

IN THE UPPER TRIBUNAL

R (on the application of Shahzad) v Secretary of State for the Home Department IJR [2015] UKUT 00137 (IAC)

Field House  
London

Thursday, 22 January 2015

**BEFORE**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**KHURAM SHAHZAD**

Applicant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

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Mr Gibson-Lee, instructed by Khans Solicitors appeared on behalf of the Applicant.

Mr A Bird, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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**JUDGMENT**

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JUDGE DAWSON: The applicant is a national of Pakistan where he was born on 3 July 1982. He arrived in the United Kingdom with a visit visa in 2007 following a successful appeal against the refusal by the Entry Clearance Officer of his application in 2006. The applicant was granted leave to enter by virtue of his visa until 28 December 2007. He thereafter remained without leave.

2. On 10 September 2012 he wrote to the respondent asking for leave to remain on human rights grounds referring specifically to Article 3 and Article 8. The documentation he submitted with that letter included the respondent's standard application form FLR(O), statements by him and his wife, copies of hers and his passport, payslips of his partner, family photographs and between items 11 and 16 the following:

(11) An affidavit from uncle, Mister Abrar Mehmood from Pakistan;

(12) Police report (FIR) with English translation.

(13) An email sent from a cousin from Pakistan.

(14) Proof of private and family life of the applicant.

(15) Newspaper cutting describing my country's recent situation.

(16) Country report (Amnesty International).

3. I pause here to observe that the whereabouts of the above material is not clear. It was not included in the application; it did not accompany the application to bring judicial review proceedings. The file indicates that the respondent returned material to the applicant and it appears that this was what was sent.

4. The next step was a further letter, this time from the applicant's representatives dated 26 March 2013. Khans Solicitors explained that they were acting and they set out all detail regarding the family life claim and raised a number of factors they considered should be taken into account by the Secretary of State. Significantly there was no reference to

the protection claim previously made. The applicant continued to wait for a decision.

5. On 14 August 2013 his solicitors sent a further letter in which they included the applicant's wife's payslips for the period March to July 2013, a further revised contract of employment, utility bills in the parties' names and greetings cards. The applicant and Ms Sugden married under UK law on 6 March 2013. They had previously relied on a marriage under Islamic law which they had entered into on 29 September 2012, in London. Certificates were provided.

6. The respondent refused to grant the applicant leave to remain. Since that refusal did not result in the applicant no longer having leave to remain her decision did not give rise to a right of statutory appeal. In summary, the respondent considered that the applicant did not meet the requirements of Appendix FM for partners and furthermore had failed to meet the exceptional criteria at EX.1(b). Given that the applicant did not have extant leave at the time of his application, it is not surprising that it is not contended he met the requirements of the Rule or Rules relevant to his application. The issue at the crux of this case is whether there were insurmountable obstacles to family life continuing outside the United Kingdom.

7. Specifically the respondent had this to say:

"You have a genuine and subsisting relationship with your British partner. Whilst it is acknowledged that your partner has lived in the UK all her life and is in employment here, this does not mean that you are unable to live together in Pakistan. Although relocating there together may cause a degree of hardship for your British partner the Secretary of State has not seen any evidence to suggest that there are any insurmountable obstacles preventing you from continuing your relationship in Pakistan. You therefore fail to fulfil EX.1(b) of Appendix FM of the Immigration Rules."

8. The respondent also made a decision in respect of the applicant's private life claim and concluded that he had spent 25 years of his life in

Pakistan and in the absence of any evidence to the contrary, it was not accepted that in the period of time he had been in the United Kingdom he had lost ties to his home country. Thus the respondent was not satisfied the applicant met the requirements of paragraph 276ADE(iv). I pause here to observe that one of the grounds of challenge initially was that the applicant had spent thirteen years in the United Kingdom. I was not specifically addressed on this point by Mr Gibson-Lee but it is undisputed that the applicant has only been here since 2007 and the argument based on longer period of residence was misconceived.

9. The respondent also made a decision on exceptional circumstances. She explained that the case had been considered as to whether the application contained any exceptional circumstances which might warrant consideration by her outside the requirements of the Immigration Rules for a grant of leave. The respondent decided it did not.
10. A number of grounds were raised by way of challenge to this decision. As will become apparent, it is unnecessary to set out all those grounds.
11. It is sufficient to say that the assertions challenged the lawfulness of the decision including a failure to take into account documents submitted with the third letter of August 2013. There was unlawfulness in dealing with the Article 8 claim properly, procedural impropriety in failing to follow Appendix FM of the Immigration Rules with specific reference to EX.1 and procedural impropriety in failing to follow enforcement instructions and guidance with specific reference to chapter 53 in the respondent's Enforcement Instructions and Guidance.
12. The final ground was an irrationality challenge that the respondent had failed to give exact reasons why the application failed to meet the requirements of R-LTRP.1.1(d).
13. Permission was granted by Upper Tribunal Judge Macleman for reasons given in his decision dated 6 August 2014 in these terms:

“Perhaps the grounds are only disagreement with a conclusion lawfully reached. Perhaps the appellant’s first recourse should have been to ask the respondent for a decision carrying a statutory right of appeal. However, at this stage, and in absence of any acknowledgment of service or other information from the respondent, I do not think the grounds are so obviously incapable of success as to be held unarguable.”

No Acknowledgment of Service has been filed by the respondent.

14. There appears to have been an issue regarding the filing of the certificate of service. In any event as pointed out by Mr Bird the respondent is not prohibited from participating in these proceedings having regard to Rule 29(3) of the Procedure Rules of the Upper Tribunal. Mr Gibson-Lee explained his own difficulty regarding the absence of Acknowledgement of Service. I do not consider that any prejudice arises from the absence of that material in the light of the narrowing of the grounds by Mr Gibson-Lee at the outset of the hearing before me today.
15. The respondent’s detailed grounds of resistance as described were filed with the Upper Tribunal on 8 January 2014. They were served by email on the applicant’s solicitors on Monday, 19 January and Mr Gibson-Lee explains that notwithstanding the difficulties as they were in email format the following day on Tuesday, he was clearly in difficulties in complying with the order made by Judge Macleman as to the filing of documents including the skeleton argument. He drew my attention to a draft skeleton that he had prepared prior to seeing this material from the Secretary of State on 17 January which adopts the grounds of challenge on which permission was sought. Helpfully Mr Gibson-Lee clarified the applicant’s position and explained that he did not rely on those grounds. In particular he no longer relied on the protection issues that had been raised in the initial letter of application. The revised grounds he stated were in the following terms:

“It was accepted that the relationship between the applicant and claimant was genuine. She is a British national and has a job in the United Kingdom. It is simply unreasonable and inconsistent with her human rights to expect

her to go to Pakistan where she does not speak the language or know the culture. The respondent's decision was effectively asking her to adopt a life in Pakistan where the relationship was not accepted by the applicant's family. She had never been there. There were security risks. It was not suggested that these were insurmountable but the couple would be unable to have the family life that they have in the United Kingdom in Pakistan."

In revising these grounds Mr Gibson-Lee also indicated that he relied on paragraphs 48, 51 and 52 of the previous grounds.

16. Paragraph 48 argues that the respondent's decision violated the claimant, his partner and their children's right to a family life and that such violation is disproportionate in the circumstances. I pause here to observe that there are no children to the relationship and that appears to have been an error.
17. Paragraph 51 refers to Ms Sugden's status as a British citizen and her full-time work here as well as the fact that she has never been to Pakistan before where she is unaware of the culture and languages. It is stated that she clearly knows it is extremely difficult for a woman to work in Pakistan, particularly when she was a foreigner. The claimant has enemies in his country and in addition his relatives had not accepted his marriage to a non-Muslim person. I observe that the protection claim was not pursued.
18. Paragraph 52 is in terms that the respondent failed to consider whether it is reasonable to expect the couple to leave the United Kingdom to live in Pakistan and that her decision is unlawful and procedurally improper.
19. The thrust of Mr Bird's oral submissions was that the apprehended difficulties that Ms Sugden would encounter had not been drawn to the attention of the Secretary of State at any stage and the decision of the Secretary of State could not be challenged on rationality grounds in respect of material that was not before her. He argued that the respondent was not obliged to assume stereotypes in terms of the situation she was required to take into account. I invited him and Mr

Gibson-Lee to address me on the correct test for insurmountable obstacles and I invited the parties to have regard to the decision of the Administrative Court in *Iftikhar Ahmed v SSHD* [2014] EWHC 300 (Admin) in which Green J reviews the decisions in *Nagre v SSHD* [2013] EWHC 720 (Admin) and the observations by the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192.

20. My attention was also drawn to the revision to Section EX which emerged in the changes in July 2014 to the Immigration Rules. This included a definition of insurmountable obstacles in these terms and I quote:

“EX.2 For the purposes of paragraph EX.1.(b) insurmountable obstacles means the various 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.”

21. Mr Bird referred me to the extracts from the respondent’s guidance dated October 2013 dealing, *inter alia*, with insurmountable obstacles. In particular he drew my attention to paragraph 22 of the decision under challenge in which it was noted that the substance of this particular guidance was applied when the August 2013 decision in the case before me had been taken. That guidance found echo in the revisions to Section EX. Mr Bird conceded that the insurmountable obstacles test could not be more demanding than that set out in the revisions to the Rules in July 2014. Mr Gibson-Lee accepted that concession and argued that the revisions indicated the correct test in this case. That clarifies the correct legal approach the Secretary of State was required to take.

22. I turn to the second limb of Mr Bird’s argument which is that the factors which Mr Gibson-Lee contends rendered the obstacles insurmountable were not drawn to the attention of the Secretary of State. So what was the case before the Secretary of State when she reached her decision? It was an application by somebody who had remained unlawfully since

expiry of his visa in 2007 that included a protection claim and material relating to that claim which is no longer relied on. It included details of a relationship with a British national who was in full employment yielding a sufficient salary to meet the threshold in Appendix FM.

23. An additional factor raised in paragraph 51 of the grounds adopted by Mr Gibson-Lee is that the applicant's relatives had not accepted this marriage to a non-Muslim person. As I have observed already the application of September 2012 was accompanied by statements. The applicant's statement focuses upon the risks and circumstances giving rise to this fear which he no longer relies on and also how he met Ms Sugden and that they had moved in together. He refers to his parents and family having come to know about that relationship, however no evidence was provided of that nor was there any evidence before the Secretary of State of the way in which they had expressed their disapprobation. The applicant made no mention of the difficulties it is now contended Ms Sugden would face. Similarly, her own statement refers to the history of the relationship. She gives a slightly different account of how the parties had met. She does not refer to concerns about relocation to Pakistan. The letter of 26 March 2013 contained more detail about the relationship and Ms Sugden's circumstances. Here too there is no submission that she would find it difficult in Pakistan.
24. The letter dated 14 August 2013 was accompanied by payslips and other material relating to Ms Sugden's circumstances. The respondent acknowledges that this material was not taken into account when reaching a decision. I am satisfied that the new material had no material bearing on the factors the respondent was required to consider, particularly in the light of her acknowledgement of the genuineness of the relationship and the fact of Ms Sugden's employment in the United Kingdom.
25. In the closing stages of Mr Bird's submissions Mr Gibson-Lee sought to further amend the grounds by arguing that the Secretary of State had not set out the test she was required to apply and she did not refer to her own

guidance. In deciding not to grant leave for this further ground of appeal advanced I had regard any potential merit. There is no reason to believe from the decision of the Secretary of State that she did not have regard to her own guidance in reaching this decision and furthermore the language in her decision is indicative that such guidance was indeed followed.

26. I return to the third point argued by Mr Gibson-Lee that the Secretary of State's decision was flawed by failing to have regard to the material that I have listed above which accompanied the initial letter of application. I am not persuaded that that material related to the case as now put that Ms Sugden herself would be willing to relocate to Pakistan but instead it related to the claims made which was of risk to the applicant resulting upon his intervention in a local cricket match in 2007.
27. I am satisfied that the respondent focused upon particular facts relating to the claimant and Ms Sugden. I am also satisfied that those facts as presented fell for appraisal within Section EX of the Rules and her own guidance. Those same facts did not necessitate a consideration outside the Rules and guidance.
28. The argument before me is that there are insurmountable obstacles to his family life continuing in Pakistan. The approach I am required to take is not what I would do were I the Secretary of State but instead I am reviewing the reasonableness of the Secretary of State's conclusion based on the material before her whatever sympathies I might have. My conclusion is that the decision of the Secretary of State was within the range of permissible responses to the facts as presented to her in the three letters and therefore *Wednesbury* reasonable. Accordingly this application is dismissed.
29. Mr Gibson-Lee makes no application for permission to appeal to the Court of Appeal. I am nevertheless required to decide whether I have erred in my decision; I am not persuaded that I have.
30. As invited by the parties I make no order as to costs. ~~~~0~~~~