Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16291/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 21st March 2019

Decision & Reasons Promulgated
On 28th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ASAD KHALID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S A Salam of Salam & Co Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Meyler (the judge) of the First-tier Tribunal (the FtT) promulgated on 16th October 2018.

2. The Appellant is a citizen of Pakistan born 7th January 1986. He entered the UK as a student on 26th June 2009. His student leave was extended until 31st May 2011. Thereafter he had Tier 1 (Post-Study) leave until 19th July 2013. He then made an

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application for leave to remain as a Tier 1 (Entrepreneur) which was refused and his subsequent appeal dismissed. He became appeal rights exhausted on 11th March 2014. He has had no leave since that date.

3. On 5th April 2018 he applied for leave to remain based upon his relationship with his fiancée [RC] who is a British citizen and to whom I shall refer as the Sponsor.

4. The application was refused by the Respondent on 24th July 2018 and the appeal heard by the FtT on 24th September 2018.

5. The judge found there would be no insurmountable obstacles to family life between the Appellant and Sponsor continuing outside the UK. The judge did not accept that the Immigration Rules in relation to family life and private life could be satisfied. The judge accepted that the Appellant and Sponsor have a family life, but did not find that there were any exceptional circumstances which would justify allowing the appeal with reference to Article 8 outside the Immigration Rules, and concluded that the Respondent's decision was reasonable and proportionate and did not breach Article 8 of the 1950 European Convention. The appeal was therefore dismissed.

The Application for Permission to Appeal

6. In summary it was contended that the judge had erred in considering EX.1(b) and was wrong to conclude that there were no insurmountable obstacles to family life continuing outside the UK.

7. It was contended that the judge was wrong in law to find that family life did not exist between the Sponsor and her parents and adult siblings as although the Sponsor is an adult, she had never lived apart from her parents and siblings. It was also contended that the judge was wrong not to recognise that the Appellant was a member of this family unit having lived with the family since his arrival in the UK in 2009.

8. It was contended that the judge was wrong to conclude that because the Sponsor was training to be a pharmacist, this did not amount to insurmountable obstacles to her leaving the UK.

9. It was contended that the judge was wrong not to take into account previous judicial review proceedings in which two High Court Judges had separately indicated that it was "at least arguable" that the appeal could succeed before the FtT.

10. It was submitted that the judge was wrong in law not to consider the principle in Chikwamba [2008] UKHL 40.

11. This was on the basis that the Sponsor had been offered employment with a salary of £28,050 per year, which would mean that the financial requirements of Appendix FM would be satisfied, and there would be no point in the Appellant leaving the UK to make an application for entry clearance from abroad.

12. It was also contended that the judge had erred in considering section 117B of the Nationality, Immigration and Asylum Act 2002. It was contended that the relationship between the Appellant and Sponsor had begun when the Appellant was in the UK lawfully as a student.

Permission to Appeal

13. Permission to appeal was granted by Judge Keane of the FtT who found it arguable that the judge, concerned with the application of EX.2 had arguably not applied the correct test. It was not clear that the judge had born in mind or applied EX.2. Judge Keane found that the judge arguably should have arrived at findings as to whether the Appellant and Sponsor would experience significant difficulties in continuing their family life in Pakistan which could not be overcome and should have arrived at findings as to whether the couple would experience very serious hardship in Pakistan.

14. Following the grant of permission the Respondent lodged a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge had considered the correct test and reached findings which were open to make on the evidence.

My Analysis and Conclusions

15. At the oral hearing Mr Salam relied upon his skeleton argument which was in similar terms to the grounds upon which permission to appeal had been granted. It was submitted that the judge had erred by failing to take into account the very significant difficulties that the Sponsor would face if she did not complete her pharmacy training. It was also submitted that the judge had erred by failing to consider the guidance in Chikwamba, and failing to have any regard to the findings of two High Court Judges in previous judicial review proceedings.

16. Mr McVeety relied upon the Rule 24 response. He pointed out that judicial review proceedings are not binding upon the Secretary of State or the FtT and the findings only amounted to a conclusion that the Appellant may have an arguable case.

17. It was submitted that the judge had applied the appropriate test in considering whether there are insurmountable obstacles to family life continuing outside the UK, and it was open to the judge to conclude that the fact that the Sponsor lived with her parents, and was training to be a pharmacist did not amount to insurmountable obstacles.

18. I conclude that the FtT decision does not disclose that the judge applied an incorrect legal test. The appropriate test was whether there were insurmountable obstacles to family life continuing outside the UK. Insurmountable obstacles is a phrase defined in EX.2 of Appendix FM which for ease of reference is set out below;

    "For the purposes of paragraph EX.1.(b) insurmountable obstacle means the very 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."

19. The judge does not set out the above definition, but that without more does not mean that the incorrect test has been applied. The phrase "insurmountable obstacles" is explained in Agyarko [2017] UKSC 11 and the judge specifically makes reference to Agyarko at paragraph 20 of the FtT decision. The Appellant in Agyarko was a national of Ghana who married, by proxy, a British citizen who had lived in the UK almost all his life and was in full-time employment. The Supreme Court found in Agyarko that those circumstances did not amount to insurmountable obstacles to family life continuing outside the UK.

20. In my view it was open to the judge to find at paragraph 20 that there was no evidence of "anything beyond the normal bonds of emotional dependence between adult parent and child and adult siblings" in relation to the Sponsor living with her parents and siblings. The Appellant also lived with the Sponsor. That is a finding that in my view was clearly open to the judge to make, and the grounds upon which permission to appeal was granted, do not disclose a material error of law, but disclose a disagreement with the conclusion reached by the judge.

21. The judge took into account (paragraph 19) that the Sponsor's career and training are very important to her, and was aware that her training would be completed at the end of 2018. The judge was entitled to conclude that evidence had not been presented to show that the Sponsor would be unable to use her pharmacy qualification in Pakistan. The judge noted that the Sponsor had arrived in the UK from Pakistan in 2008 and would be familiar with the language and culture. The judge took into account at paragraph 24, the submission made by Mr Salam that in Pakistan the Sponsor would not have the same type of employment as she would find in the UK and would effectively be working as a sales person rather than a pharmacist, but noted that no documentary or country information was submitted in support of that assertion.

22. The judge was entitled to conclude that the Sponsor's career as a pharmacist did not amount to insurmountable obstacles to family life continuing in Pakistan.

23. The point in relation to the previous judicial review proceedings is without merit. It is correct that the judge did not refer to those proceedings but that is not an error of law. Two High Court Judges found in previous judicial review proceedings that the Appellant's relationship with the Sponsor who was training to be a pharmacist makes the case "at least arguable". The function of the judge, was to make a decision on an arguable case and that function was discharged.

24. The judge did not err in failing to refer to Chikwamba. The offer of employment materialised after the FtT decision. The position before the judge was outlined at paragraph 19, in which the Sponsor stated that she had recently received a job offer from the NHS to work as a hospital pharmacist once her training is completed. It was not therefore the case the Sponsor would automatically have an income in excess

of the minimum required of £18,600 per year. That may have been the case once the training was complete, but was not the case when the judge heard the appeal, and therefore it was not automatic that if the Appellant had to apply for entry clearance from abroad, that his application would be granted. I find no merit in this point.

25. I do not find that the judge materially erred in considering section 117B of the 2002 Act. The judge was entitled to note at paragraph 36 that the Sponsor was fully aware of the precarious nature of the Appellant's status on arrival, when she embarked on a relationship with him, and was also aware that he was an illegal overstayer from 2014. The judge was entitled to conclude that neither the Appellant nor the Sponsor had any basis to believe that the Appellant would be allowed to remain in the UK. The Supreme Court at paragraph 49 of Agyarko made reference to Jeuness to the effect that an important consideration when assessing proportionality under Article 8, of the removal of non-settled migrants, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of family life would from the outset be precarious. In such a case it was said that "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8."

26. In my view the judge followed the correct legal approach when considering this appeal. The judge did not reach any conclusions which could be said to be irrational or perverse. The judge considered all the evidence and gave sustainable reasons for findings made. I conclude that the grounds upon which permission to appeal was granted, disclose a disagreement with the conclusions reached by the judge, but do not disclose a material error of law.

Notice of Decision

The decision of the FtT does not disclose a material error of law. I do not set aside the decision of the FtT. The appeal is dismissed.

Anonymity

The FtT made no anonymity direction. There was no request made to the Upper Tribunal for anonymity, and I see no need to make an anonymity direction.

Signed Date 21st March 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 21st March 2019

Deputy Upper Tribunal Judge M A Hall