



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/11705/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 14 December 2017**

**Decision & Reasons
Promulgated
On 3 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MOHAMMAAD ATIF HANIF
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Z Ahmad, Home Office Presenting Officer.
For the Respondent: Mr A Mian, Counsel.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal with the Secretary of State referred to as “the Respondent” and Mr Hanif as “the Appellant”.
2. The Appellant is a citizen of Pakistan who made application to the Respondent for permanent residence in the United Kingdom. It was refused and he appealed and following a hearing Judge of the First-tier Tribunal Wyman allowed the appeal under the Immigration Rules.

3. The Respondent sought permission to appeal which was granted by Judge of the First-tier Tribunal Lambert on 25 September 2017. Her grounds for so granting were:-

- “1.The Respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Wyman) who, in a decision promulgated on 22/2/17 allowed the Appellant’s appeal against the Secretary of State decision to refuse leave to remain on human right’s grounds.

2. The refusal was on grounds of previous submission of a fraudulently obtained English language test result. Ground 2 contends misinterpretation of the respondent evidence and failure by the judge correctly to apply the reasoning in **SM & Qadir** and other relevant case law. The content of paragraph 53 of the decision, together with an absence of any analysis or apparent application of the respective evidential and legal burdens of proof on the respondent and Appellant renders this ground arguable.

3. Ground 1 argues incorrect application and inadequate reasoning in relation to the insurmountable obstacles test under EX1. The very brief content of paragraphs 61-67 of the decision render this ground also arguable.

4. There is therefore an arguable error of law disclosed by the application.

4. Thus the appeal came before me today.

5. Ms Ahmad expanded the Appellant’s two grounds of appeal. In short the Appellant had been refused leave to remain as the spouse of a person present and settled consequent upon the Respondent being satisfied that he had used deception in relying on a fraudulently obtained TOEIC Certificate. The Judge allowed the appeal on the basis that EX.1 was met and the Appellant had given evidence in English and had passed other English tests. Ms Ahmad argued that the Appellant had failed to meet EX.1(b) as there are no insurmountable obstacles to family life with his partner continuing outside the United Kingdom. They had sought to rely on the fact that the Appellant’s wife was born and raised in the United Kingdom as insurmountable obstacles and the Judge had agreed with this. She submitted the Judge had failed to appreciate that “insurmountable obstacles” is a high threshold and an individual’s preference or choice did not meet the requirements. She referred me to the authority of **Agyarko & Ikuga, R (on the applications of) v SSHD [2017] United Kingdom SC 11**. Further it was incumbent upon the Judge not to simply allow this appeal on the basis that the Immigration Rules were met as this is an appeal which falls to be decided under the Immigration Act 2014 which came fully into effect on 6 April 2015. There is here no finding that the decision amounts to a disproportionate interference with the Appellant’s human rights. Further the Judge has failed to give adequate reasons on a material matter with particular reference to the guidance given in **SM and**

Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)
the Judge has failed to apply the relevant test, on the balance of probabilities, regarding whether the Appellant employed a deception. The Judge has misinterpreted the evidence and has accordingly erred in law.

6. Mr Mian also relied on the authority of **Agyarko** and urged me to accept that the European Court intended the words “insurmountable obstacles” to be understood in the practical and realistic sense and that this is how the Judge had applied that analysis to this appeal. He repeated the arguments put forward in the original appeal as to the insurmountable obstacles that the Appellant and his partner would face were he to return to his country of origin and then urged me to accept that any fraud was unproven and the issue of the burden and standard of proof had been properly dealt with at paragraph 51 of the Judge’s decision.
7. I find that both grounds put forward by the Respondent are made out. The Judge has failed to apply the reasoning in **SM and Qadir**. The Judge has also materially erred by inadequately reasoning, in what is very brief content indeed, at paragraphs 61-67 of his decision why there were insurmountable obstacles to this Appellant continuing his family and private life in his country of origin.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7.(b), before any Judge aside from Judge Wyman.

No anonymity direction is made.

Signed

Date 29 December 2017.

Deputy Upper Tribunal Judge Appleyard