Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26838/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 4th April 2016	**On 17 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR SAJJAD ALI SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Muhammad, instructed by International Immigration Advisory Services (Levenshulme)
For the Respondent: Ms Johnstone, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant appeals, with permission granted on a renewed application by Upper Tribunal Judge Canavan, against the decision of First-tier Tribunal Judge J S Law dismissing the appeal under Appendix FM and Paragraph 276ADE.

2. The appellant is a citizen of Pakistan born on 1st January 1962 and entered the UK on 8th February 2007 on a visit visa limited to six months. On 23rd June 2010 the appellant submitted a human rights Article 8 application which was refused on 7th June 2011 with no right of appeal. On 6th June 2011 a Member of Parliament wrote on behalf of the appellant to the Secretary of State and on 4th June 2014 the appellant's human rights application was considered, specifically his application under Article 8 claiming family life with his partner Julie Bannister and that application was refused under Appendix FM and paragraph 276ADE of the Immigration Rules.

3. Between paragraphs 8 to 12 the judge recorded the oral evidence given by the witnesses on behalf of the appellant and at [13] set out the reasons for refusal by the respondent. The appellant did not fall foul of the suitability requirements for the purposes of Appendix FM or Paragraph 276ADE. The judge at paragraphs 19 to 20 set out the submissions made on behalf of the appellant and the respondent.

4. In the application for permission to appeal it was stated that the application was made long before the new Rules came into force but I note that the decision was made on 4th June 2014. Further to **Singh v SSHD [2015] EWCA Civ 74** , it was open to the respondent to make a decision on that basis. There is no error of law in the decision of the judge to consider the matter with reference to Appendix FM and not under the 'old rules'.

5. A second ground of appeal was that the judge's findings were not sufficiently reasoned and this has some merit, particularly when considering the grant of permission to appeal which stated that it was arguable that in finding that the appellant and his partner could continue their family life in Pakistan inadequate consideration was given to the impact that this was likely to have on the appellant's partner, who would be separated from close family members including a minor child in the UK. I return to this ground below.

6. It was also stated that the judge had failed to consider an obvious point of law in relation to whether in the alternative it would be reasonable to expect the appellant to return to Pakistan to apply for entry clearance, **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40.** As the grounds of appeal to the First-tier Tribunal, however, specifically state, the appellant would be ineligible to apply for entry clearance under the new Rules having been unable to satisfy the financial criteria I can find no obvious error in the judge's treatment of the Rules in this regard because the appellant had not fulfilled the requirements of the Rules such that return to make an entry clearance application was merely a formality.

7. With respect to the ground that the findings were not sufficiently reasoned, as I pointed out to Ms Johnstone, the judge made a series of

recorded facts but his reasoning appears to be confined to one paragraph, that at paragraph 25.

8. The appellant has sought to remain on the basis that he has now entered into an Islamic marriage and has been in a relationship with Ms Bannister for some four years. The judge does state at paragraph 22 that the respondent had correctly examined the appellant's claims and found that there was a reason to dismiss the appellant's application under the suitability test but he made no attempt to grapple with the question of whether, further to EX.1, there were insurmountable obstacles to family life with that partner continuing outside the UK.

9. Caselaw has confirmed that it is the degree of difficulty the couple face rather than the 'surmountability' of the obstacle that is the focus of judicial assessment Indeed **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** confirms that insurmountable obstacles do not specifically mean obstacles which are impossible to overcome. Particularly confusing was the judge's decision that the appellant had established no family or private life either under the Immigration Rules or Article 8 to allow him to remain. That, however, may have been inelegant phrasing. Specifically what did not appear to have been considered by the respondent (but that is not surprising as the evidence was not before the respondent when making the decision) was that the partner of the appellant had previously stated to the Home Office that she would return to Pakistan but by the time of the hearing stated that she wished to remain in the United Kingdom where she had been born and brought up and where her children and grandchildren lived. The judge made no specific finding on that.

10. Indeed in the respondent's refusal letter there was no evidence of the partner's child's existence, this it was submitted, was because none of the letters referred to her.

11. The evidence given by the appellant's partner at the hearing before me was that her mother had subsequently passed away and that her daughter continued to live with her father.

12. I am not persuaded that the appellant has shown on the evidence that there are insurmountable obstacles or even very significant difficulties in the appellant's partner relocating to Pakistan. The partner had previously indicated that she was content to remove to Pakistan and I can find nothing which has substantially altered in the appellant or his partner's circumstances.

13. Even if I am incorrect about that and I take into account Section 55 because there is reference to children the appellant's partner's daughter is now 17 but the daughter continues to live with her father and had always lived with her father. Her best interests are such that she remain at school where she is at present and in a stable environment. I can accept that she wished to continue to have contact with her mother but her interests are a primary consideration but not a paramount consideration. There was no

statement from the partner's child expressing concern that her mother and her partner would be leaving.

14. I have also taken into account the evidence that the appellant's partner has been born and brought up in the UK where her children and grandchildren live and that she has lived here all her life and is a British citizen. There is very limited evidence in relation to the grandchildren (although some photographs of younger children) and no doubt they also have their own carers. In her original statement the appellant's partner stated that she would be prepared to relocate to Pakistan but she has now changed her mind. Events have now altered to the effect that sadly her mother has passed away. That, however, will lessen her ties with the United Kingdom. Although a British citizen, the partner made a declaration that she would be prepared to leave the United Kingdom when her daughter was only 14 years old rather than the 17 years she is now and she continued to live apart from the appellant's partner. In other words when she was *younger* the appellant's partner was prepared to leave her. The appellant's partner disclosed no matters of ill health and although I accept that she is currently working I am not persuaded that she would be unable to work in Pakistan albeit that the language and culture is different. She was working previously when she made the statement that she could remove to Pakistan. The appellant himself, however, has five children in Pakistan who are presently deprived of his company.

15. The letter of his friend Mr Faial Aziz added little to the overall case merely confirming that the appellant was a courteous and generous man. This would indicate that the couple would be able to reform friendships abroad.

16. I take into account the appellant's immigration history such that he has continued to stay beyond what he claims was his six month visit visa. I can accept that the appellant and his partner are genuinely in a relationship and that the appellant's partner has limited knowledge of the culture and tradition in Pakistan although she has lived with the appellant for some years. I note she would find it difficult having had a extended family in the UK but this does not preclude her from making visits back to the United Kingdom. Although there are security issues in Pakistan her husband has lived there for many years and can speak the language and there are many many people who live there as do the appellant's five children. There is not a requirement that the partner should remove herself from the UK, merely that that is an option for her. She has been aware of the appellant's status since the onset of their relationship and as the daughter of the appellant matures I find it less of a significant obstacle as they can visit each other and keep in contact by modern methods.

17. I have taken into account Section 117 of the Nationality Immigration and Asylum Act 2002 and note that the appellant is not a financial burden on the community as his wife works. I accept that he must be able to speak some English and therefore could integrate into the community. I am

enjoined by Section 117 to place little weight on the relationship, which has been established and developed whilst the appellant has a precarious immigration status. There was no evidence that he had developed a parental relationship for the purposes of Section 117 with his partner's child.

18. The appellant was said to have diabetes. There was no indication that the appellant's health would be a barrier to his removal to Pakistan or evidence produced that his condition was significant or that healthcare was not available in Pakistan.

19. As the judge found at paragraph 17, which I preserve, the appellant was invited to substantiate his claim that he could not return to Pakistan because his relatives had stolen his property, kidnapped and ill treated his children and he would have to face the same on return, but no communication had been made by the appellant with regard to this aspect of claim in relation to Article 3. He was thus not accepted that he could not return because he would face threats from his relatives. The appellant had failed to register an asylum claim and no further element would be considered in relation to that. I am not persuaded that there are any relevant 'protection' grounds such that the appellant, and thus his partner, would be at risk on return.

20. I am not persuaded that the appellant has lost ties with Pakistan where he has family and contacts and that his establishment of a new relationship would prevent the development of those contacts. In essence, I find that the appellant can return to Pakistan and there are no significant obstacles to his partner returning with him. In this day of texting, skype and air travel the partner does not have to sever her connections with her family. She would be removing to Pakistan but will be removing with her husband who has worked in Pakistan, knows the language and has his own family there and who can support her should she wish.

21. Overall, I find that there are no compelling reasons as to why this matter should be considered outside the Immigration Rules and the appellant has failed to show he can comply with Appendix FM or Paragraph 276ADE. Even if that were not the case, and the matter fell for consideration on human rights grounds outside the Immigration Rules, because there were factors, such as the partner's change of heart I am not persuaded that the decision is disproportionate when considering the evidence overall. I bear in mind the immigration status of the appellant: he entered as a visitor and has overstayed since 2007 and at no time has had anything other than precarious status. He did not attempt to regularise his position until some three years later in 2010. The couple forged their relationship in the full knowledge that the appellant had not right to remain in the United Kingdom.

22. I have also taken into account the factor raised in respect of delay. The appellant was told in June 2011 that his claim was rejected on human

rights grounds following the forging of his relationship with his partner in 2010. I can accept that there has been some delay since his MP wrote to the Home Office requesting reconsideration but bearing in mind his application had previously been refused, that the circumstances have appeared to have changed little and the number of applications that the Secretary of State must deal with, I am not persuaded that the delay has shown to be the result of a dysfunctional system or that weight accorded to the respondent's position should be reduced. Further to **Huang v SSHD [2007] UKHL 11,** I find that the decision is proportionate.

23. I set aside the decision of First-tier Tribunal Judge Law for lack of reasoning and substantiate the decision herein which also dismisses the appellant's appeal.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007

The appellant's appeal is dismissed under the Immigration Rules and on Human Rights grounds.

Signed Date 9th May 2016

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 9th May 2016

Deputy Upper Tribunal Judge Rimington