



IAC-AH-CJ-VI

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

Appeal Number: IA/48277/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 19th February 2016**

**Decision & Reasons Promulgated
On 8th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**NABEEL TARIQ
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: No representation

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Hubball of the First-tier Tribunal (the FtT) promulgated on 16th April 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.
3. The Claimant is a male citizen of Pakistan born 23rd October 1991 who on 13th June 2014 applied for further leave to remain in the United Kingdom as the spouse of Shahida Arshad a British citizen, to whom I shall refer as the Sponsor.
4. The application was refused on 13th November 2014. The Secretary of State noted that the Claimant and Sponsor were not married, and they had not been residing together for two years prior to the date of application, and therefore the Sponsor was not the Claimant's spouse, neither did she satisfy the definition of a partner set out in GEN.1.2 of Appendix FM. Therefore the application was refused under the Immigration Rules.
5. The Secretary of State went on to consider EX.1(b) but did not accept that insurmountable obstacles existed to family life continuing outside the United Kingdom. In any event, it would appear that in order to qualify under EX.1(b) the Sponsor would need to satisfy the definition of a partner.
6. The Secretary of State did not accept that the Claimant was entitled to remain in the United Kingdom on the basis of his private life as he could not satisfy the requirements of paragraph 276ADE(1) and neither was it accepted that there were any exceptional circumstances that would entitle him to be granted leave to remain outside the Immigration Rules in reliance upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
7. The Claimant appealed, and the FtT heard the appeal on 27th March 2015. By the time of the appeal, it was accepted that the Claimant and Sponsor had married on 7th January 2015. The issue to be decided by the FtT was whether the Claimant could satisfy the financial requirements set out in E-LTRP.3.1. The FtT found against the Claimant on this issue, not being satisfied that it had been proved that there was a specified gross annual income of at least £18,600 per annum.
8. The FtT went on to consider EX.1(b) and allowed the appeal on the basis that there were insurmountable obstacles to family life continuing outside the United Kingdom. Therefore the FtT indicated that the appeal was allowed under the Immigration Rules.
9. This caused the Secretary of State to apply for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred in finding that insurmountable obstacles existed and had provided inadequate reasons for that finding. The Secretary of State contended that insurmountable obstacles is a high threshold, and the fact that individuals wished to remain in the United Kingdom, did not amount to insurmountable obstacles. It was contended that the FtT had applied an incorrect test, by finding that it would be unreasonable to expect the Sponsor to live in Pakistan when she is a British citizen. The Secretary of State contended that the appropriate test is insurmountable obstacles, which is a higher test than reasonableness.

10. Permission to appeal was granted by Upper Tribunal Judge Kopieczek in the following terms;

“I consider it arguable that the First-tier Judge erred in law in his conclusion that there would be insurmountable obstacles to the Appellant and his wife continuing their family life in Pakistan, having regard to the meaning of insurmountable obstacles set out in EX.2.”

11. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

12. The Claimant attended the hearing without legal representation. He was not fluent in English and there was no interpreter.
13. The Sponsor also attended and offered to assist the Claimant by interpreting for him and speaking on his behalf. Mr Richards had no objection to this course of action, and in the circumstances I decided it was appropriate to proceed on this basis.
14. I explained to the Claimant that I was aware that his solicitors had sent a fax to the Tribunal on 15th February 2016 indicating that he wished to withdraw his appeal. The Claimant’s signed authority was enclosed with that letter. At the same time the solicitors indicated that they were no longer instructed to represent the Claimant. They advised that the Claimant had submitted a fresh application to the Home Office.
15. The Tribunal had replied to the solicitors on the same date, advising that the appeal to the Upper Tribunal was made by the Secretary of State, and therefore it was not possible for the Claimant to withdraw that appeal.
16. The Claimant confirmed, with the assistance of the Sponsor, that he understood that his application to withdraw the appeal had been refused, and that he had attended the hearing in person, as he no longer wished to have solicitors representing him.
17. I explained to the Claimant the procedure that would be adopted, in that the Secretary of State had been granted permission to appeal, and I would hear submissions on behalf of the Secretary of State as to why it was contended that the FtT had made a mistake of law. I would then give the Claimant the opportunity to respond.
18. I advised again, that the Claimant could not at this stage withdraw the appeal.
19. The Claimant indicated that he understood and would proceed on that basis.

20. I then heard submissions from Mr Richards who relied upon the grounds contained within the application for permission to appeal. In brief summary Mr Richards contended that the FtT had been wrong to find that insurmountable obstacles existed to family life continuing outside the United Kingdom. The FtT had not identified what very significant difficulties existed that amounted to insurmountable obstacles.
21. By way of response the Sponsor spoke on behalf of the Claimant indicating that she is a British citizen and all of her family live here. She has a long employment history in the United Kingdom and it would be very difficult to relocate to Pakistan.
22. I announced at the hearing that the FtT had erred in law as contended by the Secretary of State. I indicated that I would issue a written decision giving and explaining my reasons. I set aside the decision of the FtT.
23. At this point I advised the Claimant that because the decision of the FtT had been set aside, the decision needed to be re-made, but in my view, if the Claimant now wished to withdraw his appeal then he was entitled to make that application. Mr Richards confirmed that he had no objection to that course of action.
24. Having consulted with each other, the Sponsor and the Claimant applied to withdraw the appeal that had been entered against the Secretary of State's decision to refuse leave to remain. I consented to that application pursuant to regulation 17(2) of The Tribunal Procedure (Upper Tribunal) Rules 2008.

My Conclusions and Reasons

25. My reasons for finding that the FtT erred in law are as follows. The FtT has given inadequate reasons for finding that there are insurmountable obstacles to family life continuing outside the UK. The FtT found that there would be very significant difficulties faced by the Sponsor in continuing her family life with the Appellant in Pakistan, which would entail very serious hardship for her, but has not adequately explained what the very significant difficulties would be.
26. The FtT did not have the benefit of the guidance given by the Court of Appeal in Agyarko [2015] EWCA Civ 440, which was published after the FtT decision was promulgated. However this decision clarifies what the law has always been, so far as interpretation of "insurmountable obstacles" is concerned.
27. The Court of Appeal confirmed in paragraph 21 of Agyarko that the phrase "insurmountable obstacles" imposes a high hurdle to be overcome by an applicant for leave to remain under the Immigration 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.
28. In Agyarko the mere fact that the Sponsor is a British citizen, who had lived all his life in the United Kingdom, and had a job in this country, and hence might find it difficult and might be reluctant to relocate outside the United Kingdom to continue family life, was held not to constitute insurmountable obstacles.

29. In this appeal the FtT found that the Sponsor is a British citizen, has employment in the United Kingdom, and has family here and wants to remain here. The FtT failed to adequately explain how that amounts to insurmountable obstacles to family life continuing outside the UK.
30. Having set aside the decision of the FtT, which meant that the appeal of the Secretary of State to the Upper Tribunal had been allowed, I took the view that it was appropriate to allow the Claimant's application to withdraw his appeal. He clearly understood the nature of that application, as it was an application that had been made to the Tribunal by solicitors who at that stage were acting on his behalf.
31. This is therefore a slightly unusual scenario, but the result is that the appeal of the Secretary of State is allowed in that the decision of the FtT is set aside because of material error of law. The appeal is then disposed of by the Claimant withdrawing his appeal against the initial decision to refuse him entry clearance.

Notice of Decision

The appeal of the Secretary of State is allowed and the decision of the FtT is set aside.

The Claimant's application to withdraw his appeal is granted pursuant to regulation 17(2) of the 2008 Procedure Rules. Withdrawal notices should be sent to the parties with this decision.

Anonymity

The FtT made no anonymity direction. There has been no application for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date 26th February 2016

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The appeal of the Secretary of State to the Upper Tribunal has been allowed. The Claimant has then withdrawn his appeal. There can be no fee award.

Signed

Date 26th February 2016

Deputy Upper Tribunal Judge M A Hall