



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/05175/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 May 2017**

**Decision & Reasons Promulgated  
On 27 July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**QADIR NAWAZ**  
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss S Khan, of Counsel instructed by Parker Rhodes & Hickmotts Solicitors

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Lodge, promulgated on 14 October 2016. Permission to appeal was initially refused by the First-tier Tribunal but subsequently granted by the Upper Tribunal.

**Anonymity**

2. No direction has been made previously, and there is no reason for one now.

### **Background**

3. In July 2006, the appellant entered the United Kingdom as a work permit holder valid for a period of 12 months. He remained in the United Kingdom unlawfully and was served with a removal notice as an illegal entrant on 11 December 2013. By this stage the appellant had entered into a religious marriage with a British citizen; the marriage was subsequently registered on 24 July 2014. On 7 August 2015, he made representations to remain on human rights grounds and it is the refusal of that claim, on 26 August 2015, which is the subject of this appeal.
4. The refusal informed the appellant that the respondent considered there to be no insurmountable obstacles to family life with his wife being enjoyed in Pakistan, there were no dependent children, no very significant obstacles to him integrating in Pakistan and an absence of exceptional circumstances. The appellant was afforded a right of appeal against the decision to refuse his human rights claim, solely on the ground the decision in question breaches his rights under section 6 of the Human Rights Act 1998.

### **The hearing before the First-tier Tribunal**

5. At the hearing before the First-tier Tribunal, both the appellant and his wife gave evidence. The judge concluded that the appellant could not meet the requirements of the Immigration Rules relating to family and private life and there were no insurmountable obstacles preventing the couple from continuing family life outside of the United Kingdom or, that there were exceptional circumstances to warrant a grant of leave outside of the Immigration Rules. The appeal was dismissed under and outside the Immigration Rules.

### **The Grounds of Appeal**

6. The grounds seeking permission to appeal refer to the authority of R (on the application of **SA v SSHD (Human Rights challenges: correct approach) IJR [2015] UKUT 00536 (IAC)** and the judge's reliance on **R (on the application of Agyarko and Others) v SSHD [2015] EWCA Civ 440** and argue that there was no attempt to consider the appeal in a "sensible and practical" way, an over reliance on the word "insurmountable" and that too high a hurdle was imposed.
7. Permission to appeal was granted by Upper Tribunal Judge Coker in the following terms: "*It is arguable that the First-tier Tribunal Judge has used the phrase "insurmountable obstacles" in the literal sense. Although if that is the case the error may not, on the facts presented, be material*".

8. The respondent's Rule 24 response, received on 1 March 2017 opposed the appeal, arguing that the judge's approach was proper and that he took all factors into account and provided adequate reasons.

### **The hearing**

9. Miss Khan submitted the judge had not properly considered the circumstances affecting the appellant's wife ability to relocate to Pakistan. The judge had no regard to the fact that the wife had a miscarriage and required family support. The wife was now pregnant and was due to give birth in June.
10. In reply, Mrs Pettersen argued the judge had considered the relevant factors. The judge was fully aware of the wife's situation and that this was adequately dealt with at [19]. She argued the judge did not accept the appellant was without family support in Pakistan and noted that there was no evidence that fertility treatment was not available there. Finally, she submitted that if there was an error it was not material.
11. In closing, Miss Khan submitted the judge had not taken a holistic view of the evidence. The judge had not factored into his assessment that the wife had a miscarriage. The case was not about the availability of IVF treatment in Pakistan, but the judge failed to engage with the fact that the wife was half-way through fertility treatment and was finding it difficult.
12. At the end of the hearing, I reserved my decision which I now give with reasons.

### **Decision on Error of Law**

13. I am satisfied that the decision of the First-tier Tribunal is not vitiated by a material error of law.
14. The judge was concerned with an appellant who married a British citizen who was, in turn, fully aware that he was here unlawfully before marriage. The evidence before the judge was that the wife was half-way through a cycle of IVF and a day before the hearing eggs had been collected which were to be frozen and later fertilised. In evidence, the appellant's wife said that she could not go to Pakistan at this stage of her treatment as well as for other reasons (at [9]- [10]).
15. While the decision is brief, the judge was clear that the focus of the appellant's case centred around the difficulties he claimed his wife would experience in Pakistan [14]. The judge noted the appellant's wife did not enjoy her last experience of a closeted village life when she visited Pakistan, but noted this could be overcome by living in a large city [16]. He did not accept the appellant had no family support in Pakistan and noted the wife's family could provide them with financial support. He found the wife had established an independent family life and while she was close to her extended family contact could be maintained. The judge accepted the wife would find the transition difficult and noted her

reluctance to continue family life in Pakistan, but found that none of these factors could constitute an insurmountable obstacle [18].

16. The judge noted that an important consideration was the treatment the wife was undergoing. It was unclear from the medical evidence whether she was half-way through treatment, however the judge proceeded on the basis that she was. Nevertheless, the judge found the wife could remain in the United Kingdom and complete the course of treatment before joining the appellant in Pakistan where there was no evidence that such treatment was not available [19].
17. In applying **Agyarko** (*supra*) the judge observed that the phrase "*insurmountable obstacles*" imposed a high hurdle under the Rules and that the test was "*significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the UK*". The judge accordingly found that the requirements of EX.1.(b). of Appendix FM of the Immigration Rules was not met and proceeded, in the alternative, to address Article 8 outside of the Rules. The judge noted the appellant's immigration history; his wife's nationality and concluded that it was not disproportionate to require him to leave for the purposes of making an application to re-join his wife from abroad at [21]-[22].
18. The judge's understanding of the "*insurmountable obstacles*" criterion enshrined in the Rules is the focus of the appellant's challenge in the grounds. What is argued is that the judge's application of the test was literal and he is criticised by Miss Khan for his failure to consider the wife's vulnerability and ongoing fertility treatment.
19. Before the judge the most recent analysis of the test of insurmountable obstacles, was contained in the decision of the Court of Appeal in **Agyarko**, which made clear the phrase while imposing a stringent test, was to be interpreted "*in a sensible and practical rather than a purely literal way*": see [23]. That interpretation of the criterion was endorsed on appeal by the Supreme Court: see **Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11.**
20. Whilst there is some force in the submission that the judge applied the test literally by adopting a tick-box analysis of the relevant factors against the imposed criterion, an error compounded further by his failure to direct himself that the phrase was to be applied in a sensible and practical way, I find the error, is not material, and is thus no basis for interfering with the judge's decision. The relevant factors referred to by the judge even if assessed in a practical and realistic sense could not, either individually or cumulatively, meet the criterion for the reasons the judge gave which were entirely open to him on the evidence.
21. The arguments advanced by Miss Khan as to the judge's treatment of the circumstances of the appellant's wife amount to little more than

disagreement with his findings. While the judge did not expressly refer to the wife's miscarriage he was clearly aware of her circumstances medical and otherwise and referred to them in detail at [8]-[10], and comprehensively analysed the wife's evidence of her claimed difficulties at [16]-[19]. That analysis took into account issues of family support and medical treatment. Those findings were more than adequate.

22. Overall, the burden was on the appellant to demonstrate that the insurmountable obstacles test was satisfied and the judge gave sound reasons for concluding that the criterion was not met.
23. Miss Khan indicated that a child was due to be born to the couple in mid-June. That is not a relevant factor for the purposes of these proceedings. Any child born to the couple should however be the subject of a new application.

### **Decision**

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed

Date: 08 September 2017

Deputy Upper Tribunal Judge Bagral