IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002477

First-tier Tribunal No: HU/54397/2023
LH/06533/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 September 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
UPPER TRIBUNAL JUDGE MEAH

Between

Waseem Meer
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for Home Department

Respondent

Representation:
For the Appellant: Ms B Jones, Counsel, instructed by Irvine Thanvi Natas Solicitors
For the Respondent: Ms S Cunha, Senior Presenting Officer

Heard at Field House on 9 August 2024

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge B Hughes promulgated on 24 April 2024 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 21 March 2023 refusing his human rights claim. That decision was made in response to the Appellant's application to remain as the spouse of Karen Aguirre ("the Sponsor"), a Spanish national who was granted Indefinite Leave to Remain ("ILR") in the United Kingdom under the EU Settlement Scheme ("EUSS") on 28 November 2019.

2. The Appellant is a national of Pakistan. He entered the UK as a Tier 4 (General) Student with leave granted from 04 October 2013 to 07 February 2017. He applied for an EEA Residence Card as a Non EEA National Spouse/Civil Partner on

03 June 2014. This was refused on 11 August 2014. An appeal against this decision was lodged on 08 September 2014, and dismissed on 17 September 2015. The Appellant then applied for an EEA Residence Card on the same basis on 31 December 2015. This application was refused on 16 June 2016. An appeal against this decision was dismissed on 25 August 2016. The Appellant applied for an EEA Residence Card on the same basis again on 23 December 2016. This was also refused on 17 July 2018, and an appeal against that decision was dismissed on 14 March 2019, although by this time the Appellant had been served with notice as an overstayer on 16 August 2017. On 26 June 2021 the Appellant applied for permission to remain under the EUSS as a Non-EU national spouse of the Sponsor. This was refused on 22 October 2021, and an appeal against that decision was dismissed on 22 February 2023. He made the human rights application, to which this appeal relates, on 09 February 2023.

3. The Appellant has been an overstayer since August 2017. He sought to remain based on his marriage to the Sponsor. He married her under Islamic law on 02 April 2021 and in a civil ceremony on 25 November 2021.

4. The Respondent has not disputed the genuineness of the relationship and marriage. 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 under E-LTRP.2.1 - E-LTRP.2.2, unless in the alternative he satisfies paragraph EX.1.(b). of Appendix FM to the Rules ("Paragraph EX.1."). 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. The Judge dismissed the appeal, finding against the Appellant both under the Rules and outside them.

The Grounds

5. The grounds raised challenging the Decision are in summary as follows:

> Ground 1: the Judge failed to give adequate reasons when applying the test in Paragraph EX.1.
>
> Ground 2: the Judge failed to address the submissions made in the skeleton argument on how much weight should be given to the public interest in requiring the Appellant to return to Pakistan to apply for entry clearance in light of the submissions that the Appellant had not practised deception on his arrival in the UK and why the weight attributed to effective immigration control outweighed the family life between the Appellant and the Sponsor in the circumstances of his particular case.
>
> Ground 3: The Judge misdirected himself in law and/or failed to give adequate reasons, in [31] of the decision, for holding that the issue of whether the Appellant had been a party to a marriage of convenience, as previously found in 2015, was a "new matter" within the meaning of s85 of the Nationality, Immigration and Asylum Act 2002.

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

> "… The grounds aver that inadequate reasons were given at [34] for the finding that there were no insurmountable obstacles for the purposes of

> EX1 (b). In particular there are insufficient reasons as to what level of discrimination would be required for very serious hardship and there was a failure to properly consider the evidence on employment prospects. It is said that there are insufficient reasons as to the proportionality of a temporary separation and why immigration control outweighed other matters (see 37). Finally it is said there were inadequate reasons for holding that the marriage of convenience issues constituted a "new matter (see [31]).
>
> It is arguable that the judge erred in considering the marriage of convenience issue as a new matter because the judge failed to consider the question of whether it could raise or establish a ground of appeal. It seems to me that it is arguable that it would not and that is sufficient for the purposes of a permission application. It is arguable in respect of insurmountable obstacles that insufficient consideration was given to an argument developed at para 16 of the skeleton argument that the Appellant still less his wife would have a prospect of finding employment. While it is not arguable in my view that insufficient reasons were given on the proportionality outcome generally, arguably there are insufficient reasons as to why in these particular circumstances a temporary separation would not be unjustifiably harsh…"

Discussion and Conclusions

7. We had before us 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 Ms Jones and Ms Cunha, we indicated that we would set aside the First-tier decision owing to material errors of law in Judge Hughes' decision and remit the matter to the First-tier to be decided de-novo for the following reasons.

8. Ground 1, EX.1 (b), Insurmountable Obstacles – It was argued on behalf of the Appellant before the First-tier Judge that the Sponsor would face discrimination in Pakistan both as a woman and as a non-Muslim which would affect her right to equal treatment. Background country information placed before the Judge noted that it was unlikely that the Appellant, and even more so the Sponsor, would obtain employment in Pakistan in light of the prevailing circumstances there. The Judge's findings on this issue are contained at [32]-[34] as follows:

> "32. I do not find that there would be insurmountable obstacles to family life continuing in Pakistan. I am not persuaded that the Appellant would face very significant obstacles to integration upon his return to Pakistan. He speaks Urdu, had lived in that country for the first 20 years of his life and still has two siblings living in Pakistan. I accept that it may be difficult for him to reach his sibling in Kashmir, but those siblings remain in the country and should be able to provide a degree of support. I also find it likely that the Appellant will have a wider network of relatives who may be able to provide some support for him upon return.
>
> 33. It would be difficult for the Appellant's wife to leave her friends and employment behind and move not only to another country, but to a different culture where she would find it difficult to adapt to the different expectations that are made of women in Pakistan. I accept that she would find it uncomfortable, and the evidence before me shows that she would face a degree of discrimination but I do not

> consider that this would reach the high bar of constituting very serious hardship.
>
> 34. The Appellant and his wife would have each other for support, and the support of his extended family. The Appellant should be able to obtain employment and add to the livelihood of his family and also support his wife. None of the matters referred to above, even taken together, constitute insurmountable obstacles…"

9. It was not in dispute that the Sponsor has never been to Pakistan and that her only connection to Pakistan is through the Appellant. Relying on the Respondent's policy entitled "Family Policy, 'Family life (as a partner or parent) and exceptional circumstances" , v19.0, of 15 May 2023, and relevant country background material, the Appellant's skeleton argument detailed at [11]-[17] that the Appellant's and Sponsor's relocation to Pakistan would entail very serious hardship amounting to insurmountable obstacles. This was owing to discriminatory treatment of women and non-Muslims in Pakistan, the economic and political crisis there, that female labour participation is one of the lowest in the world which is concentrated in the informal economy, making it in combination with the systemic discrimination against women, further unlikely that the Sponsor would be able to find work in Pakistan.

10. There is a paucity of reasoning in the Judge's findings, especially given that the definition in paragraph EX.2.(b) refers to "the very significant difficulties which would be faced by the *applicant* or *their partner* in continuing their family life together outside the UK and *which could not be overcome* or would entail very serious hardship for the *applicant* or *their partner*" (our emphasis). Inadequate reasons were given as to why or how the multifarious difficulties which may be faced by the Sponsor as a woman, who is also a non-Muslim, that were put before the Judge, could be overcome in Pakistan. The Judge's assertions that the Sponsor would find it "uncomfortable" and would suffer a "degree of discrimination" lacks reasoning and he fails to underpin the extent of any impact of such treatment in the round with the other salient factors put to him on the overall obstacles the Appellant and the Sponsor would face, and whether these, when taken together cumulatively were capable to amounting to insurmountable obstacles; **R (Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11**.

11. Ground 2 – Proportionality and public interest - The complaint here was that the Judge failed to address the submissions made at [18]-[29] of the skeleton argument that to require the Appellant to return to Pakistan for a temporary period to apply for entry clearance would be disproportionate under Article 8 ECHR, in applying the guidance in **Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC)** as confirmed in **Alam v SSHD [2023] EWCA Civ 30**. The argument here was on the so-called "**Chikwamba"** principle derived from **Chikwamba v SSHD [2008] UKHL 40**. The Judge's findings on Article 8 ECHR and s.117B Nationality, Immigration and Asylum Act 2002 is at [35]-[37] of the Decision.

12. The thrust of the Appellant's submissions before the First-Tier Tribunal on this point was that his was a case that would inevitably succeed in an application for entry clearance under the Partner Route if he returned to Pakistan to make an application from there.

13. That being so, there was no public interest in his removal. The appeal should have been allowed. It was an error for the Judge not to determine those submissions. There were insufficient features in the Appellant's case to make it in the public interest to require him to return to Pakistan to apply from there. There was nothing in the Respondent's decision that suggested that such an application would not succeed, as the Appellant was able to show that he met all the other substantive requirements of the Rules other than the immigration status requirements, and not having been refused under any of the Suitability Requirements of the Rules, the Respondent was now prevented from relying on any adverse or suitability factors in a future application for entry clearance, thereby rendering the Appellant's prospective success in such an application to be a virtual certainty. The Judge stated in his decision at [37] that:

> "37. In this context, I also take into account that the Appellant can reasonably to be expected to return to Pakistan and, if he so chooses, to make an entry clearance application as a spouse from there, it having been established in evidence that his wife has been working and there is therefore a reasonable prospect that she would be able to meet the minimum income threshold. Temporary separation for that purpose would not be a disproportionate outcome weighed against the importance of effective maintenance of the system of immigration control. I note the argument from Ms Moffat that this would result in a separation of six months, perhaps as long as nine months, but I do not consider that to be unreasonably long in the context of the need to maintain effective immigration controls.."

14. At the hearing before us Ms Jones reiterated the absence of the Judge's consideration of the arguments in the skeleton argument pertaining to the "**Chikwamba"** principle as was settled in ground 2 of the permission application. Ms Cunha submitted that there was no error in the Judge's approach in the light of **Alam v Secretary of State [2023] EWCA Civ 30** and **Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC)**, and that in both **Younas** and **Alam**, there was no general presumption that the public interest does not require removal where the Appellant meets all of the requirements under the Rules save for immigration status, and a broader more holistic evaluation of competing public interests was still required in the overall balancing exercise to be carried out under any assessment of Article 8 ECHR and section 117B.

15. In terms of Article 8 ECHR, the case law in relation to **Chikwamba** has clearly developed in the light of **Younas** and later by the Court of Appeal decision in **Alam**. In **Alam**, the Court of Appeal held that the prospective ability of an Appellant to succeed in an application for entry clearance is only relevant to the public interest assessment where the application "was refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance". The following is stated at para 6, i-iii of **Alam**:

> "*For the reasons given in this judgment, I have reached five conclusions. Three are matters of general principle. The others concern the present appeals*.
>
> *i.* ***The decision in Chikwamba is only potentially relevant on an appeal when 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***. (our emphasis).
>
> *ii. Even in such a case, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and they may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance.*
>
> *iii. A fortiori, if the application is not refused on that procedural ground, a full analysis of all the features of the article 8 claim is always necessary….."*

16. We shared with the parties our preliminary observations that this Appellant's application was one that was refused on the narrow ground that he was without immigration status, and that no Suitability Grounds had been applied against him, so his case was one of those envisaged in [6-i] of **Alam**. The argument in the skeleton was also advanced on the same premise. To this extent, it was therefore necessary for the Judge to engage with the submissions in the skeleton argument at [18]-[29], to state why in his assessment, given that the Appellant's case was one that was refused solely on the narrow procedural ground, that the public interest required him to return to Pakistan to make an entry clearance application to return. By not identifying any other factors telling against the Article 8 ECHR claim, and by omitting to provide a more fuller analysis under this heading (**Alam** 6-ii), he fell into error.

17. Ground 3 – Failure to give adequate reasons for holding whether the Appellant had been a party to a marriage of convenience, as was previously found in 2015, and whether this was to be treated as a 'New Matter' – Our preliminary observations to the parties was that this ground was misconceived in that the finding made in the most recent of the Appellant's three previously dismissed appeals, and in particular the allegation about his former marriage being one of convenience, was to do with a refusal of an application for an EEA Residence Card under the Immigration (European Economic Area) Regulations 2016. In contrast, this appeal is against a decision to refuse a human rights application based on marriage to a settled person with ILR, where the respondent has not taken the marriage of convenience point against him either in the original refusal decision, or at any point after the refusal during the course of the appeal, hence it was, as things stood, of little relevance.

18. After some discussion, Ms Jones sought to clarify the rationale behind the attempt by the Appellant to raise the previous finding of a marriage of convenience in this appeal was to 'clear his name' in relation to this allegation which he continues to refute. This was so that this particular finding would not weigh against him in any wider Article 8 ECHR proportionality assessment in this appeal, in the light of the evaluation to be carried out as envisaged in **Alam** at [6-ii], even if, and in the instance that the Judge had accepted the submissions on the refusal being on narrow procedural/immigration status grounds, which might then have led to a fuller analysis of the Article 8 ECHR claim, albeit with the "**Chikwamba**" principle in mind. Clearly, the Judge did not undertake such an assessment and he made no mention in his decision of either **Chikwamba**, **Younas** or indeed **Alam**.

19. Ground 3 is not therefore made out, as there is otherwise no basis in law for the Judge to have treated an attempt to relitigate an unrelated matter that had arisen

in a previous appeal, to be raised under the guise of a 'New Matter' in the present appeal, so that the Appellant could use it a conduit to 'clear his name'. This, or indeed any other matter could only be raised to the limited extent, as accepted by Ms Jones at the hearing, with matters arising from any of the Appellant's three previous appeal decisions through trite principles in **Devaseelan 2002 UKIAT 00702**, only insofar as they might be relevant to any of the issues in contention in the latest extant appeal. We accept, however, following Ms Jones' clarification, that the only relevance of the allegation of marriage of convenience was likely to be a feature in any wider proportionality assessment, including under 6-ii of **Alam**, had the Judge embarked on such an analysis, which he did not. However, the way in which this ground was raised and the manner in which the attempt was made to argue it as a 'New Matter' simply confused the issue.

Remaking the decision

20. We therefore set aside the decision of the Judge.

21. We are satisfied that the making of the decision by the Judge is vitiated by material errors on a point of law on grounds one and two which are made out. Firstly, although the Judge did address some elements of the Appellant's case that was put before him, he omitted to conduct an holistic analysis of the evidence and/or provide adequate reasons as to why the Sponsor would not face very serious hardship that could be tantamount to insurmountable obstacles. This included the Sponsor, as a consequence of being a female who, as a non-Muslim who had never been to Pakistan, was facing the prospect of relocation there. Secondly, there was also a lack of adequate reasoning by the Judge on the concomitant argument on why it was unlikely that the Sponsor would be able to obtain employment in Pakistan as a woman with her characteristics in that country, given the specific country background material that was relied upon in this regard and extensively detailed in the skeleton argument. Thirdly, the Judge also fell in to error by not engaging with the arguments on the point of the "**Chikwamba"** principle, given the specific evidence before him on this which had also been raised in the skeleton argument. This ought to have been considered as relevant by the Judge.

22. Applying **AEB [2022] EWCA Civ 1512** and **Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC)** , we have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement. We consider, however, that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process.

Notice of Decision

23. The decision of the First-tier Tribunal sent to the parties on 24 April 2024 involved the making of a material error of law. It is set aside in its entirety.

24. The appeal is remitted back to the First-tier Tribunal sitting at Hatton Cross to be heard by any judge other than First-tier Tribunal Judge B Hughes.

S Meah
Judge of the Upper Tribunal

Immigration and Asylum Chamber

19 August 2024