



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000523

First-tier Tribunal No: HU/53840/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21st September

2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MUHAMMAD SHOAIB ALVI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Lay of Counsel, instructed on behalf of Abbott Solicitors

For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 11 September 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Broe promulgated on 8 February 2023 (dated 1 February 2023) in which the Appellant's appeal against the decision to refuse his human rights claim dated 20 June 2022 was dismissed.
3. The Appellant is a national of Pakistan, born on 1 April 1970, who first arrived in the United Kingdom with entry clearance as a student on 1 March 2004 and leave to remain as such to 19 February 2005. The Appellant's leave to remain as a student was extended on a number of occasions to 30 June 2009, thereafter a

further application for leave to remain as a Tier 4 (General) Student was refused on 2 August 2010. The Appellant remained in the United Kingdom without leave until a human rights application was granted on 13 May 2019 on the basis of his relationship with his two British citizen daughters, with leave to remain as such to 13 November 2021 and which continues pursuant to section 3C of the Immigration Act 1971. On 11 November 2021 the Appellant sought leave to remain under Appendix FM on the basis of his relationship with his partner, Tamseen Abdul and it is the refusal of that application on 20 June 2022 which is the subject of this appeal.

4. The Respondent refused the application the basis that the Appellant did not meet the definition of 'partner' in Appendix FM to the Immigration Rules as he had not been in a relationship akin to marriage and cohabiting for a period of two years. It was accepted that all of the other requirements of the Immigration Rules were met. The application was also refused under paragraph 276ADE of the Immigration Rules as the Appellant did not meet the requirements therein, in particular there were no very significant obstacles to his reintegration in Pakistan. The Respondent considered the Appellant's two children from a previous relationship, but there was little information about them available such that no exceptional circumstances were found to warrant a grant of leave to remain.
5. Judge Broe dismissed the appeal in a decision promulgated on 8 February 2023 on all grounds. In summary, it was accepted by both parties at the hearing that the Appellant could not meet the requirements of the Immigration Rules as the Appellant had not cohabited with his partner for the required time at the date of application, however the Judge in any event went on to consider whether paragraph EX.1 of Appendix FM could met. It was found that it could not as there were no insurmountable obstacles to family life continuing outside of the United Kingdom. The Appellant for similar reasons did not face very significant obstacles to reintegration in Pakistan. Overall it was found that the refusal was not a disproportionate interference with the Appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights, in particular as he had remained in the United Kingdom for a number of years without leave to remain.

The appeal

6. The Appellant appeals on four grounds as follows. First, that the First-tier Tribunal materially erred in law in failing to consider that as at the date of hearing, the Appellant had cohabited with his partner for just short of three years and therefore met the substance of the requirements in Appendix FM as at the date of hearing. No weight was given to this factor in the proportionality assessment, nor that any application for entry clearance would succeed. Secondly, that the First-tier Tribunal materially erred in law in its application of section 117B of the Nationality, Immigration and Asylum Act 2002 by failing to give weight to the Appellant's relationship which commenced whilst in the United Kingdom lawfully. Thirdly, that the First-tier Tribunal's approach to the principle in *Chikwamba* as set out in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) was irrational given that the Appellant's historic overstaying, after which he had been granted leave to remain on the basis of his relationship with two British citizen children could not be sufficient for it to be proportionate for the Appellant to return to Pakistan and apply from there. Finally, that the First-tier Tribunal materially erred in law in failing to consider all of the relevant factors cumulatively in the proportionality assessment.

7. At the oral hearing, on behalf of the Respondent, Mr Basra accepted that the First-tier Tribunal erred in law on the second ground of appeal by failing to attach weight to the Appellant's relationship when considering the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 given that the Appellant had leave to remain when his relationship commenced. When asked as to whether there was any issue with the period of cohabitation being sufficient to meet the definition of partner as at the date of hearing before the First-tier Tribunal, or as to satisfaction of the requirements of Appendix FM as at the date of this hearing, Mr Basra indicated that there was no need for any further updated evidence and it was accepted that the requirements of the rules were met, including the definition of partner as there was sufficient evidence of cohabitation for over two years. Mr Basra further indicated that the appeal could therefore be remade on this basis and allowed as the substance of the Immigration Rules were met.

Findings and reasons

8. As appropriately accepted by the parties, the First-tier Tribunal erred in law on the first and second grounds of appeal, namely that there was a failure to consider whether or not the Appellant met the substantive requirements of Appendix FM of the Immigration Rules as at the date of hearing (the relevant date in a human rights appeal) and a failure to consider in the proportionality balancing exercise that the Appellant's relationship began at a time when he was in the United Kingdom lawfully such that it was not subject to only little weight being given to it under section 117B(5) of the Nationality, Immigration and Asylum Act 2002. These both feed in to the final ground of appeal as to consideration of all relevant factors cumulatively.
9. The First-tier Tribunal gave no consideration as to whether the Immigration Rules were met at the date of hearing, seemingly accepting what the Appellant said at the hearing that his relationship was not one that satisfied the requirements of the Rules without reference to the detail in his Skeleton Argument which accepted this only as at the date of application and went on to detail how the partner definition was met not only at the date of decision, but also at the date of hearing. Having not considered this point, it is unclear as to why the First-tier Tribunal went on to consider whether paragraph EX.1 of Appendix FM was met as it could not have been in any event unless it was accepted that the definition of partner had been met.
10. The final consideration of the proportionality balancing exercise then appears only to have been conducted on an erroneous basis in relation solely to the principle in *Chikwamba* and by reference to the case of *Younas*. Neither of which were relevant on the facts of this case, as is clear in *Alam v Secretary of State for the Home Department* [2023] EWCA Civ 30, the principle in *Chikwamba* is only potentially relevant in an appeal where an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance. That is not the reason for refusal in the present case, which was on the basis that the substance of the rules were not met. In any case, there would be required a full Article 8 assessment, with a balancing exercise of the public interest (including but not limited to the Appellant's immigration history) against the Appellant's private and family life. The latter was not considered at all.

11. The First-tier Tribunal approached this appeal on the wrong basis throughout and missing the vital first step of considering the Appellant's case that he did in fact meet the requirements of Appendix FM of the Immigration Rules which if accepted, would effectively resolve the appeal in his favour in accordance with TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109 in that there is no public interest in removing an individual who meets the requirements of the Immigration Rules for a grant of leave to remain. For all of these reasons, the First-tier Tribunal decision must be set aside.
12. Given that the Respondent accepts that as at the date of hearing (before the First-tier Tribunal and without further evidence as at the date of hearing in the Upper Tribunal being required) the Appellant meets the requirements of Appendix FM for a grant of leave to remain, his appeal is allowed on human rights on the basis that his removal in these circumstances would be disproportionate.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeal is remade as follows:
The appeal is allowed on human rights grounds.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11th September 2023