



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19997/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 9th January 2019

Decision & Reasons Promulgated
On 18th January 2018

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr YAWAR [S]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Mrs Aboni, Senior Presenting Officer

For the respondent: Mr H Hashmi, Counsel, instructed by Five Star
(International) Limited

DECISION AND REASONS

Introduction

1. It is the Secretary of State who is appealing in these proceedings. For convenience I will continue to refer to the parties as they were in the First-tier Tribunal.

2. The Secretary of State has been given permission to appeal the decision of First-tier Tribunal Judge PJM Hollingsworth who, in a decision promulgated on 12 September 2017, allowed the appellant's appeal on article 8 grounds.
3. The appellant is a national of Pakistan born on 26 November 1992. He came to the United Kingdom in June 2011 as a student with leave valid until August 2012. He then re-entered the United Kingdom in December 2012, again with leave as a student. That leave was valid until August 2013 and was subsequently extended until April 2016. He then made an in time application for leave to remain on the basis of family life. This was refused by the respondent on 5 August 2016.
4. His application was based upon his marriage in December 2015 to Mrs [MA]. She is originally from Pakistan and had limited leave to remain until 9 October 2016. The application was refused because whilst a genuine and subsisting relationship was accepted she was not a British citizen nor is she settled or a refugee with leave. Regarding the appellant's private life, he had not been here the necessary 20 years and no reason was seen why he could not integrate into life in Pakistan.

The First tier Tribunal

5. First-tier Tribunal Judge Hollingsworth did not have the benefit of a presenting officer for all of the hearing. There had been a presenting officer in attendance and the decision records the appeal began at 3.15. As the time approached 4. pm and there were 5 witnesses for the appellant the presenting officer indicated they needed to leave by 5:20 PM and objected to the appeal continuing in their absence. The judge refused to adjourn and continued to hear the appeal after the presenting officer left.
6. The judge concluded there would be very significant obstacles to the appellant's integration into Pakistan on the basis his wife could not join him. This was said to be because of his wife's immigration status and the fact he is a Sunni Muslim and she follows the Shia branch of Islam and would be at risk of persecution.

The Upper Tribunal

7. Permission to appeal has been granted on the basis it was arguable that the judge misdirected himself in suggesting the fact that the appellant's wife could not be removed meant the respondent were agreeing it was not reasonable for her to go with him to Pakistan. The 2nd ground was the judge failed to refer to any country information that demonstrated they both could not live together in Pakistan because they followed different branches of Islam. Finally,

it was arguable the judge failed to consider the public interest factors in section 117 B.

8. An application was made on the 3rd January 2019 by email by the appellant's representatives seeking to adjourn today's proceedings. This was on the basis that there had been a change of representation on 20 March 2018 and the new solicitors, 5 Star International Ltd, had not obtained the papers from the previous solicitors. They state they contacted the Tribunal office on 24 August 2018 and Field house on 5 September 2018 seeking documentation. Some documentation was provided but they still awaited the bundle submitted at the original hearing and the skeleton argument referred to in the decision. That application was refused on the basis the solicitors had adequate time to seek the paperwork. The adjournment application was refused by Notice dated 8 January 2019 from a staff member exercising delegated powers. It was felt the appellant's representatives had not demonstrated they had made sufficient effort to obtain the necessary papers.
9. At the outset of the hearing Mr H Hashmi indicated he still had not received all of the papers. The file confirmed contact with the Tribunal on 30 August 2018 about papers. There is also a fax from the appellant's former solicitors dated the 23 November 2018 indicating that the file had been sent to the appellant's new representatives. The presenting officer opposed the adjournment and said that she had advised the appellant instructing solicitors that she will be in attendance early this morning and could provide papers if required.
10. The limited correspondence on file does suggest the appellant's new solicitors have not pursued the matter with sufficient vigour. I have borne in mind the principles set out in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). I have also had regard to paragraph 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 which advises the Tribunal to avoid unnecessary formality and deal with a case in a proportionate manner. It was my conclusion the issue could be adequately dealt with by providing Mr H Hashmi with the relevant papers from the court file and allowing him time.
11. At hearing, Mrs Aboni submitted that the judge was mistaken in believing the sponsor could not leave the United Kingdom. It was accepted on behalf of the Secretary of State that she had been granted discretionary leave. This however did not mean she could not go back to Pakistan with her husband. Furthermore, the judge failed to adequately reason why paragraph 276 ADE(vi) was applicable. The judge had concluded that because of their religious differences the couple could not go to Pakistan but made no reference to any country background material supporting this.

Furthermore, the public interest in maintaining immigration control and the factors set out in section 117 B were not considered. She did accept that the 3rd ground in the leave application was incorrect in stating that section 117 B provided that little weight should be given to a family life established when the appellant's leave is precarious. In fact, section 117 B (4)(b) in stating that little weight should be given to a relationship formed with a qualifying partner is referring to someone in the United Kingdom unlawfully which is not the situation here.

12. I raised with Mrs Aboni that the decision indicated the presenting officer had to leave because of the hour. The respondent had not sought to argue the judge erred in proceeding in the absence of the presenting officer. Mrs Aboni indicated she had not drafted the grounds. She questioned why if the appellant chose to instruct a representative in Scotland the fact the representative then had to travel a considerable distance should be a ground for not adjourning. Whilst she indicated there were some issues about the judge continuing in the absence of the presenting officer she was not seeking to rely upon this as an additional ground.
13. Mr Hashmi made the point the appellant is entitled to instruct a representative of their choice, irrespective of where they were located. The judge had set out in detail why they were proceeding.
14. He referred me to page 20 of the appeal bundle. This was a letter sent by the Home Office to the appellant's solicitors including a copy of the Minute in relation to the grant of discretionary leave to the appellant's wife. The Minute recorded that his wife had been dependent upon her father's claim for protection. His claim was refused but he was granted discretionary leave which covered her. Her circumstances changed when she married and was no longer dependent upon her father. It was pointed out that her mother and brother had been granted further leave to remain on the basis of their family life until 24 September 2019, as had her father. The Minute records that she was granted leave as it would be disproportionate to remove her in the circumstance.
15. Mr Hashmi argued therefore the respondent was accepting it would be disproportionate to remove her to Pakistan. The judge had referred to this Minute at paragraph 15 of the decision in considering the proportionality of the refusal of the appellant's application and concluded the appellant and his wife could not live in Pakistan. His wife would be unable to support an entry clearance application by him because of her immigration status.
16. In response, Mrs Aboni reiterated that the respondent was not seeking to remove the appellant's wife. Whether she went to Pakistan with him was a matter for her. It is correct that the

respondent cannot remove his wife. This however is different from saying she cannot go to Pakistan.

Consideration

17. The appellant came here from Pakistan with leave as a student until 30 April 2016. In December 2015 he married a national of Pakistan. At the time his wife was entitled to be here because her father had been granted discretionary leave in April 2014 following his unsuccessful protection claim. In line with this leave had been granted to his wife and their son and daughter, the appellant's wife.
18. The appellant then made an application for leave to remain 3 days before his leave was due to expire. That application could not succeed under the rules because of his wife's limited immigration status. In considering the appeal judge initially was to look at matters through the prism of the rules. The respondent had considered the application under appendix FM but the difficulty for the appellant was EX 1 did not apply because of his wife's lack of an appropriate immigration status. The judge accepted appendix FM could not be met.
19. The appellant's representative argued that he did meet the requirements of paragraph 276 ADE(vi). This is concerned with private life which can encompass family life. The judge correctly referred to this at paragraph 16 and 20.
20. The determinative issue was whether there would be very significant obstacles to the appellant's integration into Pakistan. The judge at paragraph 18 refers to the fact they follow different branches of Islam. The judge then states that his wife cannot back because she is a Shia Muslim who would be persecuted as she has married a Sunni Muslim. The 2nd inventory of productions for the appellant contains numerous articles about violence between the two sects. However that is not reflected in the judge's decision. It does not explain and reference to country information why his wife would face persecution. I find this to be a material error of law.
21. First-tier Tribunal Judge Hollingworth then wrongly conflates the grant of discretionary leave to the appellant's wife with the conclusion that she cannot reasonably return to Pakistan. I find paragraph 22 to 25 illustrate the judge's misconception. The appellant's wife was no longer dependent on her father because she had married and was living with the appellant. The Minute is dealing with her situation as someone who no longer would have leave as a dependent as she is an adult and is married and living with her husband in Derby. The issue was whether her removal as a consequence would breach her article 8 rights. Those rights were considered against the prism of the immigration rules. Specifically

on the 13th line of page 20 the Minute and records that she did not meet 276ADE(vi)She had not demonstrated very significant obstacles to her integration into Pakistan. Rather, she was granted leave outside the rules on the basis of exceptional circumstances. Those circumstances included her immigration history as a dependent on her father's claim; the previous discretionary leave, and the fact her mother and brother and also been granted leave until 24 September 2019.

22. The judge records that an application for entry clearance by the appellant would not succeed until 2024 because of his wife's lack of status. There also would be issues about financial requirements and so forth. However, there is the option of his wife going to Pakistan with him. The only counter to this advanced by the judge is that she would thereby face persecution. As indicated earlier, the judge has not reached a sustainable conclusion on this.
23. For completeness I find the judge has adequately considered section 117 B. This can be seen at paragraph 34. However, I find the decision is fatally flawed by the Judge conflating the grant of discretionary leave to the appellant's wife with not being able to go to Pakistan and also concluding she would face persecution without explaining this conclusion.

Decision

The decision of First-tier Tribunal Judge Hollingworth allowing the appeal on article 8 grounds materially errs in law and is set aside. The matter is remitted to the First-tier Tribunal for a de novo hearing.

Francis J Farrelly
Deputy Upper Tribunal Judge.

Directions

- (i) Relist for a de novo hearing at Nottingham excluding First-tier Tribunal Judge Hollingworth.
- (ii) An Urdu interpreter will be required
- (iii) The hearing should take no longer than 1- 30 hours.
- (iii) The appellant's representatives are to prepare a properly paginated bundle.

Francis J Farrelly
Deputy Upper Tribunal Judge.