



IAC-FH-NL-V1

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

Appeal Number: IA/37555/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 13 January 2016**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD. SHAKIL HUSSAIN TARAFDHAR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. D. Mills, Home Office Presenting Officer

For the Respondent: Mr. S. Muquit of Counsel, instructed by Taj Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge A W Khan promulgated on 30 December 2014 in which he allowed Mr. Tarafdhar's appeal against the Secretary of State's decision to refuse to leave to remain as a spouse under Appendix FM of the immigration rules.
2. For the purposes of this decision I refer to the Secretary of State as the Respondent and to Mr. Tarafdhar as the Appellant, reflecting their positions before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

“The judge recognised that the Appellant could not meet Appendix FM. However the judge went on to allow the appeal under Article 8 ECHR. It is not clear what factors weighed in the judge’s mind when he decided that there were exceptional features of the Appellant’s case that justified allowing the appeal. This lack of reasoning is an arguable error of law.”
4. At the hearing it was submitted by Mr. Muquit that there was a misapprehension in the grant of appeal. First it referred to the fact that the Appellant appealed against refusal of leave to remain as a student [1], when he had applied for leave to remain as a spouse. Secondly it stated that the judge had allowed the appeal under Article 8 ECHR having recognised that the Appellant could not meet the requirements of Appendix FM [3]. However the judge had allowed the appeal under Appendix FM with reference to paragraph EX.1. Mr. Mills accepted that there were differences between the grounds and the grant of permission, but submitted that permission to appeal had been granted, which was accepted by Mr. Muquit, who agreed that the hearing should proceed.
5. I heard submissions from both representatives, following which I reserved my decision.

Submissions

6. Mr. Mills submitted that the error was in the approach to “insurmountable obstacles”. None of the factors considered by the judge could be considered to be insurmountable. Following the case of VW (Uganda) [2008] UKAIT 00021, there had to be far more than mere hardship. I was referred to paragraph [21] of Agyarko [2015] EWCA Civ 440. This states:

“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.”
7. He submitted that the judge had equated insurmountable obstacles with what was reasonable, which was a misdirection in law. The threshold was higher than reasonableness. I was referred to paragraph [25] of Agyarko - “The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here - and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so.” It was submitted that the factors referred to in the decision related to hardship and choice and were not insurmountable obstacles.
8. I was referred to paragraph [13] of the decision. It was of little relevance that the Appellant’s sponsor was born and had a job in the United Kingdom. She had been to Bangladesh twice. The fact that she had no family there was not an insurmountable obstacle. The fact that she could not speak Bengali was not an insurmountable obstacle. The only factor

which could point to an insurmountable obstacle was connected to the care of her mother. He conceded that, if the sponsor's mother would become reliant on the state were she to be parted from the sponsor, that could lead to a finding that it was an insurmountable obstacle. However there were two other siblings who lived in the same area of Birmingham. The judge had discounted their ability to care for their mother as they were her sons. It was submitted that frequently the opposite argument was made, that it was culturally a son's responsibility to look after his mother. It was submitted that the responsibility for a mother fell on sons and daughters-in-law. The sponsor's mother had two married sons living nearby. The judge had made a mistake in the way he had dealt with the ability of the sons to care for their mother. Paragraph 276ADE(vi) stood or fell with the insurmountable obstacles point.

9. Mr. Mills submitted that, if I agreed with his submissions regarding paragraph EX.1, he could see the merit in the submission that the Appellant had a case under Article 8 given the findings. I was referred to paragraph [30] of Agyarko. It was possible to fail under paragraph EX.1 but to succeed under Article 8, in the presence of compelling circumstances.
10. Mr. Muquit submitted that Mr. Mills had conceded that, in principle, looking after a disabled mother could constitute an insurmountable obstacle. He submitted that the judge was correct in allowing the appeal under paragraph EX.1 as the sponsor was looking after her disabled mother. I was referred to the findings in paragraph [13], in particular that the sponsor played the "major part" in looking after her mother. I was referred to paragraphs [3], [5] and [9] for evidence of the type of physical care which the sponsor gave to her mother, in particular regarding personal hygiene.
11. He submitted that the findings in paragraph [13] were open to the judge. The grounds of appeal were little more than a disagreement with the judge's conclusion. Other people could not take over the care of the sponsor's mother. The judge had preferred the evidence of the sponsor and her family that other family members were not able to take over from the sponsor in caring for their mother. The reference to cultural matters was that it would be inappropriate for a male family member to wash a female. The Respondent had misread the comments regarding culture.
12. In summary he submitted that the concession that, in principle, living with someone who needed daily care could be an insurmountable obstacle pointed to the fact that there was no error of law and the grounds were mere disagreement.
13. In relation to Article 8, it was unreasonable and disproportionate to expect the sponsor to relocate to Bangladesh. It would sever the special dependency between the sponsor and her mother. He submitted that the appeal should be allowed either under paragraph EX.1 or under Article 8. If it were to be reconsidered under Article 8, it should be remitted to the

First-tier Tribunal as there would be further updates on the position. As had been accepted by Mr. Mills, some of the family circumstances may not have been explored by the judge in the First-tier Tribunal.

14. Mr. Mills submitted that the concession he had made was that there could be insurmountable obstacles if a sponsor cared for her disabled mother and there was nobody else who could reasonably care for her. He did not make the concession that the fact that the sponsor cared for her disabled mother was in and of itself an insurmountable obstacle. He submitted that inadequate reasoning had been given by the judge who had rejected the argument that the sponsor's brothers and their wives could care for their mother. In paragraph [9] the judge found that they had their own homes, and in paragraph [13] that they had their own families and lived separately, but he questioned why this was a rational explanation for why the sons were not able to care for their mother. He submitted that more reasons should have been given as to why the alternative care with her sons and daughters-in-law was not reasonable. No reason had been given as to why the care required by the sponsor's mother amounted to an insurmountable obstacle.
15. In relation to Article 8 I was referred to the case of SS Congo [2015] EWCA Civ 387. He submitted that remittal to the First-tier Tribunal for consideration of Article 8 would be just to the Appellant.

Error of law

16. The relevant part of paragraph 13 of the decision states as follows:

"I am entirely satisfied that insurmountables (sic) do indeed exist preventing such family life continuing outside the UK because Mrs Tarafder was born in the UK. She has only visited Bangladesh twice, firstly in 2006 and lastly in 2010. I accept that she has no family in Bangladesh and that she cannot read or write Bengali though she does speak some of the language. I accept that she has a job in the UK but most importantly, I accept that in reality she plays the major part in looking after her mother. There is clear evidence that the Appellant's mother is in receipt of disability living allowance and I find that the evidence from both the Appellant and his wife is entirely credible in respect of her physical ailments. It is only entirely natural that it is the Appellant's wife who is the proper person who is expected to look after her mother and indeed it would not be appropriate for male members of the family to assist in certain tasks that need to be carried out which must be obvious. I also accept that if Mrs Tarafder were to go to Bangladesh, two of her brothers are estranged from their mother and the remaining sons would not in reality be in a position to look after her because they have their own family and live separately. It was suggested on behalf of the Respondent that carers could be appointed but this would not really be a fair and reasonable solution as Mrs Tarafder is the main carer and of course she is female and looks after her mother, particularly in relation to personal matters which it would not be appropriate, culturally speaking, for male members of the family to perform."

17. Paragraph EX.2. defines "insurmountable obstacles" for the purposes of paragraph EX.1. as "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.”

18. Following the case of Agyarko, paragraph [25], the fact that the Appellant’s wife was born in the United Kingdom and has a job in the United Kingdom is not an insurmountable obstacle. Neither is the fact that she has only visited Bangladesh twice and has no family there. She speaks some Bengali and the fact that she cannot now read or write Bengali is not an insurmountable obstacle. The only one of the factors set out in paragraph [13] which was accepted by Mr. Mills as being capable, in principle, of amounting to an insurmountable obstacle, was the care provided by the sponsor to her mother. However he conceded only that this would amount to an insurmountable obstacle were the sponsor’s mother to need to depend on the state for her care in the absence of receiving care from the sponsor herself.
19. I find that the fact of depriving someone of the care which they receive from another person is not in and of itself an insurmountable obstacle unless it can be shown that there is no one else who could provide that care. It could be argued that unless it could be shown that such care would not be provided by the state, it would not amount to an insurmountable obstacle, but Mr. Mills conceded that if the absence of the sponsor meant reliance on the state, this could be capable of amounting to an insurmountable obstacle.
20. In relation to whether or not the sponsor’s mother would be able to receive care from another family member in the absence of the sponsor, the judge found that the sponsor’s two brothers “would not in reality be in a position to look after” their mother. The reasons he gave for this were that “they have their own family and live separately.” In paragraph [9] he refers to the evidence of the sponsor that “her brothers could not support their mother because they had their own homes”. I find that this, in and of itself, is not an adequate reason. There is no evidence that the brothers’ family circumstances are such that they would not be able either to accommodate their mother, or to provide the necessary care to her in her own home. There are no reasons given as to why the fact that the sponsor’s brothers live separately and have their own families means that they cannot care for their mother.
21. The judge also states that “it would not be appropriate for male members of the family to assist in certain tasks that need to be carried out which must be obvious”, and later, when responding to the Respondent’s suggestion that carers be appointed, states that “it would not be appropriate, culturally speaking, for male members of the family to perform” personal matters. However there does not appear to have been any suggestion that male members of the family attend to the personal hygiene needs of the sponsor’s mother. Indeed the decision records that the Respondent suggested that carers be appointed rather than care being received from male members of the family. Further there is no reason

given as to why the daughters-in-law of the sponsor's mother could not assist in relation to personal care tasks.

22. I find that inadequate reasons have been given as to why the fact that the sponsor's mother would have to receive care from someone else amounts to an insurmountable obstacle. I find that inadequate reasons have been given as to why the sponsor's brothers and their families cannot care for the sponsor's mother in the absence of the sponsor. I find this is especially the case given that the definition in paragraph EX.2. refers to "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*" (my emphasis). Inadequate reasons have been given as to why the difficulties which may be faced in providing alternative care for the sponsor's mother could not be overcome.

Notice of decision

The decision involves the making of an error on a point of law and I set it aside.

The appeal is remitted to the First-tier Tribunal.

Signed

Date 28 January 2016

Deputy Upper Tribunal Judge Chamberlain