Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21218/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th December 2017	**On 6th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SUHENA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Mills (Senior Home Office Presenting Officer)
For the Respondent: Ms R Popal (Counsel)

DECISION AND REASONS

1. It will be convenient to refer to the parties as they were before the First-tier Tribunal. Mrs Suhena Begum is, accordingly, the appellant and the Secretary of State the respondent.

2. The appellant's appeal against a decision to refuse her human rights claim was allowed by First-tier Tribunal Judge Davey ("the judge") in a decision promulgated on 12th December 2016. The judge found that the requirements of the Immigration Rules ("the rules") in Appendix FM were

met regarding leave to remain for partners, as were the requirements of paragraph EX.1 of Appendix FM. The judge went on to find that even if the requirements of the rules were not met, the case revealed exceptional circumstances, such that the respondent's decision was disproportionate.

3. The respondent applied for permission to appeal, contending that the judge materially erred in his assessment of whether insurmountable obstacles to family life continuing in Bangladesh were shown to be present. The author of the grounds drew attention to the analysis made by the Court of Appeal in Agyarko [2015] EWCA Civ 440. The evidence before the Tribunal showed that the circumstances in the appellant's case were not exceptional and did not constitute insurmountable obstacles to family life continuing abroad.

4. In the alternative, the judge made no findings about the possibility of there being a temporary separation, while the appellant left and made an entry clearance application. The judge noted a lack of evidence supporting the claim that her mother-in-law required the appellant's care but even if care were required, the evidence did not show that this could not be temporarily provided by the local social services authority under the community care scheme, perhaps with assistance from the rest of the family.

5. Finally, it was contended in the grounds that the judge's reasoning on financial independence and section 117B(3) of the 2002 Act was flawed. He took into account the appellant's contribution to the care of her mother-in-law and the impact removal would have on the family and the broader community, but as there was a lack of evidence showing that care was in fact required to the extent claimed, the assessment was unsustainable. In finding that the appellant was not likely to be a burden on the UK taxpayer, the judge applied the wrong test, the relevant threshold being whether she was financially independent. The evidence showed that she was not and so any finding that it was in the interests of the economic wellbeing of the United Kingdom that she should have leave was flawed.

6. Permission to appeal was initially refused but granted by an Upper Tribunal Judge, on 25th September 2017. He drew attention to the stringency of the insurmountable obstacles test. On the facts, the circumstances did not, arguably, meet the required threshold. Moreover, the decision was arguably unclear on what the circumstances were that permitted the judge to find that they were exceptional. Reliance upon the appellant's presence as relieving the taxpayer of the burden of providing care for her mother-in-law may have been unsupported by the evidence and wrong in principle.

Submissions on Error of Law

7. Mr Mills, for the respondent, said that the judge made two key findings. First, he found that there were insurmountable obstacles to family life continuing abroad and that the requirements of the rules were met in this context. Second, even if the requirements were not met, there were exceptional circumstances present which showed that the Article 8 assessment outside the rules fell in the appellant's favour.

8. Dealing with the first finding, paragraphs EX.1 and EX.2 set out the appropriate test and the relevant paragraph in the decision was paragraph 14. The facts found were not capable of amounting to insurmountable obstacles. Agyarko was worth recalling. The spouse in that case was a British citizen who had spent all her life in the United Kingdom and did not wish to leave. The Court of Appeal said that insurmountable obstacles were simply not shown and in that regard the Supreme Court upheld that view. In contrast, the judge in the present appeal thought that the test was met.

9. The spouse in the present appeal spoke some Bengali and had parents from Bangladesh. The facts did not disclose that he would be returning to an alien culture. The other key aspect of the insurmountable obstacles assessment concerned the care to be provided to the appellant's mother-in-law. At paragraph 7 of the decision, the judge found that the appellant was spending 24 hours with her mother-in-law but the evidence did not, in fact, show that she needed such extensive support. No doubt the care provided by the appellant was convenient because it freed up her mother-in-law's husband, her father-in-law, to enable him to work in Cornwall. If the appellant returned to Bangladesh, her father-in-law might well have to change the location of his employment. However, the rules provided an elevated threshold and her father-in-law's preference was not capable of meeting the relevant test.

10. So far as the assessment outside the rules was concerned, it was apparent that the same facts found by the judge could not in themselves show exceptional circumstances, or that the decision under appeal amounted to a disproportionate response.

11. Ms Popal said that the findings in paragraph 7 of the decision showed what was exceptional in the case. The appellant's mother-in-law gave oral evidence. The Secretary of State might disagree with the outcome, but the judge heard the evidence and gave it due weight. There was extensive medical evidence showing the appellant's mother-in-law's ill health.

12. So far as Agyarko was concerned, the income threshold under the rules was also an issue in that case and the question for the Court of Appeal and the Supreme Court was whether it was too harsh. Here, the appellant and her sponsor were able to meet the income threshold.

13. Also relevant was the decision of the House in Lords in Chikwamba. There was no public interest in the appellant leaving and returning to Bangladesh in order to apply for entry clearance. Paragraph 15 of the decision contained the judge's conclusion regarding the rules, before he then moved to make an assessment outside them. As Lord Reed explained in the Supreme Court judgment in Agyarko, a fair balance was required to be struck and a structured approach to proportionality taken. The judge went through the components of the appeal, including the appellant's circumstances and those of her mother-in-law. Without her support, the mother-in-law would be in difficulties. The appellant's husband met the income requirements of the rules. This was not a case where there was simply one factor in play. Ms Popal said that the appellant's status was an important issue. She had leave extended by section 3C of the 1971 Act. An in time application for further leave was rejected because of a fee issue but the correct application was made within 28 days of that time. The decision contained no material error of law.

14. Mr Mills said in reply that the Secretary of State's case was manifestly not a disagreement with the outcome. The relevant thresholds were not applied. It was clear from the Supreme Court judgment in Agyarko that the proportionality assessment was required to be informed by factors which included the rules and section 117A to D of the 2002 Act. The Supreme Court upheld the stringent test regarding insurmountable obstacles and the need for exceptional circumstances, where family life was precarious. That was the case in the present appeal, the appellant being an overstayer. The evidence did not show that the requirements of the rules were met or that the mother-in-law required sufficient care to show that exceptional circumstances were present. This was not least because care was available from other family members or from the local authority. The public interest was not outweighed by the employment and other preferences of the family.

15. Mr Mills said that the judge commented on the appellant's immigration status at paragraphs 1 and 2 of the decision and again at paragraph 18, but declined to make a finding about the earlier application and whether it was made in time or not. This was a material omission as the appellant's status was important, not least in the context of section 117B of the 2002 Act. Ms Popal responded that any error here was not material. If the appellant were an overstayer, that would not be a significant factor in relation to paragraphs EX.1 and EX.2 of the rules or the wider Article 8 assessment. The judge noted that her status was a matter of dispute but the decision was clear. In the alternative, if the judge had found in favour of the appellant that she had section 3C leave, that would have given even greater force to her case.

16. Mr Mills said that the matter of the appellant's status was important and in declining to make a finding on this, the judge was unable to decide on the proper weight to be given to the public interest in removing overstayers.

The issue remained unresolved although relevant to section 117B and, therefore, to the overall assessment outside the rules. After all, if the appellant were present in the United Kingdom lawfully and the income threshold met, she might be in a position to meet the relevant requirements of the rules and have no need to rely on paragraph EX.1. The Secretary of State found that she was an overstayer and this was plainly a material factor.

17. In a brief discussion on the appropriate venue if an error of law were found, the two representatives agreed that the First-tier Tribunal should remake the decision, not least because the Secretary of State's challenge was on the basis of a lack of evidence showing the true extent of the mother-in-law's ill health and the care she required.

Decision on Error of Law

18. The decision has been prepared with characteristic concision by a very experienced judge. With some regret, however, I conclude that Mr Mills has shown that there is a material error of law. In substantial part, this is the result of matters beyond the control of the judge. The decision was completed and promulgated on 1st February 2017. The following day, the Supreme Court gave judgment in Agyarko [2017] UKSC 11. Mr Mills is right to say that the Supreme Court upheld the stringency of the significant obstacles test considered by the Court of Appeal. The Supreme Court judgment also added important and relevant further guidance, drawing on the Strasbourg jurisprudence and, in particular, Jeunesse (2015) 60 EHRR 17. This bears directly on the domestic expression of the phrase "insurmountable obstacles", which appears in paragraph EX.1(b) of Appendix FM to the rules and which is now defined in paragraph EX.2.

19. At paragraph 16 of the decision, the judge identified the factors explaining his finding that insurmountable obstacles were present. These were that the appellant's husband has no basis in Bangladesh, has not worked there and has no evident family support network to help him settle, find accommodation or make a life there. The Secretary of State's view that the appellant would have the necessary wherewithal to support him was unsustainable. The judge found that the husband barely speaks Bengali and has only the experience of living and working in the United Kingdom and that there should be no assumption that he had developed a level of understanding of Bangladeshi culture and customs by reason only of his relationship with the appellant. On this basis, the judge found that he could have no confidence in the notion that the appellant would be able to support and assist her partner, so that family life might be continued to a reasonable standard in Bangladesh.

20. There is some force in Mr Mill's broad submission that the facts in Agyarko are sufficiently similar in important respects, compared with those in the present appeal, to show that the insurmountable obstacles test could not

be met, accepting of course the judgments are not properly reached by means of mere analogy. What is important is the Supreme Court's guidance on the correct approach, at paragraphs 42 to 48 of the judgment. Lord Reed confirmed that the expression "insurmountable obstacles" employed by the Grand Chamber in Jeunesse is a stringent test. It was not met where what was proposed was the relocation of a family from Holland to Suriname, even though the children, the eldest of whom was at secondary school, were Dutch nationals who had lived in Holland all their lives and had never visited and who would experience a degree of hardship if forced to move. The applicant's partner in Jeunesse was in full-time employment in the Netherlands.

21. The Supreme Court noted that EX.1(b) applies in cases where an applicant for leave to remain under the partner route is in the United Kingdom in breach of immigration laws, so that insurmountable obstacles to family life continuing abroad will be required to meet the requirements of the rules. The meaning of "insurmountable obstacles" in EX.2 was found to be consistent with the meaning derived from Strasbourg case law, so that, overall, an appellant could not succeed unless able to show very serious difficulties in continuing family life outside the United Kingdom, which could not be overcome or would entail very serious hardship. Even where such difficulties do not exist, leave to remain might be granted outside the rules so long as "exceptional circumstances" are present, meaning those which would result in unjustifiably harsh consequences for the individual, such that refusal would not be proportionate, as expressed in the Secretary of State's own guidance. This approach was found by the Supreme Court to be compatible with Article 8. Lord Reed expressly held that in the absence of either "insurmountable obstacles" or "exceptional circumstances" it is not apparent why refusal of leave should be incompatible with Article 8.

22. Another salient feature of the analysis is the importance of assessing the precariousness of family life in these cases. Again, the particular emphasis this is given by the Supreme Court was not available to the judge. Where family life is created when those involved are aware that the immigration status of one of them is such that the persistence of that family life within the host state from the outset would be "precarious", it is likely only to be in exceptional circumstances that removal of the non-national family member will constitute a violation of Article 8. "Precariousness" is not a preliminary hurdle to be overcome but family life established in the knowledge that a person's stay is unlawful or precarious affects the weight to be given to it in the balancing exercise. The significance of this factor depends on what the outcome of immigration control might otherwise be. The public interest has greater weight where what is in issue is the automatic deportation of a foreign criminal, compared with, on the other hand, a person who is certain to be granted leave, at least if an application were made from outside the United Kingdom, even if residing in the United Kingdom unlawfully, so that in that

case no public interest exists in removal. This is the point illustrated by Chikwamba [2008] UKHL 40.

23. It is appropriate at this point to turn to the judge's assessment of the appellant's immigration status. This was contested, as the letter giving reasons for the adverse decision makes clear. The appellant's response to the Secretary of State's finding that she was an overstayer when she made her latest application was to assert that an in-time application made on 2nd May 2014 on a spousal basis was wrongly refused on the basis of non-payment of a fee. The judge noted the issue but found that he could not resolve it, save that he noted the appellant's denial that she was an overstayer and found her reasons supporting her claim not to have been working in breach of her terms of entry to be credible and sustainable. He was satisfied that the issues were not determinative.

24. They were, however, material. The precariousness of family life forms an important part of the "insurmountable obstacles" test, both under the rules and in an Article 8 assessment outside them, as Jeunesse makes clear. The relevance of the appellant's immigration status is also a factor that bears on the public interest in her removal for the purpose of making an entry clearance application from abroad, even supposing that the remaining requirements of the rules relating to the income threshold and so on, are met.

25. Precariousness is also material to the public interest question, the factors set out in section 117B of the 2002 Act falling to be considered in the overall assessment. At paragraph 17 of the decision, the judge took the statutory framework into account, noting that the appellant would develop her English language skills and was not likely to be a burden on UK taxpayers. Her parents-in-law were British nationals and her father-in-law was working and making a contribution. The support given by the appellant prevented a burden falling on the health and social services. However, the level of care appears to have been resolved without assessment of the support available from other family members, including the appellant's father-in-law, who has chosen to work a very considerable distance from the family home. There is also force in Mr Mills' submission that section 117B(3) requires an assessment of financial independence, rather than the saving of costs which might otherwise fall on others.

26. In summary, the Secretary of State's challenge to the decision is not simply a disagreement with the outcome. The stringency of the insurmountable obstacles test having been made clear by the Supreme Court, the judge's assessment of the evidence, in the light of the findings of fact made at paragraph 14, did not show that the relevant threshold was met. This is so in relation to the rules in paragraph EX.1(b), defined by EX.2, and for the purposes of the assessment outside the rules, regarding whether exceptional circumstances were shown in the case. The status of the appellant at the time she made her application for leave

was a material factor bearing on the weight to be given to the public interest.

27. The decision of the First-tier Tribunal is set aside. It will be remade in the First-tier Tribunal at Taylor House before a judge other than Judge Davey.

Notice of Decision

The decision of the First-tier Tribunal is set aside. It will be remade in the First-tier Tribunal at Taylor House, by a judge other than Judge Davey. Case management will be for the First-tier Tribunal but my initial view is that a time estimate of three hours is appropriate.

Signed Date 5th March 2018

Deputy Upper Tribunal Judge R C Campbell

Anonymity

The First-tier Tribunal Judge made no anonymity direction or order and none has been applied for. I make no order or direction on this occasion.

Signed Date 5th March 2018

Deputy Upper Tribunal Judge RC Campbell