



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: HU/03157/2018

THE IMMIGRATION ACTS

Heard at: Field House  
On: 11 February 2019

Decision and Reasons Promulgated  
On: 01 March 2019

Before  
Deputy Upper Tribunal Judge Mailer

Between  
T R K  
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr M West, counsel, instructed by Kalam Solicitors

For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh, born on 1 January 1992. He appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 21 November 2018, dismissing his appeal against the decision of the respondent dated 9 January 2018 to refuse to grant him leave to remain as the spouse of [SS].
2. It was accepted that the appellant could not succeed under the Rules. The appellant satisfied the suitability, relationship and financial requirements of Appendix FM [10]. The English language requirements had not been complied with. He acknowledged that the 2010 certificate submitted in support of the appeal had expired. He contended however that given his qualifications and ability to give evidence in English at the

hearing, he would be able to pass an English language test at the required level.

3. He contended that the decision breaches his family life rights under Article 8 of the Human Rights Convention.
4. The Judge found at [13] that it has been established on a balance of probabilities that he is in a genuine and subsisting relationship with his wife. It is further established that she suffers from severe eye difficulties and that the parties have been undergoing a course of fertility treatment.
5. He stated that whilst it may be that the relationship between them commenced when the appellant held leave to be in the UK, by the time of his marriage in April 2016, he had become an overstayer in December 2014.
6. He found that it has not been shown that there are insurmountable obstacles to the parties living in Bangladesh. Treatment is available for the appellant's wife there. The fact that the cost of some medication would be beyond the means of the parties is a consequence of no weight [13]. Whilst it is accepted that he is fluent in English, the position nevertheless remains that he has not provided the specified evidence showing that he meets the English language requirements under the Rules. The 2010 certificate relied upon has long expired.
7. Should she choose to do so, the appellant's wife can remain in the UK to continue her treatment. For his part, the appellant can return to Bangladesh to make an out of country application for entry clearance [13].
8. The Judge directed himself in accordance with various authorities which he has identified at [14]. Whilst it is acknowledged that he might endure some hardship on return to Bangladesh, where he is very familiar with its culture and the way of life, such hardship does not engage the guidance set out by the President of the Tribunal in Treebhawon and Others.
9. His wife cannot insist that her husband should be entitled to live in the UK when he might lawfully be refused leave to enter or remain. The "mere hardship" that the appellant might endure is insufficient to make a finding of "insurmountable obstacles" [16].
10. He considered the provisions of s.117B of the 2002 Act. He referred to the decision in R (on the application of Chen) (Appendix FM - Chikwamba - Temporary Separation - proportionality) IJR [2015] 189 (IAC).
11. He referred to the decision in Bibi and Another, R (on the application of) v SSHD [2013] EWCA Civ 322. By a majority decision the court of appeal

held that the English language requirements for an application for leave to enter as a spouse did not amount to a disproportionate interference into rights protected under Article 8 of the Human Rights Convention. The requirement had a rational and proportionate justification for the purpose of any perceived discrimination for the purpose of Art 14/Art 8 ECHR.

12. On 28 December 2018, First-tier Tribunal Judge Grimmett granted the appellant permission to appeal. It was arguable that he erred as it appears that the rules were met save for the English language test and the appellant has significant ability in English. It is also arguable that the Judge erred in the lack of consideration of the appellant's wife's medical problems.
13. On behalf of the appellant, Mr West, who did not represent the appellant at the hearing, adopted the grounds of appeal: The Judge erred in failing to engage with the fact that the appellant's circumstances fell within the scope of Chikwamba, supra. He referred to the decision in Agyarko and Ikuga R (On the application of) v SSHD [2017] UKSC 11 where it was held that whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of the immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal then the weight of the public interest in his or her removal would generally be very considerable. If, on the other hand an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba.
14. He submitted that on the evidence before the Tribunal, it was clear that if the appellant were to make an application for entry clearance as a partner from abroad, it would 'most certainly' be successful. Had the Judge properly engaged with that point, he would have been bound to find that there is no public interest in the appellant's removal and the respondent's decision is accordingly disproportionate.
15. He submitted that the suitability and relationship requirements of Appendix FM were satisfied as were the financial requirements as his partner receives personal independence payments and accordingly the appellant does not have to meet the income threshold of £18,600.
16. He has to show that his partner is able to maintain themselves adequately without recourse to public funds. The calculations demonstrated that his partner's weekly net income after deduction of weekly housing costs is

greater than the weekly net income that the appellant and his partner would have received if they were in receipt of income support.

17. There was ample evidence before the Tribunal that he would almost certainly be able to pass an English language test in speaking and listening at a minimum of Level A1 of the CEFR for language. He had passed the IELTS with an overall score of 5.0, Level B1 of the CEFR for language. He held a diploma in law and is a second year LLB (Hons) student. This is a case where the appellant would be able to gain the specified certificate within a matter of days, having regard to the findings referred to.
18. He submitted that the finding by the Judge at [16] that no grounds have been established to grant leave outside the rules in circumstances in which refusal would result in unjustifiably harsh consequences for the appellant is “perverse.” The finding that there were no insurmountable obstacles in the circumstances, amounts to a material error of law. The Judge did not reject the evidence, set out in the sponsor’s witness statement at paragraph 11, that his partner’s medication, Humira 40, is either not available in Bangladesh, or if available, would be too expensive to afford.
19. The ‘crucial’ finding at [13] that the cost of some of the medication would be beyond the means of the parties ‘is a consequence of no weight,’ constituted an error because:
  - (a) there was a letter from Dr Pasu dated 29 September 2017 at page 17 who stated that if the specialist treatment is stopped then the appellant’s partner’s vision will be negatively impacted. Accordingly, the fact that the cost of some of the medication would be beyond the means of the appellant and his partner is a consequence of significant weight and directly relevant to the insurmountable obstacles assessment;
  - (b) the Judge provided no reasons for the finding. It is trite law that the Judge is under a duty to give adequate reasons: MK (Duty to Give Reasons) Pakistan [2013] UKUT 00641;
  - (c) the Judge undertook an inadequate assessment of whether insurmountable obstacles would be faced by his partner, or whether she would be able to accompany him to Bangladesh. However, in stating that she would find no insurmountable obstacles in Bangladesh, ignores the fact that she would not be able to receive adequate treatment. That was a matter directly relevant to the insurmountable obstacles assessment.
20. There was no reference in the respondent’s decision regarding the adequacy of treatments available to her.

21. In his witness statement before the Tribunal, the appellant stated that they are in receipt of IVF treatment and both must attend every appointment. It is not possible for his wife to relocate to Bangladesh on account of her critical condition. His village is over 300km from the capital. There are no specialist eye hospitals in his town. His wife would have to travel from the village to the capital, a 12-14 hour journey by train, in order to obtain treatment. Further, steroid medication makes her bones weak and fragile, and she is also susceptible to joint pains, nausea and migraines.
22. Mr West submitted that the Judge's finding amounts to a bare assertion which has been rebutted.
23. Finally, there was no evidence as to the length of his absence in taking the English test. Any period would be disproportionate.
24. On behalf of the respondent, Ms Pal noted that the appellant did not satisfy the relevant English language requirements. She accepted that he could satisfy it. The Judge set out the two available choices to the sponsor at [16]. She could either visit her husband in Bangladesh for a short period or remain in the UK. There was moreover an eye hospital available, albeit situated at a great distance from the village where they would stay. They were however not obliged to stay there. The sponsor's benefits could continue.
25. She submitted that in the circumstances, the Judge has properly considered the issues and has made a sustainable proportionality assessment.

### **Assessment**

26. The Judge was referred to the decision of the Supreme Court in Agyarko. Even if the applicant was residing in the UK unlawfully, and he was otherwise certain to be granted leave to enter, at least if an application was made from outside the UK, then there might be no public interest in his removal. It was noted that this was illustrated by the decision in Chikwamba.
27. The evidence before the First-tier Tribunal was to the effect that, apart from the English language requirement under Appendix FM, the appellant met the other requirements.
28. There was however ample evidence before the First-tier Tribunal testifying to the appellant's ability to pass an English language test in speaking and listening at a minimum of Level A1 of the CEFR for languages required by section E-ECP. 4.1. (b) of Appendix FM. He had passed an IELTS with an

overall score of 5.0. More significantly, he was at the time registered as a second year LLB (Hons) student.

29. Further, there was cogent evidence relating to his wife's very significant medical problems. The failure to make any finding relating to the adequacy of treatment was a matter that was directly relevant to any assessment of whether there would be insurmountable obstacles. Her medication was not shown to be available in Bangladesh or if so, whether it would be too expensive to afford. The Judge has thus given no reasons for the assertion that treatment would be available for her in Bangladesh.
30. There was however evidence before the Tribunal that if her medical treatment were stopped, her vision would be negatively impacted. She has been undergoing specialist treatment in that respect as is evident from a letter from Dr Pasu produced at page 17 of the appellant's bundle.
31. In the circumstances I find that the making of the decision by the First-tier Tribunal involved the making of material errors of law. I accordingly set aside the decision.
32. In re-making the decision, I have had regard to the evidence already referred to in this decision.
33. The only outstanding requirement under Appendix FM related to the production of the relevant English language certificate.
34. I find that the appellant would be able to provide the specified evidence relating to the English language certificate with relative ease. He has already passed an English language test in speaking and listening at a minimum of Level A1 of the CEFR for languages. He had passed an IELTS with an overall score of 5.0 which is at level B1 of the CEFR for languages. He also holds a diploma in Law and was a second year LLB (Hons) student. The First-tier Tribunal Judge himself noted and accepted that the appellant was able to give fluent evidence in English [13].
35. I thus find that if the appellant were to make an application from abroad, he would be certain to be granted leave to enter.
36. In the circumstances, I find that there would be no public interest in his removal. He would be separated from his wife for a period. She is dependent on the continued receipt of Humira 40. The fact that the cost of the medication would be beyond the means of the parties, is a matter of considerable consequence. If his wife's specialist treatment is stopped, her vision will be negatively impacted. She would face insurmountable obstacles were she to be required to accompany him to Bangladesh.

37. Having regard to the evidence as a whole, I find that the decision of the respondent constitutes a disproportionate interference with their rights to respect for family life under the Human Rights Convention.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set aside the decision, I re-make it and allow the appellant's appeal.

Signed: Deputy Upper Tribunal Judge Mailer

Dated: 20 February 2019