



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07995/2016

THE IMMIGRATION ACTS

Heard at Field House  
On March 12, 2018

Decision & Reasons Promulgated  
On March 26, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

JUBEL [K]  
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Rahman, Counsel

For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction.
2. The appellant is a Bangladeshi national. The appellant applied for indefinite leave to remain as the spouse of a British national on September 1, 2015. His application was refused by the respondent on March 2, 2016. His appeal came before Judge of the First-tier Tribunal Adio (hereinafter called "the Judge") on March 20, 2017 and in a decision promulgated on March 30, 2017 the Judge allowed the appeal on the basis he satisfied Section EX.1 of Appendix FM of the Immigration Rules. The Judge

concluded there were insurmountable obstacles to family life existing anywhere other than the United Kingdom having regard to the relationship that existed between the appellant's wife and her parents and in particular her mother.

3. The respondent appealed that decision and permission to appeal was granted by Judge of the First-tier Tribunal Brunnen on October 9, 2017. The matter came before me on January 3, 2018 and after hearing representations from both parties I found there was an error in law on the basis the Judge's findings were made without any current medical evidence and I adjourned the matter for further evidence.
4. A further bundle was served late by the appellant's solicitors on March 15, 2018 and contained within that bundle was medical evidence appertaining to the appellant's father-in-law's health-something that had not specifically been argued before the FTT Judge.
5. Mr Melvin had provided written submissions that did not take this new evidence into account. He indicated that in light of the content of the bundle and the fact the appellant's wife was again absent he would be challenging both the medical evidence and the subsistence of the relationship. The latter point was being taken because there was a lack of evidence the relationship was subsisting despite this not being an issue either in the most recent decision letter or before the FTT Judge.
6. The appellant's wife had not attended the hearing and Mr Rahman indicated the reason for this was she was at home caring for her father who was 80 years old and in poor health.
7. The issue of an adjournment was discussed but after putting the matter back twice for Mr Rahman to take instructions the appellant indicated he wanted his appeal to proceed today.
8. Thereafter, I took oral evidence from the appellant and heard submissions from both representatives. I reserved my decision.

### **APPELLANT'S CLAIM**

9. The appellant adopted his statement dated March 14, 2018 and gave oral evidence. He stated he and his wife had married in Bangladesh on November 27, 2006 and on May 5, 2011 he entered on a spouse visa.
10. In September 2015 the appellant lodged an application for indefinite leave to remain based on his marriage. He no longer pursued this application but instead invited the Tribunal to allow his appeal under article 8 ECHR on the basis (a) he satisfied Section EX.1 of Appendix FM of the Immigration Rules or (b) there were compelling circumstances that made removal disproportionate.
11. The appellant himself had suffered medical problems from 2010 and in April 2012, having been diagnosed with excessive fluid on the brain and with a large tumour at the base of his skull. Both conditions were successfully treated but he did lose the

hearing in his right ear. He has to have regular check-ups on his brain and on the functions of his glands.

12. He agreed he had previously relied on his mother-in-law's ill health as she had been suffering from cancer. Subsequent to that hearing she died in August 2017. Although his father-in-law had health problems, as described in paragraph 5 of his statement, they had only become a problem since the death of the appellant's mother-in-law.
13. His father-in-law requires around the clock care and both he and his wife care for him. The appellant looks after his father-in-law on his own when his wife is at work.
14. Medical evidence confirmed his father-in-law suffered from a condition that slowed his heart rate to such a level that it does not pump enough oxygen around his body thereby placing him at risk of losing consciousness. There have been three incidents when he blacked out and on two occasions he was taken to hospital.
15. The appellant will often sleep in a single bed in his father-in-law's bedroom and takes him to the bathroom at night and assists him going to and from the toilet. In the morning the appellant washes and dresses him as well as cooking breakfast for him. The appellant's father-in-law can walk short distances with the aid of a walking stick and so the appellant will take him out. The appellant and his wife jointly care for her father in the evenings.
16. The appellant's father-in-law will not deal with carers and although the appellant's wife has siblings they have not played any role in his day-to-day care.
17. The appellant's father-in-law's English is non-existent. If the appellant had to leave the United Kingdom this would have a disastrous effect upon both the appellant's wife and her father.
18. The appellant would be unable to provide the physical, emotional and mental support that he has been providing his father-in-law since August 2017 and the effect upon his wife will also be significant.
19. In oral evidence he confirmed that his wife was unable to attend either the original hearing or the current hearing due to the fact that she was providing care for her parents. The appellant's father-in-law was unfit to attend court and was being looked after by his wife. The appellant's father-in-law has an appointment to attend at the hospital later this month when he will be assessed for a pacemaker.
20. During cross examination he confirmed that both he and his wife were first cousins and he accepted that the previous Judge in 2015 rejected his claim to be in a subsisting relationship or to be a credible witness. He confirmed that due to his mother and father-in-law's ill-health they had not had much of a social life. He had not discussed this issue at the previous hearing because there was no need and he reiterated his father-in-law's health had worsened over the last 6 to 8 months.

21. The appellant accepted there was no medical evidence that showed he suffered from dementia but his wife knew more about his condition.
22. He explained that his brothers and sisters-in-laws were busy with their own lives and had not taken on the responsibility for looking after their father. He was aware there had been some discussion about a carer coming in but he believed his father needed 24 hour care and this was not available and in any event he would not have anyone else.

### **OTHER EVIDENCE IN SUPPORT**

23. The appellant's wife, whilst not attending the hearing, provided a witness statement dated March 14, 2018. She confirmed that since August 2017 she has had to give up her employment in a restaurant and now only works part-time in a grocery store earning £7500 gross. Her hours of work are between 9 AM and 2 PM five days a week. In addition, she receives a carer's allowance for looking after her father although this payment will be reviewed when a decision is taken over whether her father will have to have a pacemaker.
24. Her father receives a state pension and disability living allowance. She confirms that her father will not deal with strangers and believes that the hospital, doctors and nurses killed his wife. Her husband had the ability to bring her father out of his shell and interacts freely with him. Her father is very close to the appellant to the extent that her husband helps him use the toilet and wash as him as well as providing his daily meals.
25. The appellant's wife reiterated that whilst she has three siblings living in this country they each have their own families and they had distanced themselves from their parents ever since their mother, who has since died, needed more help. It is her recollection, the family stopped helping in 2015 and would only visit every couple of months and there were limited phone calls from them.
26. Whilst acknowledging a private carer could be employed she does not believe such a solution would be effective in this case. The amount of care on offer would be insufficient because her father's condition required constant monitoring. Her husband was on hand all day and this was a better solution.
27. Medical evidence confirmed the appellant's own medical history and there was also medical evidence from February 2018 which outlined her father's medical condition, how it was currently being managed and there was also a report detailing an assessment that had been carried out on him. This report was based on a conversation with the appellant's wife who provided details to them of his current circumstances.

### **SUBMISSIONS**

28. Mr Melvin invited the Tribunal to find that there was no evidence of any subsisting relationship between the appellant and his wife. The only evidence of that

relationship was in the form of oral evidence from the appellant himself. The appellant's wife had failed to attend the hearing and there was no documentary evidence of their relationship. The appellant's wife had been given the opportunity to attend today's hearing or alternatively to attend on a different date when this appeal could be heard. Both options had been declined. Previously the appellant had relied on his mother-in-law's illness and had not previously raised his father-in-law's illness. That medical evidence submitted was insufficient to support the appellant's claim that he should be allowed to remain in this country. Whilst he accepted the appellant had medical problems and was now 80 years of age there was no independent evidence from social services or from within the community to suggest support would not be available in the event the appellant was required to leave. Mr Melvin submitted that the appellant was exaggerating his father-in-law's health problems in his attempt to remain in the United Kingdom. The referral document contained in the bundle was not a formal medical assessment but was based on a conversation with the appellant's wife. No weight should be attached to this report. Mr Melvin invited me to find there were no insurmountable obstacles and there were no exceptional circumstances why this appeal should be allowed under article 8 ECHR.

29. Mr Rahman challenged the respondent's claim that there was no evidence that the marriage was subsisting. Whilst noting a previous Tribunal (not the Tribunal which heard this matter on the last occasion) had found there was no subsisting relationship it was important to note firstly this was not an issue raised by the respondent in the last refusal letter and secondly the Judge was satisfied that their relationship was genuine and subsisting. Mr Melvin had raised the issue of subsisting relationship only at today's hearing and he invited me to find that there was a genuine and subsisting relationship between the appellant and his wife and following the decision letter the only issue preventing the appellant succeeding under the Immigration Rules was whether there were insurmountable obstacles to family life continuing outside of the United Kingdom. Mr Rahman submitted that the medical evidence did support what was being argued and that the reason it had not previously been raised was simply because it had not been an issue before the original Tribunal. The appellant's father-in-law's condition had worsened since that last hearing and since his wife's death. The Tribunal should note what the medical evidence says about his condition and the fact that there was a lack of support from within the family. He argued that the Tribunal could attach weight to the assessment report because whilst the information may have come from the appellant's wife the referral itself had come from the council. He submitted that there were insurmountable obstacles or alternatively there were exceptional circumstances that merited the appellant's appeal being allowed outside of the Immigration Rules.

### **FINDINGS**

30. The appellant had made an application for indefinite leave to remain and in dismissing that appeal the FTT Judge concluded that the appellant could not demonstrate compliance with the Immigration Rules. This finding has not been challenged and today's appeal is brought on the basis that the appellant satisfied the

Immigration Rules and in particular Section EX.1 of Appendix FM of the Immigration Rules. Alternatively, the appeal is brought on private and family life grounds under article 8 ECHR.

31. Mr Melvin at the commencement of today's hearing raised a new issue namely the subsistence of the appellant's marriage. In cross-examination he referred the appellant to previous and pointed out to the appellant that that earlier Tribunal had not found their relationship to be subsisting.
32. I did not find this line of cross-examination to be helpful at all. Neither the refusal letter nor his colleague in the First-tier Tribunal felt this issue was a relevant matter to be pursued. When this matter appeared before me in January 2018 there was no indication that subsistence of the marriage would be a live issue. I indicated to the parties during that earlier hearing that there was an error of law and that I would be dealing with an article 8 assessment both within and outside the Immigration Rules. If subsistence of the marriage was a live issue then it was incumbent upon the respondent to raise that issue so the appellant and his wife could address it. Whilst I did not prevent that line of questioning been put I was satisfied on the oral evidence given by the appellant that he was in a genuine and subsisting relationship with his wife.
33. The second issue that was raised by Mr Melvin centred around the fact that the appellant's father-in-law's ill health had hitherto not been raised. I will assess the evidence of ill health in due course but on the face of it I accept that at the FTT hearing the father-in-law's ill health was not an issue but it became an issue more recently. It is perhaps something which should have been raised at the conclusion of the hearing in January 2018 but I note the medical evidence post-dates that hearing date.
34. The appellant has argued that there are insurmountable obstacles to him enjoying family life outside of the United Kingdom. Section EX.2 of Appendix FM of the Immigration Rules defines "insurmountable obstacles" and both the Court of Appeal and more recently the Supreme Court in Agyarko v SSHD [2017] UKSC 11 identified the high test that had to be met. The test is a "significantly more demanding test" than the reasonableness test applied in article 8 ECHR appeals.
35. The Supreme Court reminds us that the test is a *stringent test* and requiring the appellant and spouse to settle in the appellant's country of origin, whilst creating a degree of hardship, did not amount to insurmountable obstacles. At [45] of the Supreme Court decision the Court stated-
 

"By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in

a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate".

36. I previously found there had been an error in law in the way the Judge had dealt with the assessment of the medical evidence. The First-tier Tribunal had been considering the mother-in-law's medical condition and the only evidence before the court on that occasion was that she had been given the all clear for the cancer she had been treated for. She had attended at hospital for an MRI scan but this had not revealed anything untoward. The medical evidence provided in relation to the appellant revealed he was not seeing a consultant but had been advised to have another scan in or around August 2017. No further medical evidence for either the appellant or his mother-in-law (or his father-in-law for that matter) had been adduced and no evidence of whether the appellant could receive any ongoing treatment for his condition in Bangladesh had been adduced to the Judge.
37. On the issue of medical care the situation I am faced with today is potentially different from that faced by the First-tier Judge. I have been provided with recent medical evidence and I have considered that evidence and whether that evidence alters the position.
38. The report provided by the hospital is a medical discharge summary and is dated February 15, 2018. It seems that the appellant's father-in-law was both admitted and discharged on an emergency basis that day. The document listed those matters that were being investigated and diagnosed and reported that the appellant's father-in-law had collapsed in a chair and was incontinent. The father-in-law recovered but was taken to hospital and denied having any further symptoms of chest pain, shortness of breath, leg swelling or pain or symptoms of infection recently.
39. The report recorded that he was currently under the care of the cardiology team and I have seen a follow-up letter suggesting further tests were being undertaken. The report identifies that when examined he was well and that he lived with family who were "always around". A consultant deemed him suitable for discharge.
40. There is a further report that predated his emergency admission into hospital and is dated February 9, 2018. The report identified previous surgery from 2007 and referred to the fact that at the end of November 2017 he had what was described as an "unheralded episode of unresponsiveness whilst seated". A sinus bradycardia was identified but no other significant bradyarrhythmia was identified and he was discharged with an outpatient echo and 24-hour ECG and ongoing follow-up. His sinus bradycardia was almost certainly exacerbated by the fact he had been on amiodarone since 2007 and in the opinion of Dr Evans, consultant, there was no reason for him to continue this medication. She therefore arranged for a 24-hour ECG to be carried out once the medication was out of his system and the appointment was booked for the end of March 2018. Her conclusion was that the November 2017 episode was likely to have been related to a sinus node disease and cessation of the

aforementioned medication may result in enough improvement to avoid a pacemaker.

41. The medical condition of the appellant's father-in-law was in my opinion exaggerated by the appellant both in his written and oral evidence. The medical evidence adduced does not support the conditions and complaints argued by Mr Rahman.
42. I had offered Mr Rahman the opportunity of putting this appeal back until May 2018 which would have enabled not only the appellant's wife to have reviewed her decision not to attend the hearing but also the medical appointment at the end of March to have been attended and the outcome known. Mr Rahman made it clear that he did not wish to adjourn the hearing and so I had to consider the appellant's appeal on the evidence currently before me.
43. Contained within the appellant's bundle is an adult referral form. The letter dated January 29, 2018 refers to the referral having come from Circle Housing Merton Priory Homes on September 4, 2017. However, it is clear from the form contained in the appellant's bundle that the information for the report appears to have come from the appellant's wife. There is a reference to dementia but as previously stated the medical evidence provides no comments or observations on this. Merely being asthmatic and suffering from diabetes would not suggest 24-hour care is needed. The report refers to the level of support needed but this report appears to be based on information provided solely by the appellant's wife and is not based on any assessment carried out. Importantly the report refers to the fact that there has to be an assessment process and clearly this has not taken place. The claim the appellant's father-in-law will not take help from third parties is again not based on any independent assessment. There was nothing in the consultant's letters that suggested the father-in-law was rejecting assistance. He appears to have cooperated with the consultant when spoken to.
44. There is no doubt that at 80 years of age the appellant's father-in-law is not as fit as he would like to be. He does have ongoing problems but the extent of those problems remains largely undocumented. The appellant relies on an emergency discharge summary and brief letter of referral as his supporting evidence. I am not satisfied this medical evidence meets the high test that needs needed to be satisfied.
45. The fact the appellant's wife was British and worked would not in itself amount to insurmountable obstacles.
46. Medical conditions could support an argument of insurmountable obstacles but such evidence would have to be considered on both its merits and content. I have considered the current medical evidence and I am not satisfied his condition is as dire as portrayed by the appellant in his oral evidence and his wife in her statement.
47. There was no evidence from family members that they are unable to provide support. The appellant's father-in-law has four children living in the United



Kingdom and they all appear to live local to him. The only evidence that they are unwilling to assist came from the appellant and his wife's evidence.

48. The appellant did not say that his wife's siblings were not on speaking terms with them. It had been open to the appellant to obtain further evidence on this issue. Such evidence could of course have been obtained if the option of adjourning the case had been taken up.
49. With regard to the provision of care generally the evidence of outside assistance was simply not contained in the bundle. The evidence that was adduced was based purely on a conversation with the appellant's wife. No assessment had been carried out. Care within the community is available to varying degrees-that is the point of a full assessment.
50. Having considered the evidence advanced I am not satisfied that there would be insurmountable obstacles to family life taking place other than in United Kingdom. If the appellant wishes to argue that he and his wife have to remain in the United Kingdom because his wife's father wholly relies on them then more evidence should have been submitted. I had adjourned the substantive hearing in January for such evidence to be adduced and I made it clear in my earlier decision that the evidence that was already before the Tribunal was insufficient. I therefore find the appellant has not satisfied the Immigration Rules.
51. I have gone on to separately consider the appeal under article 8 ECHR. I accept the appellant has a family life in the United Kingdom with his wife and the support he gives his father-in-law could amount to private life. The appellant did not meet the Immigration Rules and it therefore follows that the decision taken was lawful and for the purposes of immigration control.
52. The real issue in this appeal is whether it would be disproportionate to require the appellant to leave the United Kingdom to continue the family and private life that he has.
53. Mr Rahman referred me to the decision of R (on the application of Sison) v SSHD IJR [2016] UKUT 00033 (IAC). This was a judicial review challenge in which the applicant challenged the respondent's decision to refuse to grant leave outside the Immigration Rules. That appeal involved an applicant who sought leave to continue as the carer of an elderly couple.
54. Importantly it is clear from reading that decision that there was considerable medical and other evidence before the Tribunal. I did not have such medical or other evidence. Additionally, the applicant in that appeal had been employed as a carer.
55. In the appeal but I am dealing with there is not only the appellant's wife who could provide care for her father but there is also the option of other family members. Having read the Sison decision I find there are many differences in facts.

56. The appellant lawfully entered the United Kingdom as a spouse but in order to extend his stay he had to meet the requirement of the Immigration Rules. He could not satisfy the financial requirements of those Rules.
57. Applying section 117B of the 2002 Act he gave evidence through the interpreter and did not demonstrate any ability in English although an ability to speak English is considered at best a neutral factor. Their only income is the appellant's wife's annual salary of £7500 although this income is supplemented by a carer's allowance that she receives for her father from the Government. I accept the relationship began lawfully as they were married before he arrived in the United Kingdom.
58. I have to consider whether the circumstances that I have considered above amount to either exceptional or compelling circumstances that would enable me to allow this appeal on article 8 grounds.
59. The failure to comply with the Immigration Rules is a significant factor. The mere fact the appellant and his wife are in a subsisting relationship is insufficient to make removal disproportionate. There are options available for the appellant by way of an entry clearance application and of course there was the opportunity for the appellant to have adduced further evidence to support the medical argument which is advanced.
60. It goes without saying that if there had been stronger medical evidence this appeal may have succeeded but based on the evidence currently before me I am satisfied it would not be disproportionate to require the appellant to leave the United Kingdom. In reaching this decision I have had regard to the full circumstances of the case.

### DECISION

61. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.
62. I dismiss the appeal on human rights grounds.

Signed

Date 22/03/2018



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**  
**FEE AWARD**

I do not make a fee award because I have dismissed the appeal.

Signed

Date 22/03/2018

A handwritten signature in black ink, appearing to read 'SPAL', with a horizontal line underneath it.

Deputy Upper Tribunal Judge Alis