



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

Appeal Number: PA/02658/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 22 November 2017**

**Decision & Reasons Promulgated
On 27 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**T D
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Miszkiel, counsel
For the Respondent: Mr Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana who appealed against the respondent's decision to refuse her protection and human rights claims. The appeal against that decision was dismissed by Judge of the First-tier Tribunal Bowler ("the FTTJ") in a decision promulgated on 5 May 2017.
2. I maintain the anonymity direction made in the First-tier Tribunal.
3. Permission to appeal was granted on 5 September 2017. Hence the matter came before me.

Submissions

4. For the appellant, Ms Miszkziel relied on the grounds of appeal. In summary, the grounds relate only to the dismissal of the appeal on human rights grounds: first, that the FTTJ misdirected herself at [52] and [53] when assessing whether there were insurmountable obstacles to family life between the appellant and her partner continuing in Ghana. It was submitted that “insurmountable obstacles”, within the meaning of EX.2 of Appendix FM of the Immigration Rules meant hardship which the applicant or her partner were not reasonably expected to overcome. The FTTJ had accepted the evidence of the partner’s health condition. It was not reasonable to expect the appellant’s partner, who had had a brain haemorrhage and who had not been to Ghana for 24 years, to overcome the hardship of relocation and trying to find work at the age of 65. If no money were available he would not be able to pay for life-sustaining medication. The FTTJ made findings with regard to contact with the appellant’s partner’s brother which were not open to her on the evidence. These were errors of law in the FTTJ’s assessment of whether there were insurmountable obstacles.
5. The appellant’s second ground was that the FTTJ had misdirected herself at [75] by applying the insurmountable obstacles test when assessing Article 8 outside the Rules. According to **Izuazu (Article 8 – new rules) [2013] UKUT 00393 (IAC)** there could be no presumption that the rules would determine an assessment under Article 8. It was submitted that the insurmountable obstacles test had no bearing on the Article 8 assessment. The correct test was whether it was reasonable to expect a family member to leave the UK: **Huang [2007] UKHL 11, EB (Kosovo) [2008] UKHL 41**. It was not reasonable to expect the appellant’s partner, given his poor health, to relocate to Ghana; the respondent’s position was reflected in the requirement for 20 years’ residence when assessing a person’s private life in the UK. The FTTJ also misdirected herself as regards the risk of further brain haemorrhage: her finding was irrational. The proportionality assessment amounted to an error of law which was material to the outcome.
6. For the respondent, Ms Ahmad submitted the FTTJ had directed herself appropriately. The appellant’s family life had been precarious; according to **Agvarko [2017] UKSC 11**, in such circumstances there would have to be unjustifiably harsh consequences as a result of refusal. No such potential consequences existed. The risk of another haemorrhage had been considered. The appellant’s challenge concerned the weight given to the evidence; that was a matter for the FTTJ. The challenge was a mere disagreement with the findings.

Discussion

7. Ms Miszkziel confirmed that the grounds of appeal before me arose from the FTTJ’s findings with regards to EX.2 and her assessment of proportionality outside the Rules and pursuant to the Article 8 jurisprudence.
8. I deal first with the submission that the FTTJ misdirected herself in law in assessing whether there were insurmountable obstacles to family life continuing in Ghana.
9. It was held in **Agvarko [2017] UKSC 11** that the definition of “insurmountable obstacles” at 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” was consistent with Strasbourg case law. This in turn was consistent with **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** in which it was held that the term “insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are

impossible to surmount: **MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC)**; they concern the practical possibilities of relocation.

10. In **VW and MO (Article 8-insurmountable obstacles) Uganda [2008] UKAIT 00021** the Tribunal held that the test or criterion of “insurmountable obstacles” remains part of UK and Strasbourg jurisprudence on Article 8, albeit that decisions sometimes formulate this test in terms of “reasonableness” or “seriousness”, which indicates that it is not a test subject to strict definition. The Tribunal went on to say that, whichever of these formulations is used, however, an applicant must show more than a degree of hardship. The Tribunal made the point, however, that it is a guiding principle rather than a strict precondition.
11. There is no challenge to the FTTJ’s record of the evidence or her findings at [49]. She correctly noted the appellant’s partner had suffered from a brain haemorrhage in the past but that this was under control, through medication, and he was working at the date of hearing; she noted his age. She noted the appellant’s partner was born and brought up in Ghana and came to the UK at the age of 40; he had dual British and Ghanaian nationality albeit he had not been back to Ghana since 1993. She noted the couple were familiar with the culture and society in Ghana. They had transferable skills [53]. She found the appellant’s partner may face challenges seeking work but that the “evidence does not show that [the appellant] would face significant problems in seeking work”. The FTTJ’s finding that the appellant would be able to work to pay for the couple’s accommodation, maintenance and any medication required by her partner is one which was open to her on the evidence.
12. The FTTJ noted, on the evidence, the appellant’s partner’s current health. She did not accept the assertions of the appellant and her partner that they could not afford medication in Ghana. She gave her reasons for this adverse finding: no evidence had been adduced to “show the extent of that problem”. She noted the appellant’s partner was in full-time work and was “not having other treatment [than taking medication]”. She concluded, on reasonable grounds, that the appellant’s partner’s “medical needs have not been shown to be an insurmountable obstacle”. This was a finding which was open to her on the evidence.
13. I do not accept the submission that the FTTJ drew conclusions on the evidence which were not open to her; it was a matter for her the weight she gave to the evidence and she attributed appropriate weight. She did not misdirect herself as to the meaning of “insurmountable obstacles”. As she noted at [52], “while a high test, insurmountable obstacles are not ones which are impossible to surmount”. There is no misdirection in law.
14. I turn to the FTTJ’s assessment of proportionality outside the Rules.
15. The FTTJ was entitled to take into account the factual matrix identified as part of her consideration of the evidence with regard to the criteria in EX.2. This was set out in her preceding paragraphs and has not been challenged.
16. In **Agvarko [2017] UKSC 11** it was held that a court or tribunal had to decide whether the refusal to grant leave to remain was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State’s policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are “insurmountable obstacles” or “exceptional circumstances” as defined. “The critical issue will generally be

whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control”.

17. In **Gulshan** it was held that the Secretary of State had addressed the Article 8 family aspects of the claimant’s position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE; the judge should have done likewise. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: **R (on the application of Nagre) v SSHD [2013] EWHC 720 (Admin)**.
18. In the present case, the FTTJ appropriately took into account the various public interest factors in s117B of the 2002 Act at [68]-[72]. It was not an error of law to take into account the appellant did not fulfil the criteria in the Immigration Rules for the grant of leave to remain on the grounds of her family or private life [75] (**Agvarko**). In any event, I do not accept the submission that the FTTJ applied the insurmountable obstacles test when assessing Article 8 outside the Rules: the FTTJ considered whether it would be “reasonable” for the couple to continue their family life in Ghana at [75]. She made her finding on that issue on the basis of “her findings about the extent to which they would face obstacles in Ghana”. It was submitted to me that the FTTJ had taken into account the absence of insurmountable obstacles as part of her proportionality assessment. This is not the case; as is clear from [75], the FTTJ took into account her findings as to the obstacles they would face, not that she had already found them to be insurmountable.
19. This appeal arises largely from a disagreement with the weight attributed by the FTTJ to the evidence before her. Contrary to the grounds, she noted the appellant’s partner “did not often speak to [his brother] as [he] was often asking for money”. Her subsequent finding at [54] was that the appellant’s partner “has a brother living in Accra and while they may have limited contact presently, I find it has not been shown that they have no contact. [The appellant’s partner] and the appellant could seek social support and advice from [the appellant’s partner’s] brother while settling, to assist their adjustment given they have been away for 24 and 18 years”. This is not a finding that the appellant and her partner could seek financial assistance, but that they could seek other assistance. Given the evidence of contact, it was a finding which was open to the FTTJ.
20. The challenges to the FTTJ’s findings are no more than a disagreement with the weight she gave to the evidence before her. Her findings are cogent and sustainable on the evidence. She has given adequate reasons for them.
21. For these reasons, there is no material error of law in the FTTJ’s decision and reasons.

Decision

22. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
23. I do not set aside the decision.

A M Black

Deputy Upper Tribunal Judge

Dated: 24 November 2017

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black

Deputy Upper Tribunal Judge

Dated: 24 November 2017