



IAC-FH-CK-V1

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

Appeal Number: IA/29906/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 August 2015**

**Decision & Reasons Promulgated  
On 7 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MRS RIBI KHANOM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Miah of Counsel

For the Respondent: Mr C Avery, a Home Office Presenting Officer

**DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW**

**Introduction**

1. I will refer to the parties throughout this decision by their titles before the First-tier Tribunal.
2. The appellant, a citizen of Bangladesh, entered the UK on 29 May 2006 as a visitor. Judge of the First-tier Tribunal Fitzgibbon QC (the Immigration Judge) allowed her appeal against the respondent's decision to refuse her leave to remain in the UK on the basis that she had formed a family life with Mr Ahmed, a British citizen.

3. Judge of the First-tier Tribunal Pirotta gave the respondent permission to appeal that decision on 16 June 2015. She was satisfied that there were grounds for considering it wrong for the Immigration Judge to conclude that there were any insurmountable obstacles to the appellant continuing her family life with Mr Ahmed, the sponsor, if she were required to return to Bangladesh. There were, it appeared to Judge Pirotta, no exceptional circumstances so as to meet the criteria of paragraph EX.1 in the Immigration Rules (in Phelan's Immigration Law Handbook 9<sup>th</sup> ed at p.1154). The Immigration Judge was criticised for not applying the case law of **VW (Uganda) [2009] EWCA Civ 5**. Judge Pirotta considered that the Immigration Judge had not applied the law to the facts or made properly reasoned findings.

### **The Appeal Hearing**

4. At the hearing I heard submissions by both representatives. Mr Avery on behalf of the respondent (the appellant in the Upper Tribunal) submitted that the Immigration Judge's approach to "insurmountable obstacles" had been flawed. In particular, I was referred to paragraphs 11 – 14 of the decision, where the Immigration Judge dealt with EX.1(b) of the Immigration Rules. The appellant had been an illegal overstayer in the UK for over eight years in breach of Immigration Rules and therefore could not comply with paragraph E-LTRP.2.2 (b) unless EX.1 was satisfied. EX.1.(b) applied where the appellant was able to show a genuine and subsisting relationship with a partner who is in the UK and is a British citizen where the appellant was able to show that there were insurmountable obstacles to family life with that partner continuing outside the UK. This is defined in EX.2 of the Rules as being:  

'very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK which would not be overcome and which would entail very serious hardship for the applicant or their partner.'
4. The Immigration Judge decided not to set the bar for "insurmountable obstacles too high" but thought that the decision by Mr Ahmed not to "abandon his way of life in the UK and move to a foreign country" with which he had "negligible ties" should be given considerable weight. He thought that the decision overall was "reasonable". Taking all the evidence into account the Immigration Judge was satisfied to the required standard that the consequences of the appellant's removal would entail an indefinite disruption to her marriage and that it would be "unduly harsh" in all the circumstances. He was satisfied that it was not reasonable in the circumstances to expect Mr Ahmed to relocate to Bangladesh. Therefore, EX.1. did apply (i.e. there were insurmountable obstacles in this case) and because the appellant had established family life in the UK it was unnecessary for the Immigration Judge to consider paragraph 276ADE of the Immigration Rules, which deals with private life.

5. Mr Avery submitted that the Immigration Judge had not applied the test, as interpreted in the recent Court of Appeal case of **Agyarko [2015] EWCA Civ 440**. In that case the court had been concerned with two illegal overstayers who had formed relationships with British citizens. Mrs Agyarko got married to her partner. They then applied for leave to remain relying on the Human Rights Act 1998 and claiming that their human rights under that Act would be unlawfully interfered with if they were removed from the UK. They both claimed that their circumstances were exceptional which warranted the grant of leave to remain outside the Rules. The Court of Appeal decided that the insurmountable obstacles test was to be a “stringent” one but it had to be “sensible and practical” rather than “literally” interpreted. The fact that Mrs Agyarko’s partner had lived in the UK all his life and had a job here and therefore might find it difficult to relocate to Ghana to continue their family life there “cannot constitute an insurmountable obstacle”. I was invited to overturn the decision of the First-tier Tribunal and substitute the decision of the Upper Tribunal which would be to dismiss the appeal against the respondent’s decision.
6. I then heard from Mr Miah on behalf of the appellant. He submitted that paragraph 3 of the appellant’s witness statement made clear that this judge had decided the case on the information supplied before him. The sponsor would lose contact with the appellant if the latter were required to return to Bangladesh. He had no relatives in Bangladesh and no ties to speak of. Furthermore, the case was distinguished from either of the cases considered in **Agyarko**. In particular, I was referred to paragraph 23 of **Agyarko** and to paragraph 25 where it was pointed out that very weak evidence had been presented for Mrs Agyarko, who had not provided a witness statement. It is hardly surprising in the circumstances that the appellant was unable to show that there were insurmountable obstacles to her family life continuing. The language used in the Immigration Rules cannot be taken literally. A sensible and practical approach was required. A reasonable stance for the sponsor to take was that he did not wish to go abroad.
7. Mr Avery responded to say that the reasoning at paragraph 14 of the decision was flawed. The Immigration Judge had not applied the test correctly and had decided the case on very limited information as in the **Agyarko** case. There was no evidence that a protected family life existed with the extended family.
8. Mr Miah further addressed me to say that if I was persuaded as to the respondent’s argument I should nevertheless refuse to remake the decision. I should remit the matter to the First-tier Tribunal for a fresh decision because there were other grounds that could have been argued if the appellant had not succeeded in establishing that she qualified under paragraph EX.1. of the Immigration Rules.
9. At the end of the hearing I reserved my decision as to whether there was a material error of law and if there was what steps I should take to remedy that.



## **Discussion**

10. The appeal was determined solely on the basis of the Immigration Rules. The appellant had to show that there were “insurmountable obstacles” to her family life continuing if the appellant has to return to Bangladesh. The Immigration Judge took account of the fact that they entered their relationship knowing that the appellant was an overstayer who was at risk of removal.
11. The circumstances were not materially different from those in **Agyarko** in that Mr Ahmed had, apparently, lived in the UK all of his life, was employed here and had no close family ties in Bangladesh. However, I do note that the appellant had two sisters in Bangladesh but allegedly, he had not maintained contact with them. This is perhaps a point that the Immigration Judge could have been more critical about, rather than simply accepting Mr Ahmed’s assertions. It seems there was no contact with Mr Ahmed’s extended family.
12. It was suggested by Mr Miah that because Mrs Agyarko had not submitted a witness statement this, whereas the appellant had, the case of **Agyarko** was distinguished. However, as Mr Avery submitted, the Immigration Judge does not seem to have gone into the facts in any great detail. He seems to have attached considerable weight to the difficulties Mr Ahmed would face in having to return to Bangladesh with his wife, the appellant.
13. The Court of Appeal made it clear in **Agyarko** and in other cases that “insurmountable obstacles” is intended to be a high bar which must be overcome and the case law cited in that case illustrated the application of that test in a number of difficult cases. I accept that the test has to be applied in a sensible and practical way and that I am not required to apply it literally. However, the fact that Mr Ahmed has lived in the UK all his life and has a job here hardly takes it out of the ordinary.

## **Conclusions**

14. The appellant chose to embark on family life with her husband in the knowledge that she would have to return to Bangladesh. They have only been married since February 2014 and have no children. She has been in the UK as an illegal overstayer for a number of years and it is, I find, in accordance with the proper application of Immigration Rules including the public interest considerations applicable to all cases, following the insertion of Part VA into the Nationality Immigration and Asylum Act 2002 by the Immigration Act 2014, to require her to return to her own country. I find that the Immigration Judge attached excessive weight to the difficulties he perceived would be faced by the sponsor in relocating from the UK to Bangladesh. The conclusion that the effects of removal would “sever marriage ties” was not one reasonably open to the Immigration Judge on the facts. Those ties could continue from afar and it would, at some stage, be open to the appellant to apply from Bangladesh to join her

husband if he wishes to return to the UK. This of course would require her to satisfy the requirements of the Immigration Rules. In the circumstances, having carefully considered the decision, I find that this is not a decision in accordance with the Immigration Rules as interpreted by recent case law.

15. Mr Miah invited me to conclude in the event of finding an error of law that the matter should be remitted to the First-tier Tribunal. I accept I would have the power to do so under section 12 (2) (b) (i) of the Tribunals Courts and Enforcement Act 2007 but do not think it appropriate to do so. Both parties were given the opportunity to apply for any additional evidence to be admitted before the Upper Tribunal but there was no application to do so. The appellant was given an opportunity to present all his evidence before the First-tier Tribunal and in substance the matter was fully considered by the First-tier Tribunal. It is not the Immigration Judge's fact findings that have been criticised in this appeal but his application of the legal tests to the facts of the case as he found them to be. I find that it would be a recipe for unending litigation to remit the appeal to the First Tier-tribunal when the Upper Tribunal is in possession of a number of fact-findings by that tribunal.

### **Notice of Decision**

16. I find that there was a material error of law in the decision of the First-tier Tribunal.
17. Accordingly, I set aside the decision of the First-tier Tribunal. It is necessary to re-make that decision, which is that the appeal against the decision of the respondent to refuse leave to remain is dismissed.
18. There is no cross-appeal and no basis that I can see on which the appellant would be able to stay solely on the basis of Article 8 of the ECHR.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

### **Fee award**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Hanbury