



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/41292/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 September 2017

Decision & Reasons Promulgated  
On 20 October 2017

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR WADOOD FAIQ  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr P Richardson, instructed by Adam Bernard Solicitors  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Griffith, promulgated on 16 January 2017, dismissing his appeal against the decision of the respondent made on 6 October 2014 to refuse to grant him leave to remain in the United Kingdom on human rights grounds.
2. The appellant arrived in the United Kingdom in March 2005 with the assistance of an agent. He did not enter lawfully and made an application for discretionary leave on the basis of family with his wife on 28 January 2010. That application was refused as was a further application pursuant to EU law in March 2012.

3. Following that, the appellant applied for leave to remain as the spouse of a settled person which was refused on 13 March 2013 without right of appeal. Finally, in June 2014 he applied for leave to remain in the United Kingdom on the basis of his private and family life which was refused on 6 October 2014.
4. The appellant's appeal against that decision came before the First-tier Tribunal on 11 September 2015. In a decision promulgated on 17 November 2015 First-tier Tribunal Judge Abebrese allowed the appeal on human rights grounds. The respondent appealed against that decision and, in a decision promulgated on 16 August 2016 Upper Tribunal Judge Canavan allowed the respondent's appeal and remitted the decision to the First-tier Tribunal for a fresh decision on the issues.
5. Having heard the evidence from the appellant and his wife, First-tier Tribunal Judge Griffith concluded that the appellant had not shown that there were insurmountable obstacles to family life continuing outside the United Kingdom, the judge noting:-
  - (i) that there is no evidence he had been attempting to look into what job opportunities might be available in Pakistan, the appellant's wife not having undertaken research or taken any steps to familiarise herself with her husband's country of origin;
  - (ii) that the appellant had not been able to point to any particular risk to himself or his wife that could be taken into account with regards to the security situation [42];
  - (iii) that the appellant's wife could be helped to learn the local language and generally to adapt to life in Pakistan [43];
  - (iv) that the appellant's wife's medical conditions were not so significant that she was unable to hold down a full-time job [44], the medical evidence in her case being brief and inadequate [45], the letter from the GP saying she was not fit to work away from the home being contradicted [45];
  - (v) the appellant's wife knew that she was in the United Kingdom illegally and the relationship continued in the knowledge of his lack of status [47] the evidence suggesting that neither had given any thought to the consequences to their relationship in the event of an adverse decision;
  - (vi) the appellant had not demonstrated that the difficulties could not be overcome or that there would be very serious hardship for the appellant or his wife thus it had not been shown that there were insurmountable obstacles [48].
6. The judge then went on to consider Article 8 outside the Rules in the alternative concluding that removal would be proportionate; and, that little weight could be given both to his private and family life [51] given that he had never been in the United Kingdom with leave.
7. The appellant sought permission to appeal on the grounds that:-

- (i) that the appellant's wife would find it hard to integrate into a country where societal attitudes to women differed greatly from those in the United Kingdom and that it would be hard for her to find equivalent work in Pakistan [v]; and, that she has a history of fibromyalgia and depression finding it hard to mobilise in the mornings, has many close family members in the United Kingdom;
- (ii) that the test of insurmountable obstacles was not properly applied;
- (iii) that although following Agyarko v SSHD [2015] EWCA 440 the threshold for success outside the Rules was high, the proper test is not "insurmountable obstacles" but whether it is reasonable to expect the couple to relocate; that if a test of reasonableness is applied outside the Immigration Rules it is submitted that the appeal is one that which could succeed on Article 8 grounds.

### Submissions

8. Mr Richardson submitted that this was not a perversity challenge rather it was submitted that the judge had applied too high a threshold in making the assessment both under EX.1 and Article 8 outside the Immigration Rules. He submitted further that there would significant hardship for the appellant's spouse given her age, her family ties to the United Kingdom as she is now a grandmother. He submitted further she was unable to function in terms of working without help of the applicant.
9. Mr Richardson accepted that the letter from the doctor was somewhat "cryptic" but was sufficient. It was not suggested that she could not get treatment in Pakistan and thus it would not reach the threshold for a protection claim nonetheless it was a matter which needed to be taken properly into account given the substantial differences in culture between the United Kingdom and Pakistan. It was submitted following the evidence set out at D2 and D3 that in reality the appellant's wife would be living in fear, the evidence of visits by United Kingdom nationals to Pakistan not being not relevant given that many of them would be of Pakistani origin.
10. Mr Richardson submitted further the judge's approach to the threshold set out in EX1 was effectively equating it to a situation whereby Article 3 was engaged. Mr Richardson submitted further, relying on Agyarko v SSHD [2017] UKSC 11 that there were exceptional grounds on which this case could succeed. It was submitted further that in this case there was limited public interest given that it was accepted that the appellant's wife earned approximately £20,000 per annum although he accepted there was a possibility of refusal pursuant to paragraph 320(11) of the Immigration Rules.
11. He submitted further the delay in this case needed to be taken into account [see paragraph 52] there being a lack of the Secretary of State seeking to enforce after 2010.
12. Mr Whitwell submitted whilst it could not properly be argued that the judge had applied a too higher test, following the decision in Agyarko and whilst living in Pakistan might well be unpalatable and unattractive nonetheless this did not meet the relevant threshold either to succeed under EX1 or in Article 8 outside the Rules.

He submitted that little weight could be taken to the medical evidence given that the letter was undated. He submitted in reality this decision was simply a disagreement with the findings reached by the judge. He submitted that **Chikwamba** was not engaged in this case given that there was no indication that Appendix FM-SE had been met nor could it be said that the application would succeed.

13. Mr Whitwell submitted that although there had been delay in this case it was not to the detriment of the appellant and was to a great extent negated, much of time relied upon being when the Secretary of State was considering application made by the appellant.
14. In response Mr Richardson submitted that the judge had misdirected himself in law.

### The Law

15. Paragraphs EX1(a) and paragraph (b) of Appendix FM provide as follows.

EX.1. This paragraph applies if

1. (a) ...

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.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.

16. How the phrase “insurmountable obstacles” was to be interpreted is directly addressed in **Agyarko** [see paragraph 39] and what is meant by insurmountable obstacles was discussed in detail at [42] to [48]. At paragraph 44 Lord Reed held that the definition of “insurmountable obstacles” which appears in paragraph EX.1 and is defined in paragraph EX2 is consistent with the meaning which can be derived from the Strasbourg case law:-

“44. Domestically, the expression ‘insurmountable obstacles’ appears in para EX.1(b) of Appendix FM to the Rules. As explained in paragraph 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression ‘insurmountable obstacles’ is now defined by para EX.2 as meaning ‘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.’ That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until later after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer,

consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2."

17. With regard to "exceptional circumstances" Lord Reed held as follows:-

"54. As explained in paragraph 49 above, the European court has said that, in cases concerned with precarious family life, it is 'likely' only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that 'a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there' (Jeunesse, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with *qa fait-accomplis*. On the contrary 'where confronted with a *fait accompli* the removal of the non-national family member by the authorities would be incomparable with article 8 only in exceptional circumstances' (Jeunesse, (para 114).

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word 'exceptional', as already explained, as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate'. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the instructions that 'exceptional' does not mean 'unusual' or 'unique': see para 19 above".

18. It is evident from the judge's decision at [39] that he directed himself properly in accordance with the Rules and it cannot be argued this is not, in light of the decision in **Agyarko**, a misdirection on the law. At paragraph 48 the judge said as follows:-

48. I do not doubt that the prospect of resuming family life in Pakistan is not attractive and I accept that for Mrs Faiq there would be difficulties caused by her unfamiliarity with the country and culture of Pakistan and her medical problems, but on the evidence before me and for the reasons I have set out above I am not satisfied that the appellant has demonstrated those difficulties cannot be overcome or that the evidence demonstrates very serious hardship for the appellant or his wife. For these reasons I am not satisfied the appellant can show there are insurmountable obstacles to family life with his partner continuing outside the UK in Pakistan

19. Further, and in considering Article 8 outside the Rules the judge directed himself at [49] in line with **SS Congo and Others** [2015] EWCA Civ 387 and also at 53 that he could not find any compelling circumstances that tipped the balance in the proportionality exercise in the appellant's favour.
20. Contrary to Mr Richardson's submissions, I do not accept that there is any sufficient indication that the judge has not properly adopted the correct test in law as explained in **Agyarko**.
21. Further, and in any event, I consider that the findings of fact made by the judge were open to him. The medical evidence is vague and while saying that the applicant's wife requires significant assistance to help her function at home, and that "she is not fit to work away from home" this seems inconsistent with the evidence that she does work full-time away from the home. It is also evident from the letter dated 23 November 2011 that there is no evidence of depression present the last prescription being in January 2009 and it is simply not clear at all what date of the letter which appears at page DO maybe. In any event the letters are vague and fail properly to set out in any detail what help is needed.
22. Whilst I accept that the travel advice provided by FCO in particular may relate primarily to UK citizens of Pakistani heritage visiting that country, equally there is no evidence to support that submission or to show that those such as the appellant's wife would be particularly at risk. There is insufficient medical evidence to show that the treatment she receives for her condition is unavailable in Pakistan or only at excessive cost. It was open to the judge to conclude on the evidence before him that the applicant's wife may be able to get a job and it is clear that he did take into account the evidence at [24] of ties to the United Kingdom.
23. Viewing the decision as a whole the judge gave adequate and sustainable reasons for concluding that the test set out at EX1 was not met and it cannot be argued that the judge misdirected himself in law as to the relevant test.
24. Further, it cannot be argued that the judge misdirected himself in respect of an Article 8 claim outside the Rules. He was entitled to conclude for the adequate and sustainable reasons given that the balance of proportionality did not fall in the appellant's favour. It was open to him to apply properly as he did Section 117B of the 2002 Act, dealing with the various factors at [51] to [52].
25. It cannot be argued that this case is comparable to that of **Chikwamba**. The appellant has a poor immigration history and as Mr Whitwell submitted there is insufficient evidence to show that Appendix FM-SE was met. Further, in any event it is always open to the Secretary of State to refuse pursuant to paragraph 320(11) of the Immigration Rules. Thus, following the decision of Upper Tribunal Judge Gill in **Chen**, I do not consider it can be said that the judge erred in his approach to this issue.
26. With respect to the delay, I am not satisfied that it can be argued that any delay in this case falls to be counted in the applicant's favour given the length of time he has

spent in the United Kingdom without leave and the length of time spent pursuing actions.

27. Accordingly, for these reasons, I find the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

### **SUMMARY OF DECISION**

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed

Date 19 October 2017

A handwritten signature in black ink, appearing to read 'Jeremy Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul