Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23694/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 August 2017	**On 8 September 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MUHAMMAD YASIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson, instructed by M & K Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 12 June 2015 refusing to grant him further leave to remain in the United Kingdom.
2. The appellant had come to the United Kingdom as a visitor but while here had married his cousin Fatima Begum with whom his marriage had been

arranged by his family. His wife has a number of health problems, including being registered as partially blind and has been deaf and dumb since birth. She also has type 2 diabetes mellitus, hypercholesterolemia and retinitis pigmentosa. She was born in 1966 and has been in the United Kingdom for fifteen years with her own family. The appellant claims that there are insurmountable obstacles to him and his wife returning to live in Pakistan. The application had been refused under the Immigration Rules and also in respect of Article 8 outside the Rules.

3. The appellant gave evidence to the effect that only his wife understood him as they used a form of sign language that only he understood. They had been undergoing infertility treatment for about a year and a half. Before he came to the United Kingdom his wife's sister communicated with her. She had been in the care of Social Services for a short time before he came to the United Kingdom. He thought that that had been for seven or eight months.

4. The judge in her findings of fact concluded that the appellant had clearly deceived the Entry Clearance Officer as to his intentions, in that the marriage had been arranged for him and yet he had travelled as a visitor. The judge did not understand how the appellant's wife's relationship with her sister, the person who had taken over her care following her own parents' demise, had broken down given his wife's health conditions, including being deaf and dumb and partially sighted. The judge also noted the appellant's previous marriage in Pakistan and the fact that his first marriage was dissolved only eight days before he came to the United Kingdom. He had letters of support from cousins offering to provide him with financial support.

5. The judge noted evidence from the appellant's wife's GP, in which it was said that she had been under the care of the adult safeguarding team before the appellant took care of her. It was clear however that when she left the care of her local authority she was discharged at the request of her brother-in-law and not the appellant. The judge expressed surprise that the appellant and his wife were seeking infertility treatment bearing in mind his wife's age and her many health difficulties. She was concerned that she had no evidence from the appellant's wife or from the appellant's wife's sister. She was troubled by the appellant's wife's inability to express her wishes and feelings and was troubled by the letters concerning infertility treatment.

6. The judge went on to say however that despite recording these concerns the respondent did not raise any issue as to the genuineness of the relationship and she therefore proceeded to determine the appeal on the basis that there was a genuine relationship between the appellant and Mrs Begum. She found that the requirements of the Rules were not satisfied, noting that although the appellant clearly did not meet the eligibility requirements under paragraphs E-ILRP as he was in the United Kingdom without valid leave, he might be able to benefit from the exceptions in

EX.1. She concluded however that he had not shown that there were insurmountable obstacles to family life with Mrs Begum continuing outside the United Kingdom. Among other things she noted that Mrs Begum had lived in Pakistan for the first 34 years of her life and was only naturalised as a British national last year. Ostensibly she had no other family member in the United Kingdom who could provide her with support. The appellant had lived in Pakistan all his life and his family members were in Pakistan and were also related to Mrs Begum in that his parents were her aunt and uncle and therefore she had a supportive family in Pakistan. Her diabetes could be treated in Pakistan although she might need to pay for that treatment, her husband would be able to work there and presumably would be able to support her financially. There were family members in the United Kingdom who were prepared to support him and they could assist if necessary.

7. The judge noted that Mrs Begum would lose out on her benefits in the United Kingdom and the availability of treatment on the NHS and should not have to lose out on those benefits, but said that one would assume that when the decision was made that the couple would marry these matters would have been considered. The judge considered that on the other hand Mrs Begum would be with a family that cared for her, she would not be dependent on local authority care and all medical treatment that she needed would be available for her in Pakistan. She would be returning to a country in which she shared the culture and religion.

8. The judge went on to consider that in the alternative the couple might decide it would be better for the appellant to return to Pakistan and apply for entry clearance and Mrs Begum could be cared for by the local authority in his absence.

9. The judge went on then to consider the position outside the Immigration Rules, taking into account in particular the proportionality of the disruption to family and private life that would be involved. She bore in mind the public interest including the provisions of section 117B of the Nationality, Asylum and Immigration Act 2002. She had particular regard to the impact of the appellant's removal on his wife. If they decided to live in Pakistan there would be an impact on her, in that she would not have access to the NHS or benefits but would have the continued devotion of the appellant and his extended family. The appeal was dismissed.

10. In his grounds the appellant argued that the judge had taken into account irrelevant matters, in particular the issue of the fertility treatment and not accepting the sponsor would have fallen out with her family when she was cared for by the local authority. It was also argued that there were internal inconsistencies in the judge's findings, in that on the one hand accepting the couple were involved in a genuine relationship yet doubting the appellant's intentions. It was also argued that the respondent's policy guidance had been overlooked. That guidance referred to cases where either party had a mental or physical disability which could be such that in

some circumstances it could lead to very serious hardship, for example due to lack of healthcare that amounted to an insurmountable obstacle. It was also argued that there had been a failure properly to conduct the balancing exercise under Article 8 and a failure to attach appropriate weight to relevant issues, in particular that there was a material contrast between the assistance the family might give to the sponsor in Pakistan and the specialist and professional help she received in the United Kingdom. It was argued that the judge had not appreciated or in fact had seriously underestimated the extent of the sponsor's disabilities.

11. Permission to appeal was granted on all grounds.

12. In her submissions Ms Peterson relied upon and developed the points made in the grounds. She argued that matters set out in the skeleton before the judge had not been reflected in the determination, in particular the detailed argument about Article 8 outside the Rules and the medical evidence. The sponsor had a complex package of medical issues and treatment and there was evidence as to the appellant's involvement with the treatment. It was not an adequate assessment of undue harshness to say that the loss of UK benefits would be set off by the care provided in Pakistan. The conclusions in respect of Article 8 were brief. There was a failure to assess the impact on the wife of the loss of her complex medical support in the United Kingdom. The judge had relied upon irrelevant matters in coming to her conclusions. Nor had she addressed the policy guidance which had been brought to her attention. The requirements of Article 3 in the claim, bearing in mind the impact on the sponsor argued against an adverse decision.

13. In his submissions Mr Clarke argued there were no material errors of law in the judge's decision. She had begun by setting out issues of concern at paragraphs 16 to 18 with regard for example to the appellant's immigration history and deception. It was reasonable to raise the question of the dispute with the sister and the infertility treatment. However in any event the judge had clearly taken the case at its highest in accepting that the relationship was genuine. There had only subsequently been an adverse consideration of the deception and the appellant's immigration history. Therefore consideration had been given to the ability of the appellant's wife to live in Pakistan. It was taken that she was estranged from her sister and had no family in the United Kingdom who could support her. The appellant could pay for treatment in Pakistan through work. There would be no disadvantage if she went with the appellant as she could only communicate with him. It was a question of choice. There was no challenge to the finding that she could be treated in Pakistan.

14. Mr Clarke agreed that the judge had erred at paragraph 23 towards the end in concluding that the alternative of the appellant returning to Pakistan and the sponsor being cared for by the local authority was not a finding open to her. He argued though that the alternative finding concerning the couple returning to Pakistan together was sound and

contained no arguable error of law. He referred to the guidance from the Supreme Court in Agyarko [2017] UKSC 11, at paragraph 43 with regard to what was meant by "insurmountable obstacles" and the fact that it was a stringent test, and also at paragraph 68 with regard to the fact that even though the sponsor was a British citizen she was not entitled to insist that her non-national partner should also be entitled to live in the United Kingdom when that partner might lawfully be refused leave to enter or remain. There was no obligation to show that what could be provided in Pakistan was the same as in the United Kingdom.

15. By way of reply Ms Peterson argued that the precariousness of the relationship was not a knock out point. The matter had to be considered in the round. It was not just a question of like for like but other elements were in play in the dependency which reflected on undue harshness, and the Tribunal was referred to what had been said in the skeleton argument about the ongoing medical treatment in the United Kingdom. There was a good deal of evidence, including statements of support from the local community. It was a question of the impact on the sponsor. The judge had not said enough about conditions in Pakistan. The Article 8 assessment was inadequate. The sponsor was a very vulnerable British citizen. All the authorities pointed to having all the circumstances weighed out and it was not enough simply to point to negative findings about the appellant's immigration history. The evidence had not been properly considered.

16. I reserved my determination.

17. With regard to ground 1, though it might have been wiser for the judge not to comment on what essentially were concluded to be irrelevant matters, i.e. the infertility issue and the issue of the sponsor's relationship with her sister, I do not consider that those matters give rise to errors of law. It is clear from paragraph 19 of the decision that after consideration of these points the judge noted that the respondent did not raise any issues as to the genuineness of the relationship and proceeded on the basis that the relationship was genuine. There is no indication that the earlier musings in any sense coloured the judge's remarks and there was no further reference to those points but only in the public interest issue on the taking into account of the appellant's disregarding of the immigration laws in the United Kingdom.

18. As regards ground 2, again to an extent here there is a reference back to earlier considerations by the judge. What was said with regard to the appellant's intentions at paragraph 18 has to be seen in the light of the conclusion at paragraph 19 that the relationship was genuine. I do not read the judge as having made findings that the appellant's intentions towards the sponsor were a matter of concern, but rather part of a background consideration of matters which in the end did not get in the way of the judge's conclusion that the relationship between the couple was genuine.

19. With regard to paragraph 9 of the grounds, it is accepted by Mr Clarke that the judge erred towards the end of paragraph 23, as noted above, with regard to the ability of the couple to separate while the appellant returned to Pakistan to make an application. I agree that the judge did not provide adequate reasons for that element of her decision, but that is essentially an alternative to the conclusion that the couple could return to Pakistan together.

20. The heart of the judge's decision therefore in this regard is at paragraph 23. I have summarised above the matters that were noted by the judge there, including such matters as the amount of time that the sponsor had lived in Pakistan, the support she would get through family members in Pakistan and the medical care that she could be treated with, with funding from her husband working in Pakistan and also the fact that she would be returning to a country with whose culture and religion she was familiar. It is not a question of equivalence. Though it is of course the case that detailed submissions were made, in particular in the skeleton before the judge as to the breadth and depth of care that the sponsor receives and the role of the appellant in that, I do not consider the judge can be said to have erred at paragraph 23 in coming to the conclusions she did about the issue of insurmountable obstacles to family life for the couple together continuing outside the United Kingdom. The test is, as was pointed out in Agyarko, a high one. Clearly equally it must not be one that is incapable of being surmounted, but I consider it was properly open to the judge at paragraph 23 to conclude that such obstacles had not been made out. This ties in with ground 3 and the point about the policy guidance. The example given there was a lack of healthcare in the case of somebody with a mental or physical disability amounting to an insurmountable obstacle, but there was no challenge to the judge's finding that the sponsor's diabetes could be treated in Pakistan and that otherwise she would have the same kind of support even if not the equivalent support in Pakistan as she has currently in the United Kingdom.

21. With regard to grounds 4 and 5 which are concerned with Article 8, the judge clearly took into account the impact on the sponsor of being denied access to NHS benefits on returning to Pakistan. The judge was entitled however to balance against that the continued devotion of the appellant and his extended family, as well as the other positive factors considered at paragraph 23. In the end I consider the grounds in this regard and elsewhere are no more than a matter of disagreement. It may be that a judge could have come to a different conclusion either under the Rules or in respect of Article 8. But the issue is whether the judge in this case in her decision came to the conclusion that could be said to be perverse or irrational or in another way infected by public law error. In my view the judge did not so err. She came to conclusions that were properly open to her on the evidence and no error of law in her decision has been identified. It follows that her decision dismissing this appeal is upheld.

22. No anonymity direction is made.

Signed Date 1 September 2017

Upper Tribunal Judge Allen