



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18537/2019

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams
On 29 June 2021

Decision & Reasons Promulgated
On 14 July 2021

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MRS SAMINA NAVEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Mustafa, instructed by Ibrahim Consultants Limited
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission to the Upper Tribunal against the decision of a Judge of the First-tier Tribunal who dismissed her appeal against the respondent's decision of 31 October 2019 refusing a human rights claim.

2. The judge noted the appellant's immigration history. She has been in the United Kingdom since 6 September 2007. She married the sponsor, Mr Muhammad Asif on 25 December 2007 in an Islamic ceremony. Like the appellant, Mr Asif is a citizen of Pakistan. He was granted indefinite leave to remain in the United Kingdom, under what is known as the Legacy Scheme, on 20 February 2019. The appellant had had a previous human rights appeal which was refused by a Judge of the First-tier Tribunal on 7 July 2017.
3. It was conceded on behalf of the respondent that the relationship between the appellant and Mr Asif is genuine and subsisting. She stated that there were insurmountable obstacles to her return to Pakistan, that she had not left the United Kingdom since 2007, she had suffered stress and the sponsor, Mr Asif, became ill with hepatitis C, she had no immediate family in Pakistan and she and her partner were in the process of seeking fertility treatment and as a consequence met the requirements of EX.1.1 of Appendix FM. In the alternative, she argued that her removal from the United Kingdom would amount to a disproportionate interference in her and her partner's private and family life due to the length of their stay and their connections in the United Kingdom, the fact that they are not dependent on public funds, the sponsor's earning capacity, the fact that they are of good character and that the appellant was receiving treatment for stress and fertility issues.
4. The judge rightly made as her starting point the decision of the First-tier Tribunal Judge in 2017. The judge there found neither the appellant nor the sponsor to be credible witnesses, mainly due to the evidence concerning the sponsor's health. He had been found to have contracted hepatitis C and liver disease. The appellant said that he was unable to take care of himself and she was providing his sole care and support. The medical evidence provided showed that his treatment had been successful and his health issues had been resolved save for routine check-ups. The judge also found that he was working as a builder, decorator and interior designer, he was not housebound and he was active, undertaking manual work. The judge in 2017 found the appellant and the sponsor to have exaggerated the current state of the sponsor's health and found that that damaged their credibility accordingly.
5. In her witness statement, the appellant said that Mr Asif had been diagnosed with hepatitis C and fibrosis of the liver and had been receiving treatment for a number of years. She said that the treatment, which was very aggressive and came with a number of side effects, had left him severely weak. He was tested every few months to monitor his health. He also suffered from depression and anxiety due to the uncertainty over her immigration status.
6. The judge at the hearing in 2020 observed that no evidence had been produced regarding the sponsor's depression and anxiety. She found that the appellant had persisted in exaggerating the sponsor's current health issues. There was no evidence before her to suggest that his hepatitis C and liver problems were anything other than resolved. She saw no reason to depart from the judge's assessment of the appellant's credibility, in 2017.

7. She also saw no reason to depart from the earlier findings in relation to the appellant's command of the English language. The appellant had used an interpreter at the previous hearing and also did at this hearing. She bore in mind that confidence in a second language might play a part in determining whether a witness requested or used an interpreter to give evidence, but she found herself unable to discern the appellant's level of English from the current proceedings and was not assisted by any examination or test results.
8. The judge also found that the appellant had not shown that the sponsor earned a minimum of £18,600 and therefore she could not satisfy the financial eligibility requirements. She found discrepancies between the figures that were received into the sponsor's bank account and the figure declared to HMRC for the tax year of 2016/17 and found the sponsor's credibility damaged as a consequence.
9. The judge went on to consider Article 8 outside the Rules, reminding herself of the guidance in Hesham Ali [2016] UKSC 60 and Agyarko [2017] UKSC 11. She made a balance sheet analysis of the positives and negatives in the case and concluded that the public interest in the appellant's removal significantly outweighed the family and private life she had established in the United Kingdom; removal would not result in unjustifiably harsh consequences for the appellant and sponsor and would not therefore be proportionate [given the sense otherwise of what is said at paragraph 42, I consider that the judge must have meant to say "disproportionate" at that point at the end of paragraph 42].
10. The appellant sought and was granted permission to appeal first on the basis that the judge had not made any decision as to whether there were any insurmountable obstacles under EX.1 although this had been argued, and in addition, when assessing proportionality the judge had failed to take into account and/or attach adequate weight to the factors in the appellant's favour, referring in particular to the amount of time that the appellant had been in the United Kingdom, the appellant's ongoing treatment and the fact that she was looking after her husband and was stressed due to his health issues, that she was not a burden on the public funds, was of good character and had established a private life in the United Kingdom for a lengthy period. Permission to appeal was granted on all grounds.
11. In his submissions, Mr Mustafa relied on the points made in the grounds. Despite the adverse findings, the decision was flawed due to the failure to make any finding on the question of whether there were insurmountable obstacles to the family re-integrating in Pakistan. This was a material error of law.
12. He also argued that it was relevant that the sponsor had been granted indefinite leave to remain, and that, given that he was a failed asylum seeker, account should have been taken of the fact that he had claimed to be at risk on return to Pakistan.

13. In her submissions, Ms Isherwood relied upon and developed the points made in the Rule 24 response. It was accepted that the judge had not referred to EX.1, but it was argued that that was not material.
14. The asylum claim of the sponsor had not been accepted. He had been granted leave under the Legacy. The judge had taken proper account of the findings of the earlier judge and considered the previous history and looked at all the evidence. The positives and negatives had all been considered and the test outside the Rules was a high one.
15. By way of reply, Mr Mustafa argued that it was quite clear that the judge had not considered the issue of insurmountable obstacles to return to Pakistan and had not taken into account the significant fact that the sponsor was a qualified person, having been granted indefinite leave to remain.
16. I reserved my decision.
17. The first point can be disposed of relatively briefly. It is clear from EX.1 in Appendix FM of HC 395 that the paragraph applies if the applicant has a genuine and subsisting relationship with a partner who is in the UK and, as in this case, settled in the UK, and there are insurmountable obstacles to family life with that partner continuing outside the UK. Under EX.2 it is said that for the purposes of EX.1.(b) "insurmountable obstacles" 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.
18. It is common ground that the judge did not consider whether or not such insurmountable obstacles existed in this case. I do not agree that that can be regarded as an immaterial error, despite the weighty adverse findings otherwise made by the judge. It was a point that needed to be considered and that was not done, and the failure to do so amounts to a material error of law.
19. As regards the consideration of Article 8 outside the Rules, the only element, in my view, lacking from that evaluation is that same point of a consideration of whether or not there are insurmountable obstacles to family life continuing outside the United Kingdom. The judge gave very careful consideration otherwise to Article 8 outside the Rules, setting up a balance sheet in which she considered all the relevant matters. Though she did not mention it at that point, she was clearly aware of the fact that the sponsor has indefinite leave to remain, and the failure to make express reference to that in no way materially mars her decision. I should say also that I see no force to the point that the sponsor was a former asylum applicant. As Ms Isherwood pointed out, he was granted discretionary leave under the Legacy policy and thereafter indefinite leave to remain, and it cannot possibly be said to follow from those grants of leave that his claim to be at risk on return to Pakistan was accepted or that it had any weight.

20. Accordingly, there will have to be an evaluation of whether or not EX.1 applies in this case and the findings in that regard will have to be factored into the evaluation of Article 8 outside the Rules. In light of the fact that the judge's findings are otherwise unchallenged, my provisional view is that it would be most appropriate for the matter to go back to her for her to make a decision on EX.1 and to re-evaluate her consideration of Article 8 outside the Rules in light of that and her other findings. Unless I receive representations persuading me to the contrary, within fourteen days of the date of promulgation of this decision, the appeal will be remitted to Judge Verghis at Hatton Cross for her to complete her decision.

Notice of Decision

The appeal is allowed to the extent set out above.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 9 July 2021

Upper Tribunal Judge Allen