



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

Appeal Number: HU/08195/2018

THE IMMIGRATION ACTS

**Heard at: Field House
On: 1 April 2019**

**Decision & Reasons Promulgated
On: 30 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MD HASIB ELAHI
(NO ANONYMITY DIRECTIONS MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Presenting Officer

For the Respondent: Mr R Pennington-Benton of Counsel

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Bangladesh born on 29 March 1985. However, for the sake of convenience, I shall continue to refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant appealed to the First-tier Tribunal against the decision of the respondent refusing to grant him leave to remain on his family life with his partner with reference to Appendix FM of the Immigration Rules and paragraph 276 ADE (1).
3. Permission to appeal to the respondent was granted by First-tier Tribunal Judge in a decision dated 29 January 2019 stating that it is arguable that the Judge did not give adequate reasons for his finding that there are exceptional circumstances in this appeal amounting to unjustifiably harsh consequences and also by not taking into account the public interest set out in section 117B.
4. The First-tier Tribunal Judge made the following findings which I summarise. He considered the decisions of **Hyatt Pakistan** and **Chikwamba** significant. He noted that the principle established in these cases was not confined only to cases where children were involved.
5. The Judge set out the head note of **Chikwamba** where it was stated that where the only matter weighing on the respondent side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance.
6. The Judge found that this headnote makes clear that the Upper Tribunal was emphasising that the public policy aspect in considering that proportionality will usually be outweighed. The Judge then turned to the case of **Agyarko and another** at paragraph 42 to 48 which deals with the issue of insurmountable obstacles. He noted that the Supreme Court found the definition within EX 2 to be consistent with the views taken generally by the European Court of Human Rights.
7. The Judge considered the factors specific to the appellant and found that he entered the United Kingdom lawfully and his leave was successfully extended by the respondent. The appellant explained that the appellant could not make any further applications because his parents had withdrawn financial support to him because he had entered into a relationship of which his family did not approve. The Judge found the evidence of both the appellant and his partner is clear and truthful. The Judge accepted the evidence that they could not return as a couple to either Bangladesh or Turkey because the families refused to accept their relationship.
8. In to the assessment of Article 8 outside the immigration rules, the Judge stated that the respondent maintains the view that the requirement for the appellant to return to Bangladesh may well be temporary on the basis that he might well be granted immigration to return to settle with his partner in this country. The appellant's partner's salary was not disputed by the respondent. However, it is very strongly held view of both the appellant and his partner that any period of separation, albeit temporary,

would involve very serious hardship and significant obstacles. Similarly, it was asserted that the consequence of requiring the appellant to return to Bangladesh, even on a temporary basis, would be unjustifiably harsh. There needs to be an assessment of both the practical and emotional needs of the appellant and his partner and the dependency on each other of both parties. Here the Judge found it of particular importance that the appellant's partner holds British citizenship. The Judge accepted that their relationship began when the immigration status of the appellant was precarious and that is a factor that he must take into account.

9. In respect of the EX1, the Judge found that in the particular circumstances, very significant obstacles would arise for the couple if the appellant had to return to Bangladesh to make his entry clearance application. The Judge stated that this would cause significant difficulties for the partner who is a very hard-working individual who holds two managerial posts from which she earns a comfortable income. The evidence of the appellant and his partner was that the temporary separation would cause emotional distress the partner which would be "very significant indeed" given their genuine and very strong relationship.
10. The Judge allowed the appellant's appeal but did not specifically state whether he allowed it under the immigration rules or Article 8 of the European Convention on Human Rights. However, in the body of the decision, he found that the appellant does meet the requirements of the immigration rules that having found that he did, nevertheless assessed the appeal under Article 8 seems also to have allowed it under the Convention.
11. The grounds of appeal state that the only available route for the appellant for further leave to remain was under EX1 and EX 2 and the Judge at paragraph 74 and 75 in his decision asked himself the wrong question. The Judge only considered the impact of the temporary separation of the appellant and his partner when the issue to address was whether or not family life of the appellant and his partner can continue in Bangladesh or Turkey. The Judge does not give any reasons as to why the couple cannot relocate to either country to continue their family life and why any difficulties could not be overcome, and which would entail very serious hardship for the appellant or his partner.
12. The only explanation given by the Judge was at paragraph 71 of the decision was that the families of the appellant and his partner do not approve of their relationship and that is why they do not wish to live in Turkey or Bangladesh. However, this does not form part of the reasoning under EX1 which should have been addressed. The Judge has merely focused on the **Chikwamba** point and the temporary separation of the appellant from his partner and has failed to answer the correct question under the immigration rules.
13. The second ground of appeal is that the **Chikwamba** point may be relevant to the proportionality balance outside the immigration rules and it

is clear from **Agyarko** that there must be exceptional circumstances that would amount to unjustifiably harsh consequences for the appellant. The point is only relevant where it is guaranteed that the appellant would be granted entry clearance from abroad. The respondent stated that while it is accepted that at the date of the decision in the United Kingdom and date of hearing, the only outstanding issue was the appellant's immigration history which means that there is no guarantee he would be granted entry clearance for Bangladesh if he returned. Even if the appellant would be granted entry clearance if returned to Bangladesh, the separation would only be temporary, and the Judge does not properly reason why this amounts to unjustifiably harsh consequences.

14. It was not clear why the strong romantic bond between the appellant and his partner would be affected or why the partner would face emotional distress. It is also not clear why such a "rare" finding is made when the appellant circumstances do not appear to be out of the ordinary as there was no evidence of any mental health or medical condition such that the distress to the partner would be significant. The evidence is that the appellant's partner is the sole earner for of the family. Even if the relationship has endured for a number of years, the Judge has not adequately reason why temporary disruption would be "highly adverse" for the partner.
15. Further the Judge seeks to refer to the public interest considerations in section 117B that failed to consider they are neutral factors as found recently by the Supreme Court in **Ruppiah**. The Judge states that the appellant's speak English and has sufficient income available from the salaries of his partner and that these factors favouring the appellant outweigh the public interest. It is clear from this case that these factors are only relevant when they are not present, in fortifying the public interest, rather than providing the reason to outweigh it.

Decision as to whether there is an error of law

16. Upon a careful reading of the decision of the first-tier Tribunal, it is evident that the Judge acted out of sympathy for the appellant and his partner. This was obvious when he stated at paragraph 75 of his decision "I would strongly emphasise that this is a relatively rare finding in such circumstances. My finding is based upon my assessment of the very strong relationship between the appellant and his partner. I would also emphasise that that would not be a finding which I would necessarily make in other circumstances where to partners might find themselves in similar circumstances of the appellant and his sponsor.
17. It is clear from this statement that the Judge is almost apologetic to the respondent for allowing the appeal and promising not to do so again in similar circumstances. This cannot be considered as proper judicial reasoning because everyone is entitled to the same level of fairness according to the law. It is evident that the Judge was aware that the appellant was on very weak footing to claim that even a temporary

separation from his partner would amount to serious hardship for her. I agree with the respondent that there are no children in this marriage and nor is there any medical evidence to show serious hardship. The principle established **Chikwamba** does not automatically trump factors which may be found to be in favour of the State such as the poor immigration history of an individual. The absence of children may diminish the force of the principle and the fact specific assessment.

18. I was referred to the case of **Chen** where Upper Tribunal Judge Gill states that there may be cases in which there are insurmountable obstacles to family life being enjoyed outside the United Kingdom. But where temporary separation to enable an individual to make an application for entry clearance may be disproportionate and it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba**.
19. EX.1 and EX 2 applies if:
 - (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.
20. The first question that the Judge had to answer was whether there are insurmountable obstacles to family life with his partner continuing outside the United Kingdom. Insurmountable obstacles have been defined as very significant difficulties which would be faced by the applicant or their partner in continuing the family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner.
21. The Judge fell into a material error by not engaging with the issue whether there would be significant difficulties of serious hardship to the appellant and his partner to continue family life in another country. If he was satisfied that they were, he should have gone on to consider whether the **Chikwamba**, principle applied to this appellant in his assessment of proportionality under Article 8.
22. The only reason that the Judge gave was that the appellant and his partner do not wish to live either in Bangladesh or Turkey was because their respective families do not accept their relationship. The Judge did not consider that they are both adults and living in this country without family

support and therefore they could continue their family life independently in another country as they are doing here.

23. In respect of Article 8 Judge the Judge found that there are exceptional circumstances in this appeal where the appellant should be allowed to remain under Article 8. The only reasons given by the Judge was the “romantic bond” the appellant and his partner and stated that this would create difficulties for the appellant’s partner if the appellant had to return to Bangladesh to make an entry clearance application. The Judge found that the appellant’s partner has two managerial positions and therefore would be able to support the appellant’s application from abroad. The Judge also found that the appellant’s partner will face emotional distress if the appellant was to leave the United Kingdom even on a temporary basis, but the decision was not open to him for these reasons.
24. The Judge was aware that the appellant and his partner started a relationship when the appellant’s immigration history was precarious. The Judge found a material error when he considered that the factors in part 5A go in favour of the appellant and which outweigh the respondent’s interest. The Judge stated that the appellant speaks English and has clearly more than sufficient income available to him from the salaries of his partner. It was a material error to hold these factors go in favour of appellant when they should be held to be neutral factors and certainly could not be considered factors in favour of the appellant.
25. The circumstances I find that there has been a material error of law in the decision and set aside the decision of the First-tier Tribunal. I will not remake the decision but send it back to the First-tier Tribunal for findings of fact to be made about whether there would be insurmountable obstacles or hardship for the appellant and his partner continuing family life outside the United Kingdom which the First-tier Tribunal Judge failed to address.

DECISION

I remit the appellant’s appeal to the First-tier Tribunal.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

This 15th day of April 2019