IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005223

First-tier Tribunal No: HU/03672/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of February 2025

Before

UPPER TRIBUNAL JUDGE NEVILLE
DEPUTY UPPER TRIBUNAL JUDGE SEELHOFF

Between

WASAL HAMEED KAYANI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Shaw, Counsel instructed by Legal Rights Partnership
For the Respondent: Mr Ojo, Senior Home Office Presenting Officer

Heard at Field House on 28 January 2025

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge J P Howard ("the Judge"), promulgated on 14 July 2024. By that decision the Judge dismissed the Respondent's appeal against the refusal of the Appellant's Human Rights claim.

Factual Background

2. The Appellant is a national of Pakistan who came to the UK as a student in 2010. Although he extended his leave, it was subsequently curtailed and ended on the 19th May 2013 and he has not had leave since.

3. The Appellant's wife is Bulgarian and came to the UK with her two children in 2019 and met the Appellant in June 2020. The couple were unable to marry until May 2021 and the Appellant was unable to secure leave under the EUSS scheme.

The Appellant therefore applied for leave to remain on the 25th July 2023 and it was refused on the 27th October 2023.

Proceedings in the First-tier Tribunal

4. The Judge accepted that the Appellant's relationship was genuine but it was held that the Appellant did not meet the requirements of Appendix FM as there would not be insurmountable obstacles to family life continuing in Pakistan. The judge also held that any interference in family life was proportionate.

5. The Appellant applied for permission to appeal to the First-tier Tribunal which was refused.

6. The Application was renewed to the Upper Tribunal. The grounds can be summarised as being;

1. That the Judge erred in his application of EX.1 of Appendix FM by failing to take into account relevant considerations, using an incorrect form of words and by considering the possibility of the Appellant making entry clearance applications as being relevant to whether there were unsurmountable obstacles to family life continuing in Pakistan.
2. A general challenge as to whether the Judge had considered "exceptional circumstances" and Gen 3.2 of Appendix FM properly.
3. That the judge failed to consider relevant factors when considering article 8 outside the rules.

7. Permission was granted by Upper Tribunal Judge Ruddick on the first and third of the three grounds pleaded although in respect of ground 1 it was noted that the main strength of the application was in the consideration of the "entry clearance" option at [52] when addressing insurmountable obstacles to family life continuing in Pakistan.

Upper Tribunal hearing

8. Ms Shaw properly conceded in respect of ground 1 that errors alleged to have been made in paragraph 41 by referring to "very significant difficulties" in family life continuing as opposed to "insurmountable obstacles" were not arguable but then addressed us further on those aspects of the grounds she relied on.

9. Mr Ojo then responded to the grounds and invited us to uphold the decision.

10. At the end of the hearing we indicated that we would allow the appeal although our decision was reserved and invited submissions as to how to dispose of the appeal.

Decision

Ground 1

11. It was common ground that the relationship between the couple was genuine and subsisting, that the financial requirement of the rules was met and the language requirement. Because the Appellant was an overstayer he did not meet the eligibility provisions in Appendix FM. EX.1 of Appendix FM in effect means that the requirement to be in the UK lawfully does not apply where the conditions in that paragraph are met.

12. At the time of the underlying application EX.1 (b) of Appendix FM stated;

> "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with protection status, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK."

13. On a plain reading EX.1 requires judges to focus on the obstacles to family life continuing outside the UK, and not to whether there are possibilities of returning to the UK in the future, or of choosing to live apart.

14. At [52] when considering EX.1 the Judge records;

> "It will be for the sponsor to chose whether she decides to travel to Pakistan with the appellant or continue her relationship at distance by modern means of communication. The appellant will also have the option once back in Pakistan, to make an entry clearance application to rejoin the sponsor in the United Kingdom." (sic)

15. Further the judge held [53];

> "I take account of the fact that the sponsor is currently on a EUSS Pre-Settled status in the United Kingdom valid until September 2025 and that should she leave the United Kingdom, she may lose her right to apply for settled status in the future. However, whilst it may be considered harsh the choices that the sponsor and appellant will have to make, considering the evidence in the round, to the balance of probabilities standard, I nevertheless do not find that there will unjustifiably harsh consequences for the appellant and his family."(sic)

16. The Judge concluded immediately after those paragraphs [54];

> "I am not satisfied that there are very significant difficulties which would be faced by the appellant or her partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the appellant or her partner."(sic)

17. On a plain reading of the series of paragraphs set out above the Judge treated the opportunity for the Appellant to make an application for entry clearance as being relevant to the question of whether there would be insurmountable obstacles to family life continuing in Pakistan which requires a focus only on the consequences of living in Pakistan and not of whether there are long term alternatives to that. The error is compounded by talking about this as "harsh" choices for the Appellant and Sponsor and not recognising that the option to choose was not relevant to the decision as to whether the requirements of EX.1 (b) are met which needed to focus on examining how they would live outside the UK.

18. The error is made more significant because whilst the Judge clearly found that the Appellant did not have family life with his wife's adult children [44], he did not consider the question of whether or not the Sponsor continued to have family life with her children or recognise the impact the decision could have on that family life when he was required to consider the family life rights holistically. There was evidence before the Judge in the Sponsor's statement and those of the children that both were pursuing degrees at a local university and could only afford to do so because they were living with the Appellant and their mother and because their mother was paying the rent and subsidising their expenses. The question of whether there was family life between the Sponsor and her children in

accordance with the principles in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 was therefore clearly one which needed to be determined by the judge and taken into account when considering whether there were insurmountable obstacles to the family life of this family unit continuing outside the UK.

19. In reaching this decision we noted Mr Ojo's submissions that the Judge had clearly identified that the children were adults, but it is well established that the fact that children are adults does not necessarily mean that they do not have family life with a parent especially in this case where they are said to live with and be financially dependent on their mother who is their sole living parent. We have considered his reference to the principles in Volpi v Volpi [2022] EWCA Civ 464 at [2] but are satisfied that this is not a case of interfering with findings, but rather one in which key findings have simply not been made.

20. For the reasons given above we conclude that the judge materially erred in law as asserted in ground 1.

Ground 3

21. To a degree ground 3 overlaps with ground 1 in that the same concerns about the failure to take into account relevant factors in respect of the article 8 rights are repeated in the context of the alleged failure to take into account relevant factors when considering article 8 outside the rules.

22. The grounds again highlight the failure to consider the Sponsor's discrete family life with her children. The judge has not referenced this when conducting a balance sheet analysis of article 8 [66-74]. Having found that this was a material error in respect of ground 1, we are satisfied that it is an error in respect of ground 3.

23. The grounds also note a failure to take into account the fact that the Sponsor could not meet the new financial requirements of the rules and that entry clearance was not an option open to the couple contrary to the judge's findings [70]. This is a factor we would have expected to have been identified although weight would have been for the judge.

24. Whilst we are not satisfied that other factors identified in paragraph 15 of the grounds necessarily weighed in favour of allowing the appeal, the failure to properly evaluate the family life is sufficiently serious for us to conclude that the evaluation of article 8 rights as a whole is unsound and that there is a material error of law in the approach.

Disposal

25. We have consider paragraph 7.2 (b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal and the principles in Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC). We are of the view, supported by the submissions of Ms Shaw, that the nature and extent of the factfinding required in respect of the family life between the Sponsor and her children is such that remittal for a de novo hearing is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors on a point of law and is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Birmingham, to be remade afresh and heard by any judge other than Judge J P Howard.

A Seelhoff

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber