IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34154/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham	**Decision & Reasons Promulgated**
On 7th October 2015	**On 4th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR RIZWAN MUHAMMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Stephen Vokes (Counsel)
For the Respondent: Mr David Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hawden-Beal, promulgated on 3rd December 2014, following a hearing at Birmingham, Sheldon Court on 19th November 2014. In the determination, the judge allowed the appeal of Mr Rizwan Muhammad, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 23rd December 1989. He is the spouse of Ms Shameen Akhtar, a British citizen.

The Appellant's Claim

3. The Appellant's claim is that, although he cannot satisfy the requirements of paragraph 276ADE of Appendix FM, such that a decision was made by the Respondent on 11th August 2014 against him, if he were to be removed back to Pakistan, his wife, Shameen Akhtar, who was a British citizen, could not relocate with him because of significant obstacles in her path such as to create insurmountable obstacles to family life continuing between himself and his wife (see paragraph 20).

The Judge's Findings

4. The judge considered the evidence and, whilst rejecting much of what was claimed on behalf of the Appellant's wife, eventually came to the conclusion that there were indeed "insurmountable obstacles" to the family life continuing between the Appellant and his wife in Pakistan, because although she may well practise the same religion as him, and speak the same language there, (see paragraph 23), the fact was that she will be discriminated against in that country, where discrimination against women was a well-known fact, and would not be able to go out and about, or to work, and would lack "avenues of empowerment" (see paragraph 25). The judge came to the clear conclusion that there were very significant difficulties to the Appellant and his wife enjoying family life together in Pakistan (see paragraph 27).

Grounds of Application

5. The grounds of application, which are detailed and prolix, state that the finding by the judge that there were insurmountable obstacles to the Sponsor joining the Appellant in Pakistan, and under Article 8 of the ECHR, was not sufficiently reasoned and could not be sustainable.

6. On 23rd January 2015, permission to appeal was granted.

The Hearing

7. At the hearing before me on 7th October 2015, Mr Mills, appearing on behalf of the Respondent Secretary of State, placed reliance upon the recent Court of Appeal decision in **Agyarko [2015] EWCA Civ 440**. This was a case where Mrs Agyarko, a national of Ghana, had entered the UK with limited leave in 2003 and within a few months became an illegal overstayer. She formed a relationship and cohabited with a Mr Richmond Benette, who was a naturalised British citizen. They married by proxy in accordance with Ghanaian law in August 2012. The relationship and

marriage was formed in circumstances of known precariousness. The Court of Appeal referred to the case of **Chikwamba** where the House of Lords had held that there would be a violation of Article 8 if the applicant with leave to remain were removed from the United Kingdom and forced to make an out of country application. It was said that this would serve no good purpose. The Court of Appeal said that, "in a case involving precarious family life, it will be necessary to establish that there were exceptional circumstances to warrant such a conclusion" (paragraph 31). The Court of Appeal held that Mrs Akyarko could not show that her case was exceptional in the relevant sense (see paragraph 28). The claim failed under Article 8.

8. Second, Mr Mills submitted that, whilst it was accepted that women were discriminated in Pakistan, nevertheless, the judge at paragraph 24 had said that there was no particular risk to this Appellant. Third, although Mr Vokes referred to the Secretary of State's IDI (at page 27) in relation to discrimination against women, much of this relates to property disputes and divorce rights, which was not in issue here.

9. For his part, Mr Vokes submitted that whilst it was accepted that the right to Article 8 residence in the country was not a matter of choice, in this particular case, what was a distinguishing feature here was that the Appellant herself had said that she could not live in Pakistan because she would not have the right to work, to drive, and to go out. In her case, she is actually objecting to the discrimination that she will have imposed on her. That makes all the difference.

10. In reply, Mr Mills submitted that as a matter of rationality, it could not be said that the judge had failed to look at this case at the lower threshold. The appeal should be dismissed.

Error of Law

11. I am satisfied that the making of the decision by the judge involved a making of an error on a point of law. The case of **Agyarko** was not applied in the sense that it has to be applied. It is quite clear, that even in relation to an illegal overstayer who is married to a British settled spouse, the existence of "insurmountable obstacles" cannot be automatically assumed. The evidence does show that insofar as there is discrimination, it is in relation to property and divorce rights.

12. I take judicial notice of the fact that there are many people of Pakistani origin that wilfully choose to go and settle there, even when they have been born and brought up in this country and there is no objective evidence in the human rights report that suggests that there are insurmountable obstacles to doing so. It is for the Appellant to prove her case.

13. Given what the Court of Appeal has now made clear in **Agyarko**, she has failed to do so. Moreover, that decision is perfectly consistent with the

European Court of Human Rights judgment in **Jeunesse v Netherlands [2015] 60 EHRR 17**, para 108, where the Grand Chamber did not suggest that exceptional circumstances can be automatically assumed.

14. In that case, exceptional circumstances were found to exist because of other factors, such as the fact that the case involved a family with children, where the husband and the children of the applicant were all Netherlands nationals, and where the authorities had tolerated the applicant's presence in the country for a considerable period of time amounting to many years (see paragraphs 114 to 122). None of this applies in this case.

Remaking the Decision

15. I have remade the decision on the basis of the findings of the original judge, on the evidence before the judge below, and the submissions that I have heard today. I am dismissing this appeal for the reasons that I have already given above. The Appellant cannot show, as is now required following the Court of Appeal judgment in **Agyarko**, which is based upon the Grand Chamber decision in **Jeunesse**, that there are "insurmountable obstacles", whatever her own personal preferences are in the manner that she personally chooses to express them, of relocating or not relocating to Pakistan.

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 dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 2nd November 2015