant's wife's claimed income and expenditure, which is relevant to the

assessment pursuant to section 117 B of the Nationality, Immigration Assignment Act 2002.

27. In relation to the general principle of expecting the appellant return to apply for entry clearance, although reference in submissions was made the case of Chikwamba [2008] UKHL 40 I find no merit in the argument the Judge failed to consider all the evidence adequately, including the issue of the existence of insurmountable obstacles. Even though there was no challenge to the appellant's wife's refugee status and it was known that she is a national Pakistan, the Judge gives adequate reasons for the conclusions in relation to insurmountable obstacles and ability of the appellant and his wife to continue their family life in Pakistan, or the proportionality of the appellant returning to Pakistan to make an application to re-enter lawfully even if the appellant's wife remains in the UK.

28. I find having reviewed the matter that the appellant has not establish legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter. Disagreement with the findings made or desire for a more favourable outcome is not sufficient.

Notice of Decision

29. The First-tier Tribunal Judge has not been shown to have materially erred in law. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 June 2023