



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/06538/2019 (P)**

Appeal Number:

THE IMMIGRATION ACTS

Decided under rule 34

On 5 November 2020

**Decision & Reasons
Promulgated**

On 11 November 2020

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**YEGANA [H}
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Linkworths Solicitors

For the Respondent: Alain Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is appealing against a decision of Judge of the First-tier Tribunal Malcolm (“the judge”) promulgated on 17 October 2019 dismissing her human rights claim. Permission to appeal was granted on 19 May 2020.

2. On 14 August 2020 directions were issued by the Upper Tribunal expressing the preliminary view that the error of law issue in this appeal could be determined without a hearing. On 25 August 2020 the appellant's solicitors emailed the Upper Tribunal stating that their client was agreeable to the matter been determined without a hearing. The respondent has not expressed a view on this. Having regard to rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules, the nature and extent of issues to be resolved, and the wishes of the parties, I am satisfied that it is appropriate in this case to address, without a hearing, (a) whether the making of the judge's decision involved the making of an error of law; and (b) if so, whether the decision should be set aside.

Decision of the First-tier Tribunal

3. The appellant is a citizen of Azerbaijan who entered the UK in November 2017 on a visit visa. In February 2018, whilst still a visitor in the UK, she married a British citizen. On 14 April 2018, shortly before the expiry of her visit visa, she made a human rights application on the basis of her relationship with her husband. Following the refusal of her application she appealed to the First-tier Tribunal.
4. At the time of the hearing in the First-tier Tribunal, the appellant was pregnant, with a due date of 22 February 2020. She had previously suffered a miscarriage.
5. The appellant claimed that it would not be safe for her to return to Azerbaijan as her brother, who is her only immediate family (her parents having died) disapproves of her marriage and has threatened her and her husband.
6. The appellant's husband is a British national of Turkish origin. He has never lived in, and has no connection to, Azerbaijan.
7. The judge accepted that the appellant and her husband are in a genuine and subsisting relationship. The judge, applying para. EX.1 of Appendix FM to the Immigration Rules, considered whether there were insurmountable obstacles to the relationship continuing outside the UK. The judge found that (a) the appellant's husband does not have a connection to, or speak the language of, Azerbaijan, and would need to be the sole breadwinner given the appellant's pregnancy; and (b) as a protection claim had not been made the claimed threats from the appellant's brother should not be taken into account, but in any event she and her husband could live in a different part of the country to avoid any risk of harm from him.

8. The judge concluded that the appellant and her husband would face some difficulties but not to such an extent that the "insurmountable obstacles" threshold was met.
9. The judge also considered, with reference to para. 276 ADE (1)(vi) of the Immigration Rules, whether the appellant would face very significant obstacles integrating into Azerbaijan. The judge found that she would not, even if she relocated to another part of the country, given that she had spent nearly all of her life in, and was familiar with the lifestyle and customs of, Azerbaijan.
10. The judge also considered whether removal of the appellant from the UK would be disproportionate under article 8 ECHR outside the Rules and concluded that it would not.

Grounds of Appeal and Submissions

11. The grounds of appeal make three arguments.
 - a. First, it is argued that the judge erred by failing to give any consideration to the rights of the appellant's unborn child. It is argued that this should have been considered as part of the proportionality assessment.
 - b. Second, it is argued that the judge fell into error by not taking into consideration the appellant's fear of her brother and the potential harm that she would face from him.
 - c. Third, it is submitted that the fact that the appellant and her husband would have to support themselves, find somewhere to live and find employment in a country (and language) that is unfamiliar to the appellant's husband, whilst the appellant is expecting her first child, means that there are insurmountable obstacles to family life. It is not clear, from the way this ground is drafted, what the claimed error of law is. It is not, for example, submitted that the judge failed to have regard to any evidence or gave inadequate reasons. It appears that this is a rationality/perversity challenge; that is, it is being argued that it was not open to the judge to conclude otherwise than that there would be insurmountable obstacles to family life continuing in Azerbaijan.
12. The directions of the Upper Tribunal issued on 14 August 2020 invited the appellant to submit further submissions. Despite being represented, the appellant did not make further submissions and instead submitted new evidence, but without an application as required by para. 15(2A) of the Tribunal Procedure Rules. The new evidence consists of documents showing the appellant had the child she was pregnant with at the First-tier Tribunal hearing and a statement which states that she is expecting a second child and which repeats evidence given in the First-tier Tribunal. This new evidence has no relevance to whether the judge made an error of

law. Therefore, even if an application had been made, I would not have admitted it.

13. In accordance with the Upper Tribunal's directions, the respondent made written submissions. These argue that:
 - a. There is no requirement for a judge to consider the best interests of an unborn child;
 - b. The insurmountable obstacles test under paragraph EX.1 was not applicable as the application was made whilst the appellant was a visitor and therefore the conditions of paragraph E-LTRP2.1 were not met. It is argued that as the test of insurmountable obstacles was not applicable, any error in this regard would not be material;
 - c. The judge was entitled, in any event, to find that there were not insurmountable obstacles;
 - d. The judge took into consideration all relevant considerations in respect of proportionality; and
 - e. Any issues or concerns the appellant had with respect to her home area could be avoided by relocating to another part of Azerbaijan.

Ground 1: failure to consider the best interests/rights of an unborn child

14. It is well established that a judge must, when a child will be affected by a person's removal from the UK, consider the best interests of that child and treat them as a primary consideration in the assessment of proportionality under article 8(2) ECHR. However, neither party has drawn my attention to (and I am not aware of) any legislation, Immigration Rule, policy or authority to support the proposition that the best interests of an unborn child should be given distinct consideration or that the human rights of an unborn child should be considered separately from those of the pregnant mother. This ground therefore has no merit.

Ground 2: failure to consider risk from the appellant's brother

15. The threat posed by the appellant's brother is relevant to whether, and the extent to which, the appellant (and her husband) will face obstacles integrating (and maintaining their family life) in Azerbaijan. It was therefore necessary for the judge to consider this as part of the article 8 assessment even though a protection claim had not been brought. Accordingly, the judge erred by failing to consider the risk posed by the appellant's brother solely because a protection claim had not been brought.
16. However, this error is not material because the unchallenged finding of the judge (which is not undermined by any evidence that

was before the Tribunal) was that the appellant and her husband could avoid any threat from the appellant's brother by living in a different part of Azerbaijan.

Ground 3: perversity/irrationality of finding that there are not “insurmountable obstacles” under para. EX.1 of Appendix FM of the Immigration Rules

17. As observed by the respondent, because the appellant's application was made when she was in the UK as a visitor, even if it were established that there were insurmountable obstacles to the relationship continuing in Azerbaijan, she would still not meet the conditions of the Immigration Rules: see R-LTRP 1.1(d) and E-LTRP 2.1 of Appendix FM, and the explanation in *Sabir (Appendix FM – EX.1 not free standing)* [2014] UKUT 00063 (IAC).
18. However, even though a finding of insurmountable obstacles would not be determinative of the appeal, it would weigh very heavily in the appellant's favour given that the insurmountable obstacles test is intended to reflect the duty of the UK under the ECHR to act compatibly with article 8. See *Lal v The Secretary of State for the Home Department* [2019] EWCA Civ 1925 at [10]. It follows that although the judge fell into error by proceeding on the basis that the appellant would succeed under Appendix FM if she were able to show that there were insurmountable obstacles to family life continuing in Azerbaijan, the judge's finding on insurmountable obstacles was material to the proportionality assessment under Article 8(2). I therefore do not accept the respondent's argument that an error by the judge in the assessment of insurmountable obstacles would be immaterial.
19. The grounds of appeal assert that the following "set of facts represent insurmountable obstacles to family life":
 - a. lack of family support;
 - b. the need for the appellant and her husband to support themselves, find somewhere to live and find employment;
 - c. the appellant's pregnancy; and
 - d. Azerbaijan is unfamiliar to the appellant's husband who does not understand the language and culture.
20. Although not mentioned in the grounds, I would add to this list of obstacles/challenges that the appellant and her husband would need to live in a part of Azerbaijan that is unfamiliar to the appellant, in order to avoid her brother.
21. “Insurmountable obstacles” under para. EX.1 of Appendix FM is a high threshold. To meet it, the appellant has to show that there are very serious difficulties in continuing family life with her husband

which could not be overcome or would entail very serious hardship for her and her partner: see para. EX.2 of Appendix FM and *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11.

22. Some judges might have reached the view that the factors identified above in paragraphs 17 and 18, considered cumulatively, meet the insurmountable obstacles threshold because of the hardship that the appellant and her husband would face. However, it was not irrational or perverse to find that although the appellant and her husband will face significant challenges, those challenges can be overcome and would not entail “very serious hardship”. It was therefore open to the judge, for the reasons given, to conclude that there were not insurmountable obstacles to family life continuing in Azerbaijan.

Conclusion

23. For the reasons given above, I am satisfied that the decision does not contain a material error of law.
24. Plainly, circumstances have materially changed since the decision of the First-Tier Tribunal was promulgated, as the appellant now has a child, born on 22 February 2020, who is a British citizen. The best interests of this child would need to be considered by the respondent in the event that a further human rights claim is made and a judge considering the refusal of such a claim would be required to have regard, inter alia, to section 117B(6) of the Nationality Immigration and Asylum Act 2002.

Notice of Decision

- a. The appeal is dismissed. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 5 November 2020