



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04157/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4 January 2018

Decision & Reasons Promulgated
On 18 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

GULBAHAR YOLBARSOVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Ojo of Graceland, Solicitors.

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing her appeal against the respondent's decision of 1 February 2016 refusing her application for further leave to remain on the basis of her family and private life.

Background

2. The appellant is a citizen of Turkmenistan born on 25 April 1988. She first came to the UK as a student in 2009. On 24 June 2011 she married her husband, a British national. He was born 20 June 1969 and came from Turkey to the UK in December 1999. He has now lived in the UK for 27 years. Following her marriage, the appellant returned to Turkmenistan to make an application for entry clearance. This was refused by the entry clearance officer but an appeal was subsequently allowed and the appellant returned to the UK in 2012 with leave to enter as a dependent spouse valid until 15 May 2015. On 6 August 2015, she applied for further leave to remain both under the Rules and under article 8 on the basis of her family life with her husband.
3. Her application was refused. Although the respondent was satisfied that the appellant had a genuine and subsisting relationship with her partner, she found that there was no evidence to show that there would be insurmountable obstacles to family life continuing outside the UK within para EX.1.(b) of appendix FM and there were no exceptional circumstances warranting a grant of leave to remain outside the requirements of the Rules. In her grounds of appeal against this decision the appellant argued that her removal would be disproportionate and would occasion insurmountable obstacles to her family life. Her husband had very serious challenges with heart disease and there would be very serious hardship for them in continuing their family life outside the UK.

The Decision of the First-Tier Tribunal.

4. The judge heard oral evidence from both the appellant and her husband. The appellant's evidence is summarised at [7]-[18] and [22]-[24] and her husband's at [25]-[35] of the decision. The judge was referred to medical reports about her husband's heart condition which confirmed that he had had a coronary artery bypass graft × 3 performed on 25 June 2015 and had been discharged on 1 July 2015.
5. In his assessment of the evidence at [44]-[75], the judge considered whether there were "insurmountable obstacles" within para EX.1.(b), namely "very significant difficulties which would be faced by the applicant and her partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious difficulties" (Ex.2.). The judge noted that the appellant's husband had had a successful artery bypass graft in June 2015 but no current updated medical report had been provided [44] and there was no evidence that he required any particular care or assistance on a day-to-day basis which could not be given to him by the appellant [51]. There was no evidence that the appellant and her partner would not be able to be assisted in either Turkey or Turkmenistan [51] or that his current medical condition would in any way prevent his ability to travel, reside or work abroad [53].

6. The judge found from the evidence presented that the appellant and her husband would not face any significant differences in continuing their family life together outside the UK in either Turkmenistan or Turkey [58]. For the same reasons, he found that there would not be very significant obstacles under para 276ADE(1)(vi) to the appellant's integration into Turkmenistan if she was required to leave UK.
7. The judge went on to consider the position under article 8 directing himself in accordance with the guidance of the Supreme Court in R (Agyarko) v Secretary of State [2017] UKSC 11. He concluded that there were no exceptional or compelling circumstances in the appellant's case warranting consideration of her claim outside the Rules. He went on to consider the Razgar [2004] UKHL 27 approach and the provisions of S117B of the Nationality, Immigration and Asylum Act 2002. He found that the respondent's decision did not constitute a disproportionate interference with the appellant and her husband's right to respect for family life. Accordingly, the appeal was dismissed.

The Grounds of Appeal and Submissions.

8. In the grounds, it is argued that the judge erred in law in restricting himself to the test of insurmountable obstacles and exceptional circumstances without applying the reasonableness test set out in MA (Pakistan) v Secretary of State [2009] EWCA Civ953 in which the Court of Appeal confirmed the application of the Chikwamba [2008] UKHL 40 principles. It is further argued that the judge erred in law and misdirected himself in that the appellant met the test of insurmountable obstacles and exceptional circumstances. It was foreseeable that she and her husband would become destitute and without money and the sponsor had lived in the UK for 27 years and was unable to return to his job as a builder without exposing himself to a significant risk that he might once again endanger his life.
9. Mr Ojo adopted his grounds. He submitted that the judge had given no adequate reasons for the conclusion set out at [58] that the appellant and her husband would not face very significant difficulties in continuing their family life together in either Turkmenistan or Turkey. It was accepted that the appellant could not meet the financial requirements of appendix FM but the judge had failed to give proper weight to the fact that her husband had lived in the UK for 27 years and had never lived in Turkmenistan. He had failed properly to consider, so he argued, the reasonableness of expecting them to return to Turkmenistan where they would have no income or to consider the fact that, if the appellant was granted leave to remain, she would be able to work and contribute to the family finances.
10. Ms Fijiwala submitted that the judge had directed himself impeccably on the proper approach as set out in Agyarko. He had been entitled to find that the appellant could not meet the high tests of showing that there were insurmountable obstacles to family life continuing outside the UK or that there were very compelling circumstances justifying a grant of leave outside the Rules. He had considered the medical evidence relating to the appellant's husband and was entitled to take into

account the fact that he was capable of light work and to find that there was no obstacle preventing either him or the appellant obtaining employment abroad.

Assessment of the Issues.

11. The grounds do not satisfy me that the judge erred in law in his approach to the issues in this appeal. It is common ground that the appellant could not meet the financial requirements of the Rules and, therefore, to qualify for leave within the Rules she had to meet the requirements of para EX.1.(b) of showing that there were insurmountable obstacles in continuing their family life together outside the UK. The judge properly directed himself in accordance with the guidance in Agyarko. He reminded himself that "insurmountable" was to be understood in a practical and realistic sense [55]. He took into account the medical condition of the appellant's husband. He noted that there was no further medical evidence additional to the reports prepared in 2015. He also noted the evidence that his doctor had seen him two or three months previously and had told him that he could do light work, he could not continue building work but could obtain an office job [33].
12. It was open to the judge to find that his current medical condition would not prevent his ability to travel, reside abroad or work: [53]. He took into account the fact that he did not wish to leave the UK where he had lived for 27 years [49]. I am satisfied that the judge's decision on the issue of insurmountable obstacles was properly open to him. Mr Ojo argued that the judge had not given adequate reasons for his finding on this issue in [58] but when the judge's conclusions are read in the context of his summary and assessment of the evidence, his reasons are clear.
13. It was also argued in the grounds that the judge erred by restricting himself in assessing insurmountable obstacles without applying the reasonableness test in MA (Pakistan). There is no substance in this argument. The test the judge had to apply was the test as set out in the Rules as interpreted by the Supreme Court in Agyarko, which supersedes the earlier authorities under the previous Rules. The test is not one of reasonableness but whether there are very significant difficulties which could not be overcome or which would entail very serious hardship for the appellant and her husband.
14. The grounds also refer to the House of Lords opinion in Chikwamba but the guidance in that opinion must be read in light of the current requirements of the Rules. In Chikwamba the appellant could meet requirements of the Rules then in force save for requirement of making the application for entry clearance from abroad. In the present case the appellant is unable to meet the substantive requirements of the Rules and her position is therefore distinguishable from the position in Chikwamba.
15. Having considered the matter within the Rules, the judge went on to consider whether there were compelling circumstances warranting further consideration outside the Rules. Again, he directed himself on the proper approach in accordance

with the guidance in Agyarko at [63]-[64]. I am satisfied that he took all relevant matters into account and was entitled to find there were no such compelling circumstances. In any event, the judge adopted the Razgar approach and considered the provisions of the 2002 Act and was entitled to find that the respondent's decision did not constitute a disproportionate interference with the appellant and her husband's right to respect for their family life.

16. In summary, I am not satisfied that the judge erred in law. He reached findings and conclusions properly open to him for the reasons he gave.

Decision.

17. The First-tier Tribunal did not err in law and it follows that decision dismissing the appeal stands.

Signed: H J E Latter

Dated: 17 January 2018

Deputy Upper Tribunal Judge Latter