



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

Appeal Number: IA/30120/2014

THE IMMIGRATION ACTS

**Heard at Columbus House, Decision & Reasons Promulgated
Newport On 26 November 2015 On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IFTIKHAR ALI

Respondent

Representation:

For the Appellant: Ms Grubb, Counsel

For the Respondent: Mr Richards, Home Office Presenting Officer

DECISION AND REASONS

1. I refer to the Appellant in this appeal as the Secretary of State and the Respondent as the Claimant. The Claimant is a Pakistani national who was born on 2 January 1983. On 17 June 2014 he applied for further leave to remain as a spouse of a person present and settled in the United Kingdom. The Secretary of State considered his application under paragraph 284 of the Immigration Rules and refused it under paragraph 286 with reference to 284(ix)(a)-(e) of HC 395 as amended. The Secretary of State concluded that the Claimant did not satisfy the requirements of paragraph EX.1 (b) of the Immigration Rules. The

application was also refused under paragraph 276ADE of the Immigration Rules. The Secretary of State made a decision to refuse to vary the Claimant's leave to enter or remain and decided to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Claimant appealed against the Secretary of State's decision and his appeal was allowed by First-tier Tribunal Judge Suffield-Thompson in a decision promulgated on 16 June 2015. She allowed the appeal on the grounds that the decision was not in accordance with the law and under the Immigration Rules.
3. The Secretary of State sought permission to appeal against the decision of the First-tier Tribunal. Permission was granted by First-tier Tribunal Judge Reid on 16 September 2015 on the grounds that it was arguable that the First-tier Tribunal had erred in finding that there had been procedural unfairness by the Secretary of State given that the Appellant did not possess the required English language certificate at the date of the application. It is said in the grant of permission to be arguable that the Judge did not fully reason the insurmountable obstacles argument and placed too much weight on the factors in the UK.

The Grounds

4. The grounds assert that the First-tier Tribunal made material errors of law in respect of her finding that there was common law unfairness. The Claimant did not lodge the required documentation, namely an English language certificate, to demonstrate that he satisfied the requirements of the Immigration Rules at the date of the application as he had not sat the required test. The Secretary of State relied on the case of **Marghia (procedural unfairness)** [2014] UKUT 00366 and submitted that there could be no unfairness in expecting the Claimant to lodge the correct documentation with an application especially where he had had approximately two and a half years to study and prepare his application.
5. The grounds also assert that the First-tier Tribunal Judge misdirected herself as to the nature and threshold of the test under EX.1 (b) by finding that "insurmountable obstacles" existed and focussed largely on the factors in the United Kingdom as opposed to being forward focused to obstacles in Pakistan. It is also submitted that the First-tier Tribunal had either failed to provide adequate reasons and/or to find insurmountable obstacles on the basis of: British Nationality; the sponsor having a 28 year old son from a previous marriage; being "westernized" and the age gap between the Claimant and the sponsor. The Secretary of State asserts that there was no background evidence set out as to the societal views on divorce and remarriage nor why the Claimant's 28 year old son was not living an independent life given his factual circumstances.

6. The grounds further assert that the First-tier Tribunal Judge imported her consideration of “insurmountable obstacles” to paragraph 276ADE (vi). It is submitted that her earlier findings in relation to “insurmountable obstacles” infected her subsequent findings on “significant obstacles” on return to Pakistan.

The Hearing

7. Mr Richards submitted that the grounds were detailed and clear. The point on fairness did not relate to case law but to a misdirection as to what procedural fairness was. The Claimant did not possess the particular qualification that he was required to have and there could be no unfairness in refusing the application on that basis. It was not relevant that he asked for the passport back so he could take the test. In respect of insurmountable obstacles the Judge had failed to explain adequately how the circumstances were outlined in the facts of the case that there were insurmountable obstacles to the relationship continuing overseas. That point was amplified in paragraph 12 of the grounds of appeal and those were the factors identified by the Judge and it was difficult to see how without further obstacles those factors could amount to insurmountable obstacles. Essentially for those reason and for the reasons set out in the grounds the Judge’s consideration of the issues in this appeal was inadequate to the extent that it amounted to a material error of law and should be reheard.
8. Ms Grubb submitted as a preliminary point that the Judge allowed the appeal on a number of grounds. The Secretary of State would have to succeed on paragraph 276ADE, paragraph EX (1) (b) and Article 8 but did not challenge the findings in relation to Article 8. Ms Grubb relied on her skeleton argument. She submitted in relation to the unfairness point that the Judge directed herself to the correct case law which set out the proper principles which she properly followed. **Marghia** related to substantive failure. The allegation that was made was not that the Respondent was bound to allow the application but that there was unfairness in failing to provide the passport. It was significant that it was for the Tribunal to determine whether the Rules were met at the time the appeal was before it. Had the Claimant succeeded in his English language tests before the First-tier Tribunal hearing the appeal could have been allowed. In refusing to allow the Claimant to have his passport there was procedural unfairness. The Judge did make a finding that the Secretary of State had behaved in a manner that had deliberately thwarted the Claimant from sitting the test. Deliberate steps were taken to prevent the Claimant from sitting the test. There could be very little to criticise in the determination. Turning to the point regarding insurmountable obstacles, there was no representation on behalf of the Secretary of State and when considering whether the test of insurmountable obstacles had been applied it was not for the Judge to set out every part of the evidence. The Judge must show relevant

factors had been taken into account. The paragraphs dealing with this had done that. It was difficult for the Judge to deal with all the points where there had been no representations or submissions. The Judge had regard to the points and the reasoning that was set out. The reasoning in respect of insurmountable obstacles was sufficient. There were some points raised in relation to whether the sponsor's son was living an independent life. The analysis to be carried out related to the difficulties in relocating and part of those factors would be the ties to the UK. The finding that there was a close relationship was not flawed. Significantly there was a finding of fact that the sponsor would face discrimination based on the sponsor's evidence which was unchallenged and was a clear and strong factor. There had been no error. The Respondent's submissions were that the error in respect of the insurmountable obstacles infected the significant obstacles analysis and Ms Grubb repeated her observations that there were significant obstacles.

9. Mr Richards replied that the appeal was not allowed under Article 8 and there was a throw away comment in in the First-tier Tribunal's decision that she did not approach an Article 8 assessment. One could not lodge grounds of appeal against a casual comment. It was not a decision and if I was minded to find errors of law for the reasons identified in the grounds they would be material and the matter ought to be reheard.
10. Ms Grubb submitted that the factual findings were sufficient to make the findings in relation to Article 8.

Discussion and Findings

11. The First-tier Tribunal found at paragraphs 24 to 27 of the decision that the Secretary of State had acted unfairly in preventing the Appellant sitting an English language test by retaining his original passport. She found at paragraph 25:

"This means that the Appellant's application was refused without him being given a fair opportunity to meet the Rules. I find that the Respondent has behaved in a manner that has deliberately thwarted this Appellant sitting the test ..."

12. The Claimant applied for further leave to remain on 17 June 2014. His application was accompanied by a letter dated 30 May 2014 from Newport Immigration Advice Centre stating that the Appellant was taking an ESOL course with their organisation but that he was not yet ready to take the exam as ESOL Entry Level 3. This letter was considered in the Secretary of State's refusal letter of 15 July 2014 and she concluded on the basis of this letter and the absence of an English language certificate in speaking and listening that the Claimant did not meet the Immigration Rules.
13. The First-tier Tribunal found that the Secretary of State refused the Claimant's application without giving him a fair opportunity to meet the Rules. In coming to this conclusion she acted in material

misapprehension of the facts of the case. She concluded that there was unfairness as the Claimant was prevented by the Respondent from taking the English language test. She referred to letters written to the Secretary of State by Newport Immigration Advice Centre dated 4 November 2014 and 30 March 2015. However, both of these letters post-dated the Secretary of State's decision in this case which was in July 2014. At that point the information before the Secretary of State was that he was not ready to take the test.

14. The First-tier Tribunal Judge did not find, nor did she consider, whether there was unfairness to the Claimant in failing to return his passport to him after he requested it post-refusal in November 2014. The Claimant argued at paragraph 12 of his skeleton argument before the First-tier Tribunal that had the Secretary of State returned his passport after the decision he could have passed the test by the date of the hearing. The First-tier Tribunal did not consider this argument or allow the appeal on this basis. Whilst this argument was renewed by Ms Grubb in her skeleton argument, this was not the basis on which the First-tier Tribunal allowed the appeal as not in accordance with the law.
15. I therefore find that the First-tier Tribunal materially erred in law in allowing the appeal on the basis that the Secretary of State's decision was unlawful as the Claimant was not allowed a fair opportunity to meet the Rules. At the date of decision, the Claimant had conceded he could not meet the Rules and had not even requested the return of his passport. There therefore can have been no procedural or substantive unfairness.
16. The Respondent also argues that the First-tier Tribunal also misdirected itself as to the nature and threshold of the test under paragraph EX.1(b) in finding that "insurmountable obstacles" existed by virtue of the reasons given by the Tribunal at paragraph 29 of the decision. The First-tier Tribunal found, at paragraphs 28 and 29 of the decision that:
 28. ... the Appellant has family there but has no one who is able to offer him, or him and his wife a home. He is employed here in the UK and with the current situation in Pakistan he is highly unlikely to be able to find work.
 29. Most significantly his wife is a British Citizen and has lived in the UK for 30 years. She has a son in the UK, friends and a wide circle of friends she has made since being here. Her parents are elderly and in no way financially able to offer her and her husband support or a home. The Appellant's wife has become Westernized since being in the UK. She is also divorced and remarried to a younger man so would face discrimination on her return. I find all of these factors combined lead to obstacles as intended under EX1 (b) as they are more than mere difficulties or minor hurdles to over-come."
17. Permission to appeal was granted on the basis that it was arguable that the Judge did not fully reason the insurmountable obstacles argument and arguably placed too much weight on factors in the UK.

18. The First-tier Tribunal did not refer to the definition of “insurmountable obstacles” set out in paragraph EX.2 of the Rules:

“For the purpose of paragraph EX.1.1(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”.

19. In **R(on the application of Agyarko) v SSHD** [2015] EWCA Civ 440 the Court of Appeal considered the meaning of “insurmountable obstacles” in paragraph EX.1, per Sales LJ:

“21. The phrase “insurmountable obstacles” as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.

22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase “insurmountable obstacles” has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, para. [39] (“... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ...”). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by *Jeunesse v Netherlands* (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).

23. For clarity, two points should be made about the “insurmountable obstacles” criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in *Jeunesse v Netherlands* at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal in *Izuazu v Secretary of State for the Home Department* [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).

24. Secondly, the “insurmountable obstacles” criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken

into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8: see paras. [29]-[30] below.”

20. The First-tier Tribunal found that factors referred to in paragraphs 28 to 29 of the decision amounted to “more than mere difficulties or minor hurdles”. She did not direct herself that there had to be “very significant difficulties” to family life continuing in Pakistan and I find in the circumstances, she failed to give adequate reasons as to why the factors she took into account amounted to such difficulties or would have given rise to very serious hardship. This amounted to a material error of law as it cannot be said that she would have reached the same conclusion had she directed herself properly.
21. It follows from this conclusion that I find that her finding that there would be very significant obstacles to the Claimant returning to Pakistan are infected by the same error as she allowed the appeal under paragraph 276ADE on basis of her conclusions under paragraph EX.1.
22. The First-tier Tribunal did not allow the appeal under Article 8 outside the Rules and remarked that she did not need to make a detailed Article 8 assessment. She made a series of observations and commented that she would have allowed the appeal outside the Rules had she made a full Article 8 assessment. Ms Grubb argued that the Article 8 assessment should stand as the Secretary of State did not seek permission to appeal in relation to the Article 8 assessment. It is clear, however, both from the reasoning in paragraph 31 and due to the fact that the appeal was allowed in paragraphs 32 and 33 of the decision under the Rules and on the basis that it was unlawful due to unfairness that appeal was not allowed under Article 8 outside the Rules.

Notice of Decision

23. For the above reasons, the decision of the First-tier Tribunal to allow the Claimant’s appeal involved the making of an error of law. That decision cannot stand and is set aside. In view of the extent of judicial fact-finding required in the appeal is remitted to the First-tier Tribunal.
24. The appeal is remitted to the First-tier Tribunal for a rehearing before a judge other than Judge Suffield-Thompson.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

There was no application for anonymity before me or before the First-tier Tribunal and no reason for such an order arises on the facts of this case. No order is made.

Signed

Date

Deputy Upper Tribunal Judge L J Murray