Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001318
(HU/52405/2021); IA/08424/2021

THE IMMIGRATION ACTS

Heard at : Field House
On : 6 September 2022

Decision & Reasons Promulgated
On : 14 October 2022

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ATAI MUSTAFA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkin, instructed by Lawmen Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born on 2 June 1990. He has been given permission to appeal against the decision of First-tier Tribunal Judge Oxlade dismissing his appeal against the respondent's decision to refuse his application for leave to remain on human rights grounds.

2. The appellant has a lengthy immigration history which we set out as follows. He first entered the United Kingdom on 27 March 2011 with entry clearance as a Tier 4 General Student valid until 10 April 2012. On 30 March 2012 he made an application for leave to remain as a Tier 4 General Student and was granted

leave until 11 August 2014, followed by a further period of leave until 29 September 2015. On 18 August 2014 he was served with an IS151A form on the basis of having gained leave by deception, with reference to his application of 30 March 2012, and on 22 September 2014 his leave to enter was cancelled upon returning to the UK on the basis of that deception. He appealed against that decision and his appeal was dismissed on 23 March 2016 by First-tier Tribunal Judge Cockerill, who upheld the respondent's finding on deception. The appellant was refused permission to appeal to the Upper Tribunal and became appeal rights exhausted. He did not leave the UK, but on 21 November 2016 he made an application for a residence permit under the EEA Regulations. That application was rejected on 16 June 2017, as was a further such application made on 17 March 2017. Another application under the EEA Regulations was refused on 31 October 2017. The appellant then claimed asylum on 16 July 2018. His claim was refused and he lodged an appeal against the refusal decision but later withdrew the appeal on 12 February 2021.

3. In the meantime, on 3 July 2020, the appellant made the application which forms the basis of this appeal, which was an application for leave to remain on family and private life grounds, in particular his family life with his British partner Maryam Khurshid Aslam. His application was refused on 17 May 2021.

4. The respondent concluded, in her refusal decision of 17 March 2021, that the appellant's application fell for refusal on grounds of suitability under section S-LTR.1.6 in view of his presence in the UK not being conducive to the public good owing to his conduct which made it undesirable to allow him to remain in the UK. That in turn arose from his fraudulent use of a TOEIC certificate which had been obtained using a proxy English language test taker in a test taken on 23 February 2012. The certificate had been relied upon by the appellant in his application of 30 March 2012. In addition to the suitability provisions of the immigration rules, the respondent also considered that the appellant did not meet the eligibility relationship requirement as he did not meet the definition of a partner in GEN.1.2, having undergone only an Islamic marriage ceremony and not having lived with his partner for two years, and further that he did not meet the immigration status requirement of the rules as he had been without leave in the UK since 29 September 2015. The respondent accepted that the appellant had a genuine and subsisting relationship with his partner and that his partner had medical issues, but did not accept that there was evidence of any insurmountable obstacles to family life continuing outside the UK for the purposes of paragraph EX.1(b) of Appendix FM. The respondent pointed out that a decision to remove the appellant did not obligate his partner to leave the UK as she was a British citizen and that she could remain in the UK and support his application for entry clearance to join her here. The respondent concluded further that there were no very significant obstacles to the appellant's integration in Pakistan and that he could not meet the requirements of paragraph 276ADE(1) of the immigration rules on grounds of private life, and that there were no exceptional circumstances justifying a grant of leave outside the rules.

5. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Oxlade on 24 January 2022. The judge noted that there

was no further evidence adduced in respect of the TOEIC deception and therefore considered the starting point in relation to the issue of deception to be the decision of Judge Cockerill. She observed that the couple was married on 5 January 2022 and that the appellant was therefore a “partner” within GEN.1.2 at the time of the hearing. The judge heard from the appellant, his wife and her father. The evidence from the appellant was that he had only returned to Pakistan once, in 2014, and that his mother and three brothers and three sisters still lived there. His wife would not go to live in Pakistan and had refused to go back there when he had tried to persuade her. All her family was in the UK. She did not believe that she could live without him if he had to go back there. His wife’s evidence was that she was previously married and divorced, which had led to her being depressed. She had medical problems which prevented her from being able to work. She had last worked in 2021 for two weeks and had been assessed, for the purposes of universal credit, as having a limited capacity to work. She had made a claim for PIP but had been refused. She had had two operations to remove a tumour, but it had returned and she had then had radiotherapy. She needed the appellant’s emotional support. She had been born in the UK and had gone to Pakistan at the age of 9 years with her family but had returned to the UK for treatment after being diagnosed with a brain tumour in Pakistan. Her family did not trust the doctors in Pakistan, and she was therefore anxious at the thought of going there again. She was currently being monitored by the doctors in the UK because she had had a ventriculoperitoneal (VP) shunt inserted but was not receiving any ongoing treatment. She felt very negative about Pakistan as she had experienced an earthquake there, her parents had divorced and she had been diagnosed with a brain tumour. The thought of her husband leaving her to apply for entry clearance made her anxious and depressed. Her family in the UK could not offer the same support as her husband. In his evidence before the judge, the appellant’s wife’s father spoke of his daughter’s negative experiences in Pakistan as a child and her inability to cope without the appellant.

6. The judge found that the appellant had not demonstrated that there were very significant obstacles to his integration in Pakistan for the purposes of paragraph 276ADE(1)(vi) of the immigration rules and that he did not meet the requirements of Appendix FM at the time of his application as he did not meet the definition of ‘partner’ then. The judge noted that the appellant accepted that he could not meet the financial requirements of the immigration rules and she found that the respondent had correctly applied S-LTR.1.6, so that Appendix FM failed for want of immigration suitability. The judge went on to consider paragraph EX.1 and concluded that objectively there were no very significant difficulties faced by the appellant’s wife in accompanying him back to Pakistan and that the test in paragraph EX.2 was not made out. She then considered proportionality under Article 8 and concluded that the appellant’s removal would not cause a disproportionate interference with his and his wife’s family life. The judge accordingly dismissed the appeal on human rights grounds.

7. The appellant was initially refused permission to appeal to the Upper Tribunal. He renewed his application to the Upper Tribunal on the following five grounds: firstly, that the judge had made an ultra vires decision on EX.1.(b) and

had disregarded material matters; secondly, that the judge was wrong to consider the sponsor relocating to Pakistan as a live issue; thirdly, that the judge made findings against the weight of the evidence; fourthly, that the judge failed to consider the rights which would be relinquished if the appellant was removed; and fifthly, that the judge failed to appreciate the difficulties the couple would face if the appellant was removed.

8. Permission was granted by UTJ Perkins on 14 June 2022 on the following basis:

> "The First-tier Tribunal may have given an overly literal meaning to "insurmountable obstacles" and may have erred by considering how the appellant's wife might live with him in Pakistan when it was never the respondent's case that she could be expected to leave the United Kingdom. However the appellant must show to be well founded the contention at paragraph 8(1) of the renewal grounds that the respondent had conceded that the appellant's wife is not expected to relocate to Pakistan."

9. The matter was then listed for hearing and came before us. Both parties made submissions which we address in the discussion below.

Consideration and Findings

10. Like Mr Clarke, we found the first ground to be misconceived in several respects. The written grounds, at [6] to [9], assert that the respondent made a concession that the sponsor could not be expected to relocate to Pakistan and therefore effectively accepted that there were insurmountable obstacles to family life continuing in Pakistan, such that the appellant succeeded under paragraph EX.1.(b) of Appendix FM. That is plainly wrong.

11. With regard to the latter point, it is clear that the appellant could not have succeeded in his appeal under paragraph EX.1.(b) in any event, since paragraph EX.1.(b) is not a freestanding provision and he would have needed otherwise to meet the requirements of the immigration rules. That was the finding in the case of Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63, where the headnote states:

> "It is plain from the architecture of the Rules as regards partners that EX.1 is "parasitic" on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free-standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule."

12. The appellant's inability to meet the requirements of Appendix FM owing to the application of the suitability provisions in paragraph S-LTR.1.6 was a finding made by the previous Tribunal in 2016 and was maintained by Judge Oxlade for the reasons properly given at [63] of her decision. The grounds of appeal, quite properly, did not challenge that finding. As a result the appellant could not avail himself of the exception in EX.1.(b) in order to meet the requirements of the immigration rules. Quite simply, he could not meet the requirements of the rules and the judge properly concluded as such. The judge

was not wrong to go on nevertheless to consider the question of insurmountable obstacles under EX.1 because that was of course relevant to the proportionality assessment outside the rules.

13. As to the suggestion in the written grounds that the respondent had effectively conceded that the insurmountable obstacles test was met, Mr Hawkin's submissions pursued that assertion by relying upon paragraphs 4(c) and 5(d) of the Respondent's Review. He addressed us at length on the appellant's wife's medical condition and on the fact that she was being monitored because of her VP shunt, that she suffered from anxiety and depression and that she had very negative feelings about relocating to Pakistan because of her childhood experiences in that country which included an earthquake, the breakdown of her parents' marriage, bomb explosions and her brain tumour diagnosis. He submitted that paragraphs 4(c) and 5(d) of the Respondent's Review was an acceptance by the respondent that relocation to Pakistan was not an option for the appellant's wife for those reasons and in particular in light of the medical evidence which had been produced.

14. However, we agree with Mr Clarke's response that there was no such concession made by the respondent. The point made by the respondent at paragraph 4(c) of the Review was simply that the refusal decision placed no obligation on the appellant's wife to leave the UK, as a British citizen, and that it was a matter of choice for her. Paragraph 5(d) of the Review similarly referred to her having a choice. That reflected the terms of the refusal decision, which went on to make clear the respondent's position that it was open to the appellant's wife to relocate to Pakistan with him and access medical treatment there. At no point did the refusal decision or the Respondent's Review accept that her condition was such that she could not relocate to Pakistan and that is indeed made clear by the judge's record of the respondent's submissions before her at [46] of her decision. Accordingly, the grounds of appeal are misconceived in their reliance upon a concession made by respondent and are entirely without merit where they assert that the judge was not entitled to consider the question of family life continuing in Pakistan.

15. We turn next to the challenges to the substance of the judge's findings and conclusions. Mr Hawkin made detailed references to the evidence of the appellant's wife's medical condition and the evidence of her negative feelings about relocating to Pakistan as a result of her childhood experiences. However, as we pointed out to him, that did not assist him in identifying an error of law in the judge's decision since none of those matters was in dispute and, further, they were all matters which were fully considered by the judge, as can be seen at [65] and [66] of her decision. We find nothing of merit in Mr Hawkin's submission that the judge erred in law by her reference at [67] to the appellant's wife being "remarkably resilient", when considered in the context in which the phrase was used. It is clear that the judge, at [67], was simply emphasising the lack of any evidence to support what was a purely subjective claim as to the likely adverse impact of relocation to Pakistan upon her mental health. We reject Mr Hawkin's assertion that the letter from the appellant's wife's former work-place, the fitness for work statement and the fact that she was receiving universal credit amounted to such evidence. None of those went

anywhere near suggesting that she was unable to work at the time of the hearing and on the contrary, the most recent evidence, the fitness for work statement simply referred to one month of not being fit to work from 7 October 2021.

16. In so far as the grounds and submissions challenge the judge's conclusion that the sponsor was able to relocate to Pakistan, we consider that the judge was fully and properly entitled to reach the conclusions that she did on the evidence before her. Having ourselves carefully reviewed the medical evidence upon which the appellant was relying, we note that it largely dated back several years and that the most recent evidence from Kings College Hospital about his wife's VP shunt, dating back to 2019 (page 98 and 99 of the appeal bundle), suggested that the ongoing monitoring Mr Hawkin referred to consisted of a two-yearly scan. There does not appear to have been more recent evidence before the judge and it was pointed out to the judge by the respondent (as recorded at [66]) that there was no evidence of on-going treatment from Kings College Hospital and that there was, furthermore, evidence of available treatment in Pakistan. The judge observed further, at [66], that the point being made for the appellant was not in fact a lack of medical facilities in Pakistan, but his wife's inability to trust it, and the judge went on to consider the question of insurmountable obstacles in that context. As she properly noted, the test in EX.2 was an objective one. At [67] she provided cogent reasons as to why that test was not met, concluding that the obstacles relied upon by the appellant to his wife being able to relocate to Pakistan were subjective and consisted of her own claimed fears of not being able to access adequate treatment and monitoring in Pakistan and her anxiety at returning there. The judge found that no evidence had been produced of any attempts made to assuage those fears and on that basis she concluded that the appellant had failed to show that the test was met. As Mr Clarke submitted, her analysis was entirely consistent with the principles and guidance set out in Lal v The Secretary of State for the Home Department [2019] EWCA Civ 1925 and Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11.

17. The grounds went on to criticise the judge for considering the alternative position of the appellant returning to Pakistan alone and applying for entry clearance to join his wife in the UK under the immigration rules, asserting at [9] that that was not raised as a contentious issue by the respondent in the refusal decision. However, that is clearly not the case as it was specifically raised by the respondent in the refusal decision under the heading "EX.1 requirement". It is asserted in the grounds and by Mr Hawkin that the judge erred, in any event, in concluding that such an option was open to the appellant and that she had failed to consider that the sponsor was not properly equipped to deal with an indeterminate period of separation from the appellant, which would be the case if entry clearance was not granted. Mr Hawkin submitted, in that respect, that the judge had failed to consider the evidence of the sponsor's inability to work and the fact that she had been refused PIP such that the financial requirements of the immigration rules could not be met for re-entry to the UK. He submitted that the judge's findings at [75], that the sponsor could find work or alternatively considered that she had a good case for PIP, were speculative and

contrary to the evidence. However, we reject such a suggestion. As we have mentioned above, the evidence relied upon in that regard did not support a claim that the sponsor could not work. Alternatively, if the sponsor was deemed unable to work there was no proper evidence before the judge to show that she would not be entitled to PIP support such as to provide an exemption from the financial requirements of the rules. Accordingly, we conclude that the judge was perfectly entitled to conclude as she did at [75].

18. Mr Hawkin submitted further that the judge failed to consider that the appellant would be refused entry clearance under paragraph 9.3.1 of Part 9 of the immigration rules whereby an application for entry clearance must be refused where the applicant's presence in the UK is not conducive to the public good. Mr Clarke agreed that entry clearance may be refused on that basis, although we are not entirely satisfied that that would be the case, given the passage of time and any other considerations which would be taken into account at the point of such an application being made, but in any event we find merit in his submission that that was a matter which was not determinative of a proportionality assessment but formed part of it. It is also relevant to note that the judge had found that there was no requirement for the couple to be separated, since there had been a failure to show significant difficulties in family life continuing in Pakistan. That was plainly a matter relevant to the proportionality assessment, as were the other matters fully and properly considered by the judge at [72] to [76].

19. Contrary to the assertions made in the grounds and before us by Mr Hawkin, we consider that the judge had full regard to the appellant's circumstances and those of his wife and her wider family and she acknowledged and gave full consideration to the difficulties the appellant's wife would face either as a result of relocating to Pakistan or being separated from the appellant, noting at [75] that separation would result from a natural consequence of her choice not to follow him to Pakistan. The judge gave appropriate weight to the interests of the appellant and his wife, as against the public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002 which weighed against him and was perfectly entitled to conclude that the balance fell in favour of the public interest. The assertion to the contrary is little more than a disagreement with the judge's findings and conclusions. We reject any suggestion that the judge's findings were against the weight of the evidence. She had full and careful regard to all the evidence and reached a decision which was fully and properly open to her on the basis of the evidence.

20. For all of these reasons, we find no errors of law in the judge's decision and we uphold her decision.

DECISION

21. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 8 September 2022