



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02033/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 January 2018

Decision & Reasons Promulgated
On 21 May 2018

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAH KHALID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Mr P Skinner, Counsel instructed by ATM Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter “the claimant”, against a decision of the Secretary of State on 8 January 2016 to refuse him leave to remain on human rights grounds.
2. The claimant is a citizen of Pakistan who has lived in the United Kingdom since August 2011. He had permission as a student but his leave was curtailed to end on 28 August 2015. On that day he applied for leave to remain as the husband of a person present

and settled in the United Kingdom. The claimant's wife is a citizen of Afghanistan. She came to the United Kingdom in 2011 after her father had been recognised as a refugee. The claimant's wife is not a refugee but she has indefinite leave to remain.

3. The claimant married his wife in October 2014.
4. We have the benefit of appropriately brief grounds in support of the Secretary of State's case and a detailed Rule 24 notice settled by Mr Skinner as well as all the submissions from both parties.
5. We begin by considering the First-tier Tribunal's decision.
6. Although correctly reminding himself that he was deciding an appeal relying solely on human rights grounds the judge looked to the Immigration Rules to see if any ability to satisfy the Rules illuminated his considerations.
7. The application was refused under the Rules because the claimant's wife had not been earning sufficient money for sufficient time to show in the required way that she had a gross annual income of at least £18,600. With respect to the Secretary of State the decision under the Rules was clearly correct and was a consequence of the claimant's wife having worked for a fairly short period of time. By the time the case came before the First-tier Tribunal the claimant's wife had been working for something like eighteen months and had clearly established an ability to hold down a job. It was never suggested that the relationship between the claimant and his wife is other than genuine and subsisting and if the claimant could have delayed applying for leave as her husband until she had established her work record then the application would almost certainly have been successful. However, that by no means answers the challenge to the decision because the application could not succeed when it was made because the applicant's wife had not established an adequate employment record and if it had been made later the applicant would no longer have had leave to be in the United Kingdom.
8. Nevertheless, it was a feature of the judge's reasoning that the claimant could now satisfy the financial requirements of the Rules and this finding gave some insight into where the public interest lay.
9. The judge then considered the so called "ten-year route" whereby the application would have to be refused unless there were insurmountable obstacles in the way of the claimant's wife continuing their private and family life together in his country of nationality. The judge reminded himself, correctly, that the strict meaning of "insurmountable obstacles" has been diluted by authority and particularly in the decision of the United Kingdom Supreme Court in Agyarko and Ikuga, R (on the applications of) v SSHD [2017] UKSC 11 where we read at paragraph 43:

"It appears that the European Court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned."
10. The judge decided that the claimant could satisfy these Rules for two reasons.
11. First, because there was no evidence before the First-tier Tribunal that there was any possibility of the claimant's wife being allowed to join him in Pakistan and in the

absence of such evidence the judge concluded that it had not been shown that family life could continue in Pakistan.

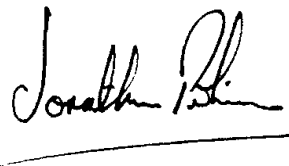
12. The claimant's wife is a national of Afghanistan. She has some experience of living in Pakistan but not much. The judge took the view that it was for the Secretary of State to show that family life could continue in Pakistan and if the Secretary of State had chosen not to call any evidence on that point then there was no proper basis on which he could conclude that it was possible for family life to be exercised there.
13. We have to say we found this a slightly surprising approach but it is supported by authority. The judge relied heavily on the decision of this Tribunal by its then President McCloskey J with Deputy Upper Tribunal Judge Norton-Taylor in CS and Others (Proof of Foreign Law: India) [2017] UKUT 199 (IAC). It is plain from that decision (see for example paragraph 22) that although the Tribunal confirmed there was no legal burden on the Secretary of State the decision was made on the basis that there is an evidential burden on the Secretary of State to show that his proposal that the family could be removed to a particular country is capable of being achieved. Here the judge took the view that the Secretary of State has decided that the private and (more importantly) family life could be continued in Pakistan but had not produced any evidence to support that conclusion and in the circumstances regarded it as an unproved assertion so that the Secretary of State's argument failed.
14. Second, the judge decided that there were insurmountable obstacles in this case. He described the issues as "finely balanced" (paragraph 61) but took account of the claimant's wife having arrived in the United Kingdom when she was aged about 15 years old and having at that formative stage of her life taken advantage of education in the United Kingdom, as she was entitled to do, and was developing a career in marketing. The First-tier Tribunal decided that it was inherently unlikely that any similar opportunities would exist in Pakistan where there is societal and cultural discrimination against women and found that that was sufficient reason to say there were insurmountable obstacles in the sense that there would be "very significant difficulties". It was acknowledged that the claimant's wife had already suffered the experience of having to rebuild her life as a young teenager when she came to the United Kingdom and it was thought too much to have to rebuild her life all over again to be with her husband. These were the judge's reasons for finding that there were insurmountable obstacles and were his alternative reason for saying that the Rules were satisfied.
15. The judge then, correctly, addressed his mind to the requirements of Section 117A and B of the Nationality, Immigration and Asylum Act 2002 which he was obliged to consider. The judge noted that the claimant was not going to be a burden of public funds because he would be supported by his wife. He found no adverse factors in Section 117B that needed to be considered. The point is made that although there was no express finding to this effect the claimant could plainly speak English which was how he was able to give evidence before the Tribunal and the judge found interference would be disproportionate. The crucial finding is at paragraph 66 where the judge says:

“On balance, I am satisfied that the proposed interference with the [claimant] and the sponsor’s family life is unnecessary and disproportionate. Their rights outweigh the (Secretary of State’s) legitimate interest in ensuring economic and social order, whilst maintaining a coherent system of immigration control. I have attached significant weight to my finding that the [claimant] has a qualifying relationship contained within EX.1 and that the [claimant] meets the requirements for leave to remain as the partner of a person present and settled in the UK under Appendix FM.”

16. There are three grounds of challenge.
17. The first is that the “very significant obstacles” finding has not been explained adequately. The explanation is clear enough. The question is whether it is lawful.
18. The first reason given, namely that the evidential burden identified in **CS (India)** has not been discharged is, we find, unassailable. Whilst we are not bound by the decision in **CS (India)** the First-tier Tribunal was bound by it and has followed it. Unless it is argued that **CS (India)** is wrongly decided it is hard to criticise the judge for following it and the grounds before us do not make that complaint. We do not wish to be thought to be giving the decision in **CS India** a ringing endorsement. It seems to us there are points in the case that might benefit from careful analysis but the First-tier Judge did not err in following a decided case of the Upper Tribunal unless that case was itself wrong.
19. The secondary point that is that on the facts the difficulties are not described properly as insurmountable obstacles is, we find, not a criticism that is made out. The judge clearly identified the correct legal test, clearly found that the matter was finely balanced and reached a clear conclusion. We do not think that this is a conclusion that was the only permissible conclusion on the facts. That is the nature of finely balanced cases. The judge heard the evidence and we are not able to say that his decision that the findings he made amounted to insurmountable obstacles is perverse or otherwise unlawful.
20. It follows therefore that the judge was entitled to find that the requirements of the Rules were met.
21. It is right that the judge did not, as is alleged in the third ground, consider the possibility of the claimant returning to Pakistan and making an application. However, it seems that this point was never argued before the judge. It is, with respect to the Secretary of State, a bit late to take it now. We do not regard it as something that is so clearly relevant that the judge should have taken it even though it was not something that had occurred to the Secretary of State until after the hearing before the First-tier Tribunal.
22. In any event we agree with the skeleton argument that this case is not entirely analogous to the decision in **Chikwamba v SSHD** [2008] UKHL 40 because it is not a case where the applicant needed to leave the country to satisfy the Rules. In-country applications by people lawfully present with his length of residence to change the basis of their permission to husband are permissible.
23. Ms Everett emphasised that the Rules governing immigration are intended to be obeyed and the application, as far as we can see, was refused properly under the Rules. The First-tier Tribunal should think long and hard before allowing on human rights

grounds an application that could not succeed under the Rules because the Rules are intended to be human rights compliant. We agree her. Nothing we are saying here is to encourage people to ignore the Rules and rely on asserting human rights. It may have been quicker and cheaper and simpler for this claimant to have left the United Kingdom and applied to come back as a husband when the claimant's wife was able to do produce the necessary evidence. That is not what happened here and we find the judge has made a careful enquiry and a has conducted a reasoned human rights balancing exercise. The judge has resolved some points in the favour of the claimant that other judges might not have resolved in that way but he has done nothing that is perverse or otherwise unlawful and overall has reached a decision that was properly open to him for the reasons given.

24. The bottom line is that the Judge's decision means that a person who entered the United Kingdom lawfully and who has embarked on a genuine supportive marriage with a wife who earns enough to support him is allowed to remain. This is not an affront to immigration control.
25. We do make the observation that cases that depend on the human rights balancing exercise will almost always be capable of resolution in different ways but where there are correct directions of law as is the case here it is hard to overturn the decision and we find that the Secretary of State has failed to persuade us that we should on this occasion.
26. It follows therefore that we dismiss the Secretary of State's appeal.

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Signed

Jonathan Perkins, Upper Tribunal Judge

Dated: 16 May 2018