**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case Nos: UI-2024-004391
UI-2023-001760

First-tier Tribunal Nos:
HU/60853/2023 HU/54533/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 14th of January 2025

**Before**

**UPPER TRIBUNAL JUDGE MAHMOOD**
**DEPUTY UPPER TRIBUNAL JUDGE STAMP**

**Between**

**Mr Muhammad Waqas**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**Entry Clearance Officer**

Respondent

**Representation:**
For the Appellant: Ms R Chapman, counsel instructed by Danielle Cohen Solicitors
For the Respondent: Mr J Thompson, a Senior Home Office Presenting Officer

**Heard at Field House on 25 November 2024**

**DECISION AND REASONS**

1. This is our oral decision was delivered at the hearing today.

## The Decision of the First-tier Tribunal and the Grounds of Appeal

2. The Appellant appeals against the decision of First-tier Tribunal Judge Andrews promulgated on 13 June 2024 dismissing his appeal against the Respondent's decision to reject his application entry clearance to join his British wife.

3. Permission to appeal was granted by First-tier Tribunal Judge Haria by way of a decision dated 20 September 2024.

4. The Appellant relies on three grounds of appeal which have been drafted by Ms Chapman. Ms Chapman also relies on a skeleton argument for today's hearing. We also had the benefit of a Rule 24 response on behalf of the Secretary of State.

5. We summarise the grounds of appeal: Ground 1 contends that there was flawed and unsustainable reasoning for preferring the Sponsor's mother's general practitioner records over the specifically obtained psychological report of Dr Nixon. Ground 2 contends that there was a flawed approach to the specific country expert report of Dr Wali. Ground 3 contends that there was an error of law by the taking into account immaterial considerations, namely whether or not there were insurmountable obstacles pursuant to EX.1.(b) of Appendix FM of the Immigration Rules, rather than exceptional circumstances pursuant to Gen 3.2.

## The Hearing Before Us

6. Ms Chapman amplified the grounds of appeal and referred to her skeleton argument. She took us to various paragraphs of the Judge's decision in which she submitted that the Judge had materially erred in law because the Judge had referred erroneously to an insurmountable obstacles test. She said that even if one looked at earlier parts of the decision, the Judge had said that even though the insurmountable obstacles test did 'not strictly apply', the Judge still went on to consider it any event. It was submitted that there was also in an error when considering the Supreme Court's decision in R (on the application of Agyarko and another) v Secretary of State for the Home Department [2017] UKSC 11.

7. Ms Chapman submitted that in essence that the Judge had looked through the prism of insurmountable obstacles rather than the correct approach pursuant to Gen 3.2 of Appendix FM to the Immigration Rules and that thereby an erroneous conclusion had been reached.

8. On behalf of the Respondent, Mr Thompson submitted that he relied on the Rule 24 reply. He referred to Ground 3 first and submitted in summary that the Judge took the approach that she did because of the submissions which were made by the advocate who had appeared at the hearing before her. It was submitted that when the decision was read holistically,

it was clear that the Judge had applied the correct test and that in any event the correct decision had been reached. Mr Thompson referred to paragraph 19 of the Judge's decision whereby she had set out that there needed to be consideration of whether or not there would be unjustifiably harsh consequences. At paragraph 77 the Judge had referred to "unjustifiably harsh consequences".

9. Mr Thompson submitted that the Judge had very clearly considered the factual matrix. The Judge had considered the Appellant's immigration history. She had considered the position in respect of the Sponsor being the Appellant's wife and the issues in respect of the Sponsor's mother. The Judge had also noted that the Sponsor's mother was some 60 years of age and the observation in respect of the age was correct.

10. Mr Thompson invited us to conclude that there was no material error of law and that none of the grounds showed merit.

11. We heard from Ms Chapman in reply and we also heard from the parties in terms of disposal if we were to find that there was a material error of law in the Judge's decision.

**Analysis and Consideration**

12. In our judgment, there is a material error of law in the Judge's decision. The Judge applied the wrong test in various parts of her decision. Whilst we agree with First-tier Tribunal Judge Haria that the decision is one which is otherwise well-written and thorough, it is not possible to ignore the numerous references by the Judge to the wrong test.

13. We start with paragraph 44 of the Judge's decision. There is a sub-heading of "*Insurmountable obstacles*?" The Judge then stated that "*strictly*" the test did not apply, but she went on to apply the test which did not apply anyway. Then at paragraph 62 the Judge's decision contains a sub-heading of "*My conclusion on 'insurmountable obstacles'*".

14. Although, as Mr Thompson states, the Judge did refer at paragraph 77 to "unjustifiably harsh consequences", she did so in the context of *R (Agyarko).*

15. In our judgment the Judge materially erred because the correct position is that the insurmountable obstacles test in this entry clearance case did not apply. There was no "strictly" about it, despite the Judge's reference to that at paragraph 44 of her decision.

16. GEN.3.2.(1) provides, in so far as relevant, that where an application for entry clearance does not otherwise meet the requirements of the Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph 2 apply. Sub-paragraph 2 provides that the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance resulting in unjustifiably

harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

17. It is not possible to conclude that the Judge looked at the case through the correct prism of GEN.3.2 in relation to unjustifiably harsh consequences. Had the Judge done so, it is possible that she might have come to a different decision.

18. In respect of grounds 1 and 2 however, we conclude that the Judge has undertaken a detailed and lawful assessment and she reached her findings in a cogent manner. This includes in respect of the Appellant's past immigration history, the aspects of the Sponsor's history as a British woman of Pakistani heritage who does not speak Urdu. The Judge's sustainable findings were that many persons would find themselves in such circumstances as well. The Judge firmly had in mind the TOIEC issues, the absconding and the Sponsor's mother's health. The medical reports and country reports were cogently and unarguably considered when looking at the decision holistically. We conclude that there is no merit to Ground 1 or Ground 2

19. We conclude though that Ground 3 is made out and that the Judge's decision contains a material error of law. A further hearing will be necessary.

20. We conclude that for the further hearing there will be retained findings. We have rejected Grounds 1 and 2. In the circumstances there will be retained findings from paragraphs 41 to 43 and paragraphs 45 to 66 of the Judge's decision.

21. We have reflected on the parties' submissions as to the appropriate disposal.

22. Although not known at this stage, Ms Chapman indicates it is likely that there will be updating medical evidence relating to the Sponsor and her mother. That may take some time to obtain. We note the potential importance of that evidence.

23. We apply AEB [2022] EWCA Civ 1512 and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC). We carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principles set out in paragraph 7 of the Senior President's Practice Statement. We take into account the history of the case, the nature and extent of the findings to be made and we consider paragraphs 7.1 and 7.2 of the Senior President's Practice Statement. We conclude that the matter be remitted to the First-tier Tribunal for rehearing.

## Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and we set it aside.

We remit the matter to the First-tier Tribunal. Paragraphs 41 to 43 and 45 to 66 of First-tier Tribunal Judge Andrews' decision are retained findings.

**Abid Mahmood**
Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 November 2024