



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07755/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21st September 2018

Decision & Reasons Promulgated
On 30th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ARIF [M]
(ANONYMITY DIRECTION - NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan

For the Respondent: Ms S Vidyadharan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Trevaskis, promulgated on 21st March 2018, following a hearing at Newport on 22nd February 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal. Permission to appeal was granted on 11th June 2018 and thus the matter comes before me today.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, and was born on 15th March 1984. He appealed against the decision of the Respondent dated 28th June 2017 refusing his application for leave to remain in the UK on the basis of his family and private life under Appendix FM and paragraph 276ADE. The basis of the Appellant's application is that he is in a genuine and subsisting relationship with a Miss [LP], a British citizen, settled in the UK, who is receiving medical care in this country, is in ill-health, and for whom the Appellant acts as a carer.

The Judge's Determination

3. The judge heard evidence that the Appellant "has major medical conditions, but no confirmed diagnosis". There was also evidence before the judge that the Appellant's partner had "major medical conditions, but no confirmed diagnosis". He heard evidence that "she is receiving chemotherapy treatment which is said to cost £73,000 each time. If the Appellant returns to Bangladesh, she will be unable to care for herself" (paragraph 13). The judge also heard evidence that the Appellant "has been her carer since November 2015". As far as the Appellant's mother was concerned she "works full-time and cares for her grandson aged 11 who lives with her" (paragraph 13).
4. The judge went on to say that he found both the Appellant and his partner to be "credible and reliable witnesses. Their credibility has not been damaged by cross-examination" (paragraph 22). That being the case, the he moved on to a consideration of whether there was "disproportionate interference with the right to enjoy a family and private life" (paragraph 23). He went on to consider the position of the Appellant's partner and observed that she was a British citizen, who was present and settled in the UK, and had no previous experience of life in Bangladesh or knowledge of its language and culture. He noted that "she also suffers from a combination of medical conditions for which she is receiving treatment under the NHS; she is also receiving a number of benefits relating to those conditions, and lives in her own home" (paragraph 27). The judge, importantly, also observed that "it is not disputed that the Appellant and the Sponsor have a genuine and subsisting relationship akin to marriage" (paragraph 27).
5. As far as the Appellant himself was concerned, the judge noted that there were obviously "no insurmountable obstacles to the Appellant returning to Bangladesh". He could continue family life with the Sponsor if the Appellant were to join him in Bangladesh but this "will have significant detrimental consequences for the Sponsor, not least the loss of access to NHS treatment, but no evidence has been presented to show that treatment for her conditions is not available in Bangladesh.
6. The judge went on to then make his decision that, based upon the evidence that had been presented to him, "I am satisfied that these difficulties will be very significant, but I am not satisfied that they could not be overcome, nor that they would entail very serious hardship for the Appellant" (paragraph 29). That being so, the judge went on to dismiss the appeal. He dismissed the appeal also on the basis of Article 8

ECHR. There was copious reference by the judge to case law that was applicable in relation to Article 8 rights (see pages 6 to 9 of the determination).

Grounds of Application

7. The grounds of application state that it was not disputed that the Appellant and the Sponsor were in a genuine and subsisting relationship that was akin to marriage (paragraph 27). The judge had also found the Appellant and the Sponsor to be both credible witnesses (paragraph 22). It was recognised that the Sponsor suffered from medical conditions and received benefits and lived in her own home (paragraph 27). However, the judge had then irrationally concluded that the test in EX.1 was not met. That was perverse in the light of the findings that the judge had made. It was contrary to the Respondent's own published guidance. The guidance given by the Supreme Court in **Agyarko [2017] UKSC 11**, was also not properly followed.
8. On 11th June 2018, permission to appeal was granted.

Submissions

9. At the hearing before me on 21st September 2018, Mr I Khan, appearing as Counsel on behalf of the Appellant succinctly and pointedly stated that the area where the judge had gone wrong was in failing to follow the guidance that was given in **Agyarko** (see paragraph 7 of the grounds of application). This is because there the Supreme Court had referred to the fact that there is a distinction to be drawn between a case where a person is automatically deported as a foreign criminal, (because the weight of public interest in that case would then be very considerable); and the distinction to be drawn with a case where an Appellant is simply residing in the UK unlawfully, but is otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, because "then there might be no public interest in his or her removal" (paragraph 51). Had the judge focussed on this, and given what the findings of the judge had been in relation to the position of the Sponsor, [LP], and the Appellant, the appeal would have fallen to be allowed.
10. For her part, Ms Vidyadharan submitted that the judge could not be faulted for having come to the conclusion that the balance considerations fell against the Appellant for two reasons. First, although the judge had accepted that were the Sponsor to go to Bangladesh with the Appellant, this "will have significant detrimental consequences for the Sponsor", the entirety of that sentence ended with the words that, "but no evidence has been presented to show that treatment for her condition is not available in Bangladesh" (paragraph 28). Ms Vidyadharan submitted that the plain fact was that no enquiries had been made about what was available in terms of medical treatment in Bangladesh. Indeed, the judge had gone on to say "there appeared to have been no enquiries made regarding her potential relocation to Bangladesh" (paragraph 28). Secondly, she submitted that if one does indeed look at paragraph 51 of **Agyarko**, although a distinction is drawn between the position with respect to a person who is automatically deported as a foreign criminal, and others, that was not to say that all such cases fell to be allowed, which did not involve the deportation of a foreign criminal. In this case, had the evidence existed

of the availability or otherwise of treatment in Bangladesh for [LP], the judge may well have come to the conclusion that the removal of the Appellant was disproportionate to their family life interests.

Error of Law

11. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
12. First, it is plain that in relation to the core findings that the judge has made, that the Appellant and the sponsoring partner were in a genuine and subsisting relationship, whereby the Appellant was caring for the Appellant, and the judge observes that “before he became the carer for his wife, she was cared for by her mother. His wife cannot go to Bangladesh because she does not speak Bengali and does not understand the culture; there is no gas or electricity in Bangladesh” (paragraph 9). Whereas it may indeed be the case that criticism of the unavailability of gas or electricity in Bangladesh is overstated, the fact remains that [LP] has not ever been to Bangladesh, does not understand its culture, and is not inclined to go there. That was the evidence before the judge. The judge did not disagree with that evidence. This means that the situation was not confined simply to the availability or otherwise of medical treatment. It was to do with the circumstances of the Appellant’s sponsoring partner herself. Those circumstances are that the sponsoring partner has her mother, brother, sister and uncle in this country. Her close family members are all in this country. She made it clear that she was not going to accompany the Appellant in Bangladesh.
13. Secondly, the Appellant’s partner was receiving chemotherapy treatment, which was costing £73,000 each time, and the delicacy of that treatment meant that the Sponsor was in any event reluctant to give that up, as the judge clearly recognised, and accompany her carer partner to Bangladesh. In the circumstances, paragraph 51 of **Agyarko** is relevant to the extent that it does make it clear that if otherwise entry clearance is certain to be granted for leave to enter, then there might be no public interest in the Appellant’s removal. That was a conclusion that the judge may well have come to had it not been for the fact that he was side tracked into a consideration of no enquiries having been made in Bangladesh about the availability of treatment, which was not the sole issue before the judge.

Remaking the Decision

14. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above. I should also add that what is clear in **Agyarko** is that the established case law on Article 8 is such that the ultimate question has to be how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. In **Agyarko** the court made clear that

“The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word ‘exceptional’, as already explained, as meaning ‘circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate’” see paragraph 60).

I find that this is a case that where there would be unjustifiably harsh consequences for the Appellant and his right to family life in this case were he to be removed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

I allow the appeal.

Signed

Dated

Deputy Upper Tribunal Judge Juss

20th October 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

20th October 2018