Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24893/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 June 2017	**On 30 June 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZOHAIB IQBAL

Respondent

Representation:

For the Appellant: Ms A. Holmes, Senior Home Office Presenting Officer
For the Respondent: Mr O. Sobowale, Counsel instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Pakistan born in 1984. He arrived in the UK illegally in March 2000 and has never had any lawful basis of stay. An application for leave to remain on Article 8 grounds was refused by the respondent in a decision dated 24 June 2015.

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3. His appeal came before First-tier Tribunal Judge Farmer ("the FtJ") on 18 October 2016 following which he allowed the appeal with reference to the Article 8 Immigration Rules. The respondent's grounds of appeal upon which permission to appeal against his decision was granted, contend that the FtJ was wrong to have concluded that the appellant met the requirements of the Rules in terms of his relationship with a partner in the UK because their relationship was not one that met the requirements of the Rules. It is further contended that the FtJ was wrong to deal with the appeal with reference to paragraph EX.1 of the Rules and further, in so doing, failed to assess the issue of insurmountable obstacles to family life continuing in Pakistan with reference to relevant authority.

4. In his decision the FtJ summarised the appellant's case for leave to remain on Article 8 grounds as follows. The appellant had been in a relationship with his current partner, [FM], a British citizen, since 2011. They underwent an Islamic marriage in July 2015, which was "celebrated" in December 2015.

5. The only family that the appellant has in Pakistan is his mother, his father having died when the appellant was young. He has no siblings. [FM] had been in the UK since she was 13 years of age. They come from different areas of Pakistan which the appellant asserted would present linguistic difficulties for one or other of them if returned. [FM] has suffered two miscarriages. She has type 2 diabetes which makes her more prone to miscarry.

6. The appellant asserted that he had strong ties in the community through his volunteer work in a mosque and the mosque supports him with food and "charitable donations". He also worked in his local church.

7. The FtJ found both the appellant and [FM] credible. At [11] he said as follows:

> "It follows that I accept that they are and have been in a genuine relationship and have been since 2011. They married in July 2015 and have lived together since then. I accept that the photographs produced are of their wedding and their anniversary. I find that they meet the criteria of Paragraph E-LTRP.1.2 of Appendix FM".

8. He then went on to say that he next had to determine whether there would be "very significant difficulties" in their family life continuing abroad under EX.1. Referring to various decisions of the Upper Tribunal and the Court of Appeal, he summarised the position at [15]. He referred to the appellant's contention that he has no home or employment in Pakistan and that his mother lives in different places by relying on friends to accommodate her and by cleaning their houses. He reiterated that the appellant's father had died when the appellant was 2 months old and that he has no siblings. He referred to the appellant having left Pakistan when he was 16 years old and that he had lived in the UK for over half his life, being now 32 years of age. He found that the appellant has no other ties or connections with Pakistan.

9. He then referred to [FM]'s family all being in the UK. She has both parents here and two brothers and two sisters in the UK and has been here herself since the age of 13 and had obtained a good education. She is a type 2 diabetic and is insulin dependent. He referred to the two miscarriages that she had suffered since January 2016. He concluded that although she is still young (22 years of age) it is possible that she will need specialist treatment to be able to carry a child to term. He referred to her intention to find employment as she had previously done. [FM] thought that it would be difficult, if not impossible, for her to find employment in Pakistan.

10. Finally, he said that he accepted their evidence and found that the circumstances they had portrayed amounted to insurmountable obstacles in that they would have no accommodation and no-one to stay with in Pakistan, or anyone who could support them there. The appellant himself had lost all his ties to Pakistan. Whilst the appellant had been in the UK to support [FM], he concluded that she has also benefited enormously from having all her family with her in the UK.

11. In submissions Ms Holmes relied on the grounds which were elaborated on with reference to aspects of the FtJ's decision. It was submitted that the FtJ had failed to appreciate the high threshold for insurmountable obstacles under EX.1. I was referred to various passages in the decision in *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440.

12. Mr Sobowale submitted that there was no error of law on the part of the FtJ, alternatively that any error of law was not material. It was submitted that though the respondent contended that two years is the hallmark of a genuine relationship as partners, that ignored the cultural context. The matter needed to be looked at holistically and it would not have been acceptable for the appellant and [FM] to live together before marriage. Had the appellant had status documentation they would have married. Furthermore, the notion of 'living together' is a broad one.

13. Alternatively, it would still have been open to the FtJ to find in favour of the appellant outside the Article 8 Rules. I was referred to the respondent's guidance entitled Immigration Directorate Instruction, Family Migration: Appendix FM Section 1.0b, relating to family life as a partner or parent and private life, 10-year routes, dated August 2015. That guidance, it was submitted, referred to issues to be taken into account in terms, for example, of language difficulties and cultural barriers. The decision in *Agyarko* was also relied on.

14. It was submitted that the FtJ had applied the test of insurmountable obstacles sensibly and practically. It would be difficult, if not impossible, for [FM] to return to Pakistan. She would be expected to modify her behaviour and would be expected to restrict her life ambitions.

15. Both parties agreed that an assessment outside the Article 8 Rules would need to take into account s.117 of the Nationality, Immigration and

Asylum Act 2002 ("the 2002 Act") in terms, for example, of the precariousness of the appellant's immigration status. However, Mr Sobowale submitted that it was not entirely clear that [FM] was fully aware of the appellant's immigration status when they entered into their relationship.

Conclusions

16. I am satisfied that the FtJ erred in law in his conclusion that the appellant met the requirements of the Article 8 Rules. His analysis at [11] which I have set out does not reveal that the Rules are met.

17. The position can be summarised relatively simply. In order to qualify for limited leave to remain as a partner under section E-LTRP, all the requirements of E-LTRP.1.2 to 4.2 must be met. These include under E-LTRP.1.8 that if the applicant and partner are married or in a civil partnership it must be a "valid marriage" or civil partnership. The appellant and [FM]'s marriage is not a marriage that is valid in English law, a fact that is not disputed on behalf of the appellant.

18. Nor is the relationship between the appellant and [FM] one that qualifies under the Rules in terms of [FM] being a "partner". Under GEN.1.2(iv) the appellant would have to establish that they had been living together in a relationship akin to marriage or civil partnership for at least two years prior to the date of application. The Islamic marriage was in July 2015 and even if they started living together then (as opposed to when the marriage was "celebrated" in December 2015) the two year period was not satisfied as at the date of the hearing before the FtJ, still less at the date of the application which is in fact the relevant date.

19. Accordingly, under the Rules they are neither spouses nor partners. That being the case, EX.1 does not arise for consideration, EX.1 being an exception to certain of the eligibility requirements but not with reference to their relationship needing to be a qualifying relationship in terms of there being a marriage, or [FM] being a partner as defined in GEN.1.2. The FtJ was therefore wrong to consider the issue of insurmountable obstacles to family life under EX.1.

20. It was submitted on behalf of the appellant that any error of law on the part of the FtJ in terms of his consideration of the Rules was not material in the light of his factual findings. I do not agree. The fact that the appellant is not able to meet the requirements of the Rules in terms of his relationship not being a 'qualifying' one, as it were, is highly significant. Accordingly, I am satisfied that the FtJ's decision must be set aside.

21. It was accepted on behalf of the appellant that if I set aside the decision of the FtJ, any re-making of the decision could take place on the basis of the information presently before me. In that context, the findings of fact made by the FtJ will stand, unless infected by the error of law. Essentially,

the FtJ found that the appellant and [FM] gave credible evidence in relation to their and their family's circumstances both in the UK and in Pakistan.

22. I also take into account the supplementary bundle provided in advance of the hearing before me which contains a further witness statement from [FM] and medical evidence which confirms that unfortunately she suffered another miscarriage in April 2017.

23. The case for the appellant has never been put on the basis that he is able to meet the private life requirements of the Rules. The only basis upon which such an argument could be advanced is in terms of paragraph 276ADE(1)(vi), i.e. that he establishes that there would be very significant obstacles to his integration into Pakistan. No argument in that respect was advanced before me. Neither individually nor cumulatively could his length of time in the UK, his private life as found by the FtJ, or his cultural integration here, establish the very significant obstacles necessary to succeed under that aspect of the Rules. His mother is in Pakistan. He lived there until he was 16 years of age and he is familiar with the language and customs of Pakistan. There is no reasonable basis from which to conclude that he would not be able to re-integrate there, even accepting that there would be initial difficulties.

24. The appellant not being able to succeed under the Rules, the question arises as to whether there are "compelling circumstances" to support a claim for a grant of leave to remain outside the Rules (*Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387. I am prepared to accept that there are such circumstances in this case in the light of the FtJ's findings. In brief, those compelling circumstances include, in particular, [FM]'s health in terms of her diabetes, and the support that she enjoys from her family in the UK which is important given that she has suffered now three miscarriages.

25. I proceed on the footing that the respondent's decision does amount to an interference with their family life in the sense that they enjoy family life in the UK in particular circumstances and that their family life in Pakistan would be different. I move therefore, straight to the issue of proportionality.

26. Again, I take into account all the positive findings in their favour made by the FtJ, which it is not necessary for me to repeat in detail. It is likely to be the case that there would be a difficult period of adjustment for both of them in pursuing their family life in Pakistan. However, they would be able to live together; it has not been suggested otherwise. [FM] would be without the family support that she enjoys in the UK and the FtJ found that all her family are here. She has been here for a number of years, arriving at the age of 13. She is now 23 years of age.

27. There is no evidence to suggest that she would not be able to obtain the necessary treatment that she needs for her diabetes in Pakistan. She has a number of qualifications which are set out in her witness statement

dated 18 October 2016, including 5 GCSEs, an NVQ in travel and tourism management, and a diploma in travel and tourism management. She has experience of working in a hotel. There is no reason to suppose that they would not be able to continue trying for a family in Pakistan. The medical facilities there may in some cases be of a lesser standard than in the UK (although no evidence to that effect has been provided) but she would still be able to obtain medical treatment should she need it.

28. The close support that she has in the UK could not of course be replicated in Pakistan but there is no reason that she could not continue to receive emotional support from her family here, albeit at a distance.

29. It is important to bear in mind that the appellant arrived in the UK illegally, albeit at a young age. He has never had any lawful status. Although it was submitted on the appellant's behalf that it was not entirely clear that [FM] was fully aware of his immigration status at the time they established their relationship, it is likely to be the case that [FM] was aware of his immigration status at about the time of their marriage, if not before. She must have questioned why they could not have their marriage registered in the UK as a legally valid marriage in UK law.

30. Even if she was not aware of his precarious immigration status at the time they entered into their relationship, it is settled law that a State is not required to respect the choice of individuals as to where they wish to conduct their married life.

31. Under s.117B(4) of the 2002 Act, little weight is to be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully, which this appellant is. Likewise in relation to private life established by a person when the person's immigration status is precarious.

32. Furthermore, as was reiterated in *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at [41], if family life was created at a time when the people involved knew that the immigration status of one of them was such that persistence of family life in the host state would from the outset be precarious "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8". Put slightly differently, and more significantly for the purposes of the appeal before me, in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise [50]. That is consistent with s.117B(4) of the 2002 Act, and the issue of the maintenance of effective immigration controls being in the public interest, also reflected in s.117B.

33. I am satisfied that the appellant and [FM] would be able to continue their family life in Pakistan, albeit accepting that there would be a degree of hardship in their being required to do so, for the reasons I have identified.

I am not satisfied that the respondent's decision amounts to a disproportionate interference with their family life, or either of their private lives.

34. Accordingly, the appeal on Article 8 grounds is dismissed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside. I re-make the decision, dismissing the appeal.

Upper Tribunal Judge Kopieczek 30/06/17