



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

Appeal Number: IA/44719/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 3 July 2014**

**Determination
promulgated
on 25 July 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MUHAMMED ARSLAN KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms S Hussain, of R H & Co., Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

- 1) The appellant is a citizen of Pakistan, born on 1 March 1988. On 16 September 2012 she applied for leave to remain in the UK on the basis of family and private life. The respondent refused that application by letter dated 4th and notice of decision dated 8th October 2013. The appellant appealed to the First-tier Tribunal.
- 2) Judge Balloch dismissed the appellant's appeal by determination promulgated on 6 March 2014.

3) The First-tier Tribunal refused permission to appeal to the Upper tribunal. The appellant applied for permission to the Upper Tribunal, on the following grounds:

2. The judge has not carried out a proper assessment of the appellant's Article 8 ECHR family life in the UK in light of the prevailing case law and in terms of the exception set down in Appendix FM, EX-1(B) of the Immigration Rules.

... whilst the judge does appear to consider the cases of *Gulshan* (Article 8 – new rules – correct approach) Pakistan [2013] UKUT 640 (IAC) and *MF* (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC) at paragraph 41 of the Determination, she has not adequately assessed the “insurmountable obstacles” which the appellant's wife would be faced with if she was to relocate to Pakistan. The appellant's wife is a British national, who has close family in the UK and has a history of various medical conditions. The judge has not adequately considered the impact which a permanent move to an alien country will have on the appellant's wife, given she does not speak the native language in Pakistan, has no knowledge of the culture, tradition and norms there and will have no close family members nearby.

At paragraph 42 of the Determination the judge held that the appellant's wife has *'converted to Islam so there is no potential difficulty regarding religion. During her previous marriage she spent a couple of years living in Malaysia so she has demonstrated an ability to adapt to living in another culture.'* ... the appellant's wife stated in her evidence (contained within her witness statement at paragraph 18) that *'Although I lived in Malaysia for 2 years with my previous husband, I still felt inhibited there. I did fully respect the way of life in Malaysia, but I found there were certain things there I could say or do.'*

... the appellant's wife is a British citizen who has been diagnosed with Graves Disease in around August 2013, which had not been diagnosed at the time of her residence in Malaysia. Relocating permanently to a foreign country where she does not speak the local language, has no knowledge of the customs and culture there and would not have any family members or friends around her, when considered in the round, would amount to an insurmountable obstacle and would in any event be 'unjustifiably harsh', as per *Nagre* [2013] EWHC 720 (Admin).

... the judge has erred in her assessment of Article 8 family life and has thereby erred in law.

... Designated Judge Woodcraft in refusing the appellant's application for permission to appeal has not adequately considered the failure of the judge to properly assess the impact on the appellant's wife's health should she be compelled to leave the UK and this amounts to an error in law.

3. The judge erred in law in paragraph 42 of her Determination where she finds that “ ... There is no evidence that Ms Brown could not retain contact with her family members and there is no independent evidence that they are reliant on her.” Further, at paragraph 54 the judge reiterates this where she concludes “There has not been any supporting evidence that her parents are reliant on her or that she could not remain in contact with her family members if living in Pakistan.”

... Ms Brown gave evidence, as noted in paragraph 21 of her witness statement, that her parents are elderly, she lives about 10-15 minutes away from them and can be there for them at any time. By requiring 'independent and supportive evidence' of Ms Brown parents' reliance on her the judge is ultimately seeking corroboration.

... there is no requirement for corroboration in such cases and the judge has erred in law by requiring corroboration.

... there was no specific reference to this ground of appeal by the Designated Judge who considered the applicant's permission to appeal application.

4. The judge has not given due consideration to the medical evidence before her in relation to the appellant's wife's medical condition ... the following evidence was presented to the judge:

- (1) medical form submitted with the appellant's application for leave to remain dated 27 August 2012 (contained within appellant's bundle at page 114);
- (2) letter from Dr Jones, Consultant Neurologist dated March 2013 (contained within the appellant's bundle at page 80);
- (3) further letter from the appellant's wife GP, Dr Mackintosh, dated 6 January 2014 (lodged on the date of the appeal hearing and referred to in paragraph 57 of the Determination).

... the above noted medical evidence presented to the judge was consistent and complete, however the judge's finding at paragraph 57 of the Determination that '*It has not been demonstrated that she could not receive treatment*' is not a well reasoned conclusion which would arise from a proper consideration of the medical evidence which was before the judge.

The letter from Dr Mackintosh clearly states that the appellant's wife is '*... under the care of a consultant endocrinologist and is on medication which requires close supervision and periodic adjustments. I would be extremely concerned if his lady had to move to Pakistan as she requires ongoing specialist medical treatment of a standard which I [sic] would be difficult to attain in that country. I would also be concerned that the stress associated with such a move would have a negative impact on her health.*' ... the appellant's GP has provided a professional and independent view of the appellant's medical issues and ongoing care she currently receives.

The judge has failed to properly consider the evidence presented to her in the form of the above noted independent evidence concerning the appellant's wife's medical conditions ... the judge should have given due regard to said evidence to allow her to make a well reasoned and accurate assessment of proportionality and she has erred in law in not doing so.

5. The Designated Judge in refusing the appellant's permission to appeal application has held that ultimately the proportionality assessment was a matter for the judge who did not find the case should succeed outside the Immigration Rules. The Designated Judge has made no clear finding in respect of insurmountable obstacles which the appellant's wife faces in moving to Pakistan with the appellant, given the fact that she is a British national with close relatives in the UK and would be moving to a foreign country where she has no knowledge of the culture or language there.

... there are insurmountable obstacles which the appellant's wife would face if she were to relocate to Pakistan and this has not been adequately considered by the judge or the Designated Judge.

- 4) (It should be observed that judges granting or refusing permission are concerned only with whether there is arguable error of law. They are not making findings, factual or legal. If a case reaches the Upper Tribunal the first question is always whether there is error of law in the determination; any error in an earlier refusal of permission is not relevant.)
- 5) On 30 April 2014 Upper Tribunal Judge Goldstein granted permission, saying that he was:

... just persuaded that paragraph 2 of the grounds in particular raises arguable issues as to the adequacy of the FtT's reasoning and whether the judge was entitled in law to reach the conclusion that she did for the reasons given.

6) The respondent filed a Rule 24 response:

...

2. The respondent will submit *inter alia* that the judge of the First-tier Tribunal directed herself appropriately. The grounds of appeal are no more than a disagreement with the adverse findings made by the judge on Article 8. The judge fully considered all the evidence available and came to a conclusion open to her based on that evidence in light of the relevant rules and relevant case law on the balance of probability and does not disclose any error. The judge observes at paragraph 55 and 56 there is limited evidence as to 'Ms Brown's medical condition' and symptoms indicating a migraine. At paragraph 41 and 42 the judge considers *Gulshan* and *MF* when determining the proportionality assessment and arrived upon considering all the facts, including the short time the applicant was in the UK and his relationship with Ms Brown.
- 7) Ms Hussain's submissions followed the lines of paragraphs 2 and 4 of the grounds. She said that the crux of the determination was the finding that there were no insurmountable obstacles to family life being carried on outside the UK. The test was not a literal one. The judge was required to consider the practical possibilities of relocation – *Gulshan* – and whether the consequences would be unjustifiably harsh – *Nagre*. The judge did not take in account of the questions posed by the Court of Appeal in *MF* and in *VW*, whether family life could reasonably be expected to be carried on abroad. The evidence was there to satisfy the reasonableness test, in particular regarding medical conditions of the appellant's wife. She suffered a brain haemorrhage in the past, has Graves Disease, and her GP is regularly monitoring her case. She has family here and none in Pakistan. It would be unreasonable to expect her to relocate permanently to that country. The judge said at paragraphs 55 and 57 that the medical information was limited and brief, but that was factually incorrect. The judge had before her a letter from the wife's GP and consultant endocrinologist regarding her medical history and treatment. If error were to be found, the appellant sought an adjournment in order to obtain a more detailed medical report. Such a report had not been obtained for Upper Tribunal purposes because the expense would not be covered by legal aid. However, if a further hearing were to be ordered the further report could be obtained. As to whether such evidence should have been before the First-tier Tribunal, Ms Hussain said that the evidence there had been sufficient, but if there were to be further consideration, it could be improved upon.
- 8) Mr Matthews submitted that the Immigration Rules in respect of Article 8 and family and private life had been held by the Inner House in *MS* to be essentially a complete code. The concept of insurmountable obstacles within the Rules was incorporated as part of the Article 8 assessment. This

was a case where the relationship was entered into while the appellant's immigration status was plainly precarious, a significant factor. The grounds went too far in saying the judge had no regard to authority such as *MF*, because she plainly followed the correct up to date understanding of the legal approach, in particular at paragraph 41 of the determination. The issue before her was largely one of fact, and the decision was well within the scope was open to her. The grounds were essentially a disagreement on the facts and did not disclose legal error. The determination was careful and went into some detail in particular at paragraphs 41-43 on the issue of insurmountable obstacles. Nothing was wrongly taken into or left out of account, and the threshold applied was not literal. As to paragraph 3 of the grounds (which Ms Hussain had not mentioned), the judge had not fallen into the error of thinking that corroboration was a legal requirement, and was entitled to notice that obvious supporting evidence was absent. The medical evidence was faithfully recited at paragraphs 55-57 and all the observations made upon it by the judge were factually unassailable. Paragraph 5 of the grounds added nothing. The determination should stand. Alternatively, if the Upper Tribunal did find error, the general principle should be followed that a fresh decision should be substituted on the evidence the appellant had chosen to lead. Where there might be a legal aid issue over obtaining a further report at this particular stage, there was no reason why all evidence should not have been available in the First-tier Tribunal.

- 9) Ms Hussain in response re-iterated that the medical situation of the appellant's wife had been crucial in the proportionality assessment, and the judge had gone wrong in law in considering that aspect.
- 10) I reserved my determination.
- 11) A judge's decision on Article 8 is not only a matter of finding the relevant facts. In the end, it is a judgment on proportionality. So long as a judge correctly directs herself on the law and gives adequate reasons, error of law cannot be found.
- 12) In my view the grounds and submissions in this case are almost entirely re-assertion of uncontentious legal principle and of the appellant's case. The features of the case upon which they concentrate were all patently before the judge and are reflected in the determination, including the medical evidence, referred to several times and in more than adequate detail. There is no error of requiring corroboration. There is no error of taking a literal approach to "insurmountable obstacles". It could not be argued that the outcome reached was not within the scope of the First-tier Tribunal. Although Ms Hussain again puts the appellant's case as clearly and as strongly as it can properly bear, this appeal amounts only to disagreement with a judgment that is not shown to be affected by any error on a point of law.
- 13) The determination of the First-tier Tribunal shall stand.

A handwritten signature in black ink, reading "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial "H".

4 July 2014
Judge of the Upper Tribunal