IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32872/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 25 March 2015	**On 17 April 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASAD ALEEM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Miss Forster, instructed by Adamsons Law

DECISION AND REASONS

1. The respondent, Asad Aleem, is a citizen of Pakistan who was born on 24 October 1982. He is married to the sponsor, Iqra Shahid (hereafter referred to as the sponsor). I shall refer to the appellant as the respondent and the respondent as the appellant as they appeared respectively before the First-tier Tribunal.

2. The appellant sought leave to remain in the United Kingdom as the spouse of the sponsor but his application was rejected under the Immigration Rules. He appealed

to the First-tier Tribunal (Judge Hillis) which, in a determination promulgated on 1 December 2014 allowed the appeal under the Immigration Rules and under Article 8 ECHR. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. It was agreed before the First-tier Tribunal that the appellant could not succeed under the Immigration Rules because he failed to meet the income threshold of £18,600 per annum. However, Judge Hillis found that the appellant did succeed by reference to EX.1 (b);

> (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 refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

4. Refusing the application, the Secretary of State, in her refusal letter dated 5 August 2014, stated that the appellant had not "demonstrated any reasons why your relationship [with the sponsor] cannot continue in your country of origin. You therefore fail to fulfil EX.1(b) of Appendix FM of the Immigration Rules." It is apparent from Judge Hillis' determination [17-19] that he had considerable sympathy for the appellant, who had narrowly missed the financial requirements of Appendix FM and who appeared, as at the date of the First-tier Tribunal hearing, to be able to meet those requirements. I am satisfied, however, that Judge Hillis did not allow his sympathy for this "near miss" to colour his analysis and the remainder of the decision.

5. Considering EX.1, the judge noted that there was "no issue that the appellant and the sponsor are in a genuine and subsisting marriage." [21]. He noted [22] "that it was accepted that the sponsor is a UK citizen who has pursued her career in law with persistence and all due diligence". He noted that the sponsor was able to speak Urdu but was not able to read or write any dialect of a language used in Pakistan and she had never lived there. The judge noted that "the sponsor states that she will be unable to find appropriate employment in Pakistan and dress in the way she has for her whole life in the UK. She was ill when she visited Pakistan due to the climate and local hygiene." The judge noted that the respondent had suggested a number of different possible scenarios. The first, the couple could remove permanently to Pakistan and continue their family life there. Secondly, the couple could remove to Pakistan for the time it would take for the appellant to make a further application for entry clearance. Thirdly, the couple could separate for the brief period it would take for the appellant to return to Pakistan alone in order to make his application for entry clearance.

6. None of these suggested scenarios found favour with Judge Hillis. He concluded [24] that there were "insurmountable obstacles" in the form of the "sponsor's career and personal circumstances as set out above". He found that "her circumstances

show, on the balance of probabilities, she would face very significant difficulties (paragraph EX.2)." That statement is problematic. I have quoted above the passage of the decision regarding the sponsor's reasons for not wishing to go to Pakistan. On the face of that evidence, the reasons do not obviously amount to "insurmountable obstacles" to her returning to Pakistan. She is well educated and should be able to find a job there. Having to dress a way slightly different to that which she is used to in the United Kingdom might be inconvenient but it is difficult to see that it would amount to a "very significant difficulty" for her. The fact that she was ill on her last visit to Pakistan does not, of course, mean that she would necessarily be ill if she were to return to the country or that she could not take reasonable precautions to avoid becoming ill. There was no medical evidence to show that the sponsor has any propensity for becoming ill in Pakistan on account of the heat or poor hygiene there or for any other reason. In the light of those considerations, there is, in my opinion, an absence of clear reasoning by Judge Hillis but such as to justify the findings which he has made at [24].

7. At [25], Judge Hillis went on to state:

> "It is not for me to speculate as to the success or otherwise or the timescale involved in the appellant making a fresh 'out of country' application. Additionally, paragraph EX.1(i)(b) does not state that the appellant leaving his wife behind in the UK would be a remedy to the issue of the insurmountable obstacles in the continuation of family life outside the UK. I therefore reject Mr Barlow's [the Presenting Officer] submission that the current nature and quality of the appellant's family life with his wife can be maintained outside the UK by his returning to Pakistan without her to make a fresh application for leave to enter the UK as her spouse."

8. It is not for the judge to "speculate" "as to the success or otherwise or the timescale involved and the appellant making a fresh out of country application". That is a matter which could and should have been addressed in evidence. If the appellant wished to assert a separation from the sponsor which his removal to Pakistan to make a new application would entail would amount to a "very significant difficulty" in the continuation "of their family life together outside the UK" then it was for him to adduce evidence to prove that assertion. Examining again the wording of EX.2, I do not find any justification for Judge Hillis' rejection of the scenario by which the appellant would return to Pakistan to make an application and the wording of the paragraph. Couples are very often separated for brief periods and their family life may be carried on during such separations by using letters, the internet or the telephone in order to stay in touch. In that way, family life can be continued "outside the UK", those means of communication offering a method by which "the very significant difficulties" (if any) could be "overcome." Judge Hillis has not considered whether separation of the couple in these circumstances would "entail very serious hardship" for the appellant and the sponsor. I find that the judge unreasonably rejected the Presenting Officer's submission.

9. I find, therefore, that the judge's determination of the appeal under the Immigration Rules should be set aside. I have remade that decision. In the light of my findings and observations, I am not satisfied, on the evidence before me, that the appellant

has established that there were insurmountable obstacles to family life being continued in Pakistan. I am not satisfied that the circumstances that the sponsor described by Judge Hillis at [22] give rise to such insurmountable obstacles. My primary finding is that the couple would continue their family life in Pakistan. Even if I am wrong in that finding, I find that many obstacles may be overcome by the appellant and the sponsor adopting either of the two scenarios suggested by the Presenting Officer to the First-tier Tribunal; given the personal circumstances of the couple, it would be reasonable to expect the appellant to return to Pakistan in order to make an application and given that he now claims to be able to meet the financial requirements. In the light of the fact the sponsor is working, the couple returning together to Pakistan for that purpose might be more problematic but even so a brief stay in Pakistan by the sponsor is highly unlikely to render any of the inconveniences of which he complains "very significant".

10. Judge Hillis also allowed the appeal under Article 8 ECHR. However, he only did so because he found that the appellant satisfied the "Article 8 provisions" of EX.1 of Appendix FM. There was no separate analysis of Article 8 ECHR other than in the context of the Immigration Rules. In the light of my findings and observations, I am satisfied that it would be proportionate for the appellant to be removed to Pakistan in consequence of the respondent's decision.

Notice of Decision

The determination of the First-tier Tribunal which was promulgated on 1 December 2014 is set aside. I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 5 August 2014 is dismissed under the Immigration Rules and on human rights (Article 8 ECHR) grounds.

No anonymity direction is made.

Signed Date 13 April 2015

Upper Tribunal Judge Clive Lane