



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA225542015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 22 May 2017**

**Decision Promulgated  
On 30 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**MUSHTAQ GURMANI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs J Moore of Drummond Miller, solicitors  
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Farrelly promulgated on 16 November 2016, which dismissed the Appellant's appeal on all grounds.

## Background

3. The Appellant was born on 20 September 1972 and is a national of Pakistan. On 2 June 2015 the Secretary of State refused the Appellant's application for leave to remain on the basis of his marriage to a British citizen.

## The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Farrelly ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 18 April 2017 Judge Hodgkinson gave permission to appeal stating inter alia

2. The grounds argue that the Judge erred as follows: Ground 1, in failing to refer to the oral evidence, in providing no reasons for rejecting such evidence and in not evidently having given such evidence any regard in the context of the claimed relationship; Ground 2, in failing to appreciate that the provisions of section 117B (4) and (5) of the 2002 Act permitted discretion in their application; Ground 3, in failing properly to apply the "insurmountable obstacles" test as to whether the appellant's disabled and visually impaired wife could be expected to relocate to live in Pakistan with the appellant.

3. In relation to Ground 1, the Judge makes no reference to having taken into account the oral evidence of the appellant and his witnesses as part of her assessment of the genuineness or otherwise of the marriage, which arguably amounts to an error of law. There is no substance to Ground 2, the Judge's consideration of section 117B being sustainable itself. It is arguable that the Judge's assessment of "insurmountable obstacles", so far as it applies to the appellant's wife, fails adequately to take into account all of her circumstances and history, linked to her significant disabilities and the fact that the appellant hails from Pakistan. Permission is granted on Grounds 1 and 3 only.

## The Hearing

5. (a) Mr Moore, for the appellant, moved the grounds of appeal. She told me that (at the hearing before the First-tier) the appellant and three other witnesses gave oral evidence and that, although the Judge carries out a detailed analysis of documentary evidence, there is no analysis of the oral evidence. She told me that it is impossible to discern from a balanced and impartial reading of the decision what evidence of the witnesses was accepted, what was rejected, and why. She told me that, in focusing solely on the documentary evidence, the Judge carries out an incomplete analysis of the evidence placed before him.

(b) Mrs Moore turned to the remaining ground of appeal and told me that the Judge's assessment of the "insurmountable obstacles" test is flawed. She told me that the appellant's wife has been a registered blind person

since the mid-1990s, and has never left Fife. She told me that the appellant's wife's ability to pursue the ordinary activities of daily living is restricted, that that evidence was before the Judge, and that the Judge had failed to correctly apply the "insurmountable obstacles" test. She reminded me that guidance about that test is now contained at paragraph 43 in Agyarko v SSHD [2017] UKSC 11.

(c) Mrs Moore urged me to allow the appeal, to set the Judge's decision aside and to remit the case to the First-tier so that an entirely new fact-finding exercise can be conducted.

6. (a) Mr Matthews, for the respondent, said that the first ground of appeal is made out. He told me that the Judge made no findings and carried out no analysis of the oral evidence, but told me that that did not affect the outcome of the case. He told me that the "insurmountable obstacles" test has been correctly applied, and so the Judge's decision should stand.

(b) Mr Matthews took me to [33] to [43] the decision and told me that, there, the Judge sets out a detailed proportionality balancing exercise taking account of all of the relevant evidence. He referred me to paragraph 44 of Agyarko v SSHD [2017] UKSC 11 and told me that there the definition of "insurmountable obstacles" contained in paragraph EX.2 of the immigration rules is endorsed. He told me that that is a test that the Judge correctly applied and, because that test has been correctly applied, the appellant cannot succeed.

(c) Mr Matthews told me that although there is an error of law in the decision, it is not a material error of law. He urged me to dismiss the appeal and allow the decision to stand.

### Analysis

7. Between [6] and [17] the Judge records that he heard evidence from the appellant and three witnesses, and then summarises what that evidence was. Between [23] and [32] of the decision, the Judge analyses the evidence. The analysis of the evidence is primarily an analysis of the documentary evidence placed before the Judge, but the analysis is carried out by reference to the totality of evidence. The first sentence of [27] records something that was said in the appellant's oral evidence. A fair reading of the analysis indicates that the oral evidence that he summarises between [6] and [17] is placed against the documentary evidence in the analysis set out between [23] and [32].

8. [24] of the decision contains a clear error of law, because there the Judge considers caselaw relevant to an application under the Immigration (EEA) Regulations, and this case concerns an application for leave to remain in the UK on article 8 ECHR grounds. Although that is a clear error, it is not a material error because the Judge incorrectly places the burden of establishing that the marriage is a marriage of convenience on the Secretary of State. That error does not place the appellant at a disadvantage, and, after carefully analysing the evidence, the Judge finds at [32] that the appellant is not a

party to a genuine and subsisting relationship. If the Judge had correctly placed the burden of proof on the appellant his conclusion would have been the same.

9. Despite the Home Office presenting officer's view that the first ground of appeal is made out, I find that it is not. The first ground of appeal is that the Judge does not make reference to the oral evidence and gives no reason for rejecting that evidence. Between [6] and [17] of the decision the Judge records the oral evidence. Between [23] and [31] the Judge gives adequate reasons for reaching the conclusion set out at [32]. The Judge does not take each witness's oral evidence line by line, but between [23] and [31] he clearly takes a holistic view of all of the evidence and sets out adequate reasons for finding that there are contradictions between the documentary evidence and the oral evidence.

10. The Judge commences [31] by saying

Documentation showing them as a couple was really what was needed.

That sentence makes it clear that the Judge found the totality of evidence placed before him to be unreliable. The Judge sets out what is missing from the evidence, having analysed each source of evidence.

11. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

12. I find that the Judge does make reference to the oral evidence as well as the documentary evidence, and between [23] and [31] sets out adequate reasons for finding that the evidence is not reliable because the evidence is contradictory. Those findings lead the Judge to the conclusion at [32]. The conclusion at [32] is fatal to the appellant's appeal. The remaining ground of appeal is entirely dependent on the first ground of appeal being made out. As I find the ground one is not made out, the appeal is dismissed and the decision stands.

13. The second (originally third) ground of appeal relates to the "insurmountable obstacles" test. It is argued that the Judge did not apply the test correctly, and that, had Mrs Copeland's circumstances been properly considered, then the only conclusion that could have been

reached would be that there are insurmountable obstacles to family life continuing elsewhere.

14. The Judge's finding that there is no genuine and subsisting relationship is also a finding that family life does not exist. Nevertheless, the Judge considered the case further on the hypothesis that family life does exist. In support of this appeal, it is argued that the Judge had not factored Mrs Copeland's circumstances into his proportionality assessment. That is wrong. A fair reading of [35], [36], [37] and [40] shows that the Judge took account of Mrs Copeland's interests as one part of all of the facts and circumstances of this case. At [38] the Judge clearly analyses "insurmountable obstacles" in a manner consistent with the definition given in EX.2 of the immigration rules, and a manner consistent with the guidance given in Agyarko v SSHD [2017] UKSC 11.

15. A report from Fife Society for the Blind, dated 21 May 2017, is now produced for the appellant. That is not evidence which was before the First-tier. It is not evidence which has previously been considered by the respondent. It may be that the appellant has further evidence which can be placed before the respondent to support a renewed application, but that is a matter for the appellant to consider.

16. There is nothing wrong with the Judge's fact-finding exercise. Despite the error made at [24] of the decision, the Judge applied the law correctly. The Judge clearly sets out his reasons for reaching his conclusion at [32] of the decision. The finding that the appellant fails to establish that the relationship is either genuine or subsisting is clearly sustainable. That finding is the fulcrum of this case. Because that finding stands, the appeal cannot succeed.

**17. No errors of law have been established. The Judge's decision stands.**

## **DECISION**

**18. The appeal is dismissed. The decision of the First-tier Tribunal stands.**

Signed  
2017

Paul Doyle

Date 25 May

Deputy Upper Tribunal Judge Doyle