



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

HU/26388/2016

THE IMMIGRATION ACTS

**Heard at Glasgow
On 9 November 2018**

**Determination issued
On 16 November 2018**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SALIM AHMED

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr L Kennedy, Advocate, instructed by Paul John & Co, Solicitors, London

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this determination refers to them as they were in the FtT.
2. The SSHD appeals against a decision by FtT Judge Farrelly, promulgated on 30 May 2018.
3. The point of the grounds of appeal is caught by the grant of permission and was succinctly advanced by Mr Govan, as follows. The judge directed himself accurately up to [20] on the essential issue: whether there were insurmountable obstacles to the appellant's wife continuing her family life with the appellant in Bangladesh. Inconsistently with those self-directions, he then allowed the appeal not because there were such

obstacles, but because the appellant's wife would not choose to move to Bangladesh.

4. Mr Kennedy's first proposition in reply was that the judge's finding at [29] and [34] that the appellant's wife in reality would not go and live with him was sufficient to justify his decision. He conceded that might apply only if her decision was not "arbitrary or capricious".
5. The further argument for the appellant was that although the decision might be somewhat muddled, and no express conclusion was stated on insurmountable obstacles, there were findings adequate to support the outcome, and it was sufficiently clear, although only by inference, that the necessary conclusion had been reached.
6. I reserved my decision.
7. The first proposition for the appellant is not well-founded. In principle, an election not to move cannot constitute an insurmountable obstacle. That requires matters such as those set out at [15], [16] and [20] of the judge's self-directions.
8. Those self-directions are impeccable, particularly as the judge appears to have been left by representatives to formulate matters for himself - see [13].
9. The judge did not think that the case turned only on the election of the appellant's wife. He understood that more was involved. To that extent, the grounds and submissions for the SSHD are an over-simplification.
10. I have considered whether the decision from [21] to [35] can be read as a resolution, by inference, of whether the difficulties in the way of the appellant's wife moving to Bangladesh are insurmountable. The judge does mention, more than once, all her objections. He finds some of them not very great, and others wholly understandable. He does not say whether any are insurmountable, or relate them back to the tests he has cited.
11. Under the heading "application of the principles", the judge reminds himself of the high threshold at [24], but at [26] he says he is engaged in a balancing exercise; at [28], he briefly cites *Razgar* and says the key issue is proportionality; and in the last paragraph, [35], he states his conclusion in terms of the balance of proportionality.
12. The legal landscape has changed since *Razgar*. In some (not all) cases there is a further exercise after assessing the case in terms of the immigration rules; but the rules are, in general, compliant with article 8, and they must be considered first.
13. The judge set out at [14] the onus on the appellant to show insurmountable obstacles. I am unable to read into the decision that he ever answered that question. Rather, he by-passed it for a generalised

balancing exercise. That was an error of legal approach, and inconsistent with his earlier self-directions.

14. While the judge did not take the wife's election as solely decisive, his expressions suggest that the question he posed was whether that was an understandable choice, not whether difficulties rose to the level required: at [29], "I believe the reality is ... his wife would not join him"; and at [34], "... it is ... unrealistic ... to think the appellant's wife would go and live in Bangladesh".
15. The decision errs on a point of law, by failing to reach a conclusion on the decisive issue, whether difficulties faced by the appellant's wife reached the level of insurmountable obstacles, as defined in paragraph EX.2 of appendix FM of the immigration rules.
16. The decision of the FtT is **set aside**. It stands only as a record of what was said at the hearing. The nature of the case is such that it is appropriate under section 12 of the 2002 Act and Practice Statement 7.2 to remit to the FtT for a fresh hearing.
17. The member(s) of the FtT chosen to consider the case are not to include Judge Farrelly.
18. No anonymity direction has been requested or made.



9 November 2018
Upper Tribunal Judge Macleman