



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08608/2019 (R)

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22<sup>nd</sup> September 2020

Decision & Reasons Promulgated  
On 29<sup>th</sup> September 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SADIA [C]  
(Anonymity Direction Made Not Made)

Respondent

**Representation:**

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer  
For the Respondent: Mr R Jesurum, Counsel instructed by Shah Law Chamber

**DECISION AND REASONS (R)**

**Introduction**

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mrs Sadia [C]. However, for ease of reference, in the course of this decision I adopt the parties'

status as it was before the FtT. I refer to Mrs [C] as the appellant, and the Secretary of State as the respondent.

2. The hearing before me on 22<sup>nd</sup> September 2020 took the form of a remote hearing using skype for business. Neither party objected. Neither the appellant nor her sponsor joined the hearing. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. The hearing was publicly listed, and I was addressed by the representatives in exactly the same way as I would have been, if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

### The Background

3. The appellant is a national of Pakistan. On 9<sup>th</sup> January 2019, she made an application for entry clearance as a partner. The application was refused for reasons set out in a decision made by the respondent dated 18<sup>th</sup> April 2019. The respondent did not accept that the eligibility relationship requirement set out in paragraph E-ECP.2.1 of Appendix FM of the Immigration Rules is met by the appellant. The respondent noted that the appellant relies upon a 'Marriage Registration Certificate' as evidence of her marriage to Mr Tariq [C] on 9<sup>th</sup> March 2013 in Pakistan. The respondent noted that the appellant had provided evidence that she was divorced on 23<sup>rd</sup> August 2011, and, evidence that her sponsor was

divorced on 21<sup>st</sup> March 2014, a year after their wedding had taken place in March 2013. The respondent noted that the marriage that had taken place in March 2013 in Pakistan had taken place whilst the sponsor was domiciled in the UK. The respondent did not accept that it was therefore a valid marriage. Furthermore, the respondent noted that the sponsor continued to live together with his ex-wife in the same house, causing the respondent to doubt that the relationship between the sponsor and his ex-wife has genuinely broken down.

4. At paragraph [16] of his decision, Judge Clarke noted that the appellant and Mr Tariq [C] have a child together born on 6<sup>th</sup> December 2013, who is a British citizen. He noted the child lives with the appellant in Pakistan and has done so since birth.
5. The appellant's sponsor and his ex-wife gave evidence before the First-tier Tribunal. Judge Clarke found, at paragraph [17] of his decision that the sponsor and appellant are not in a valid marriage. He noted that although the appellant was divorced in 2011 and was therefore free to marry, the sponsor's decree absolute from the Family Court sitting at Romford is dated 21<sup>st</sup> March 2014, some months after the sponsor and appellant were married in Pakistan. At paragraph [19] of his decision, Judge Clarke said:

“Under British law, the sponsor was not free to marry in 2013 as he was still married to Mrs Valerie [C]. I therefore find that the marriage between the appellant and sponsor is invalid. In so finding, I rely on Section 11(d) of the Matrimonial Causes Act 1973 which states that a polygamous marriage entered into outside England and Wales shall still be void if either party at the time of the marriage was domiciled in England and Wales. This provision was set out by the Upper Tribunal in *Abdin (domicile – actually polygamous marriages)* [2012] UKUT 00309”

6. Judge Clarke concluded that as the marriage is not a valid marriage, the appellant cannot meet the requirement in E-ECP.2.7, and therefore cannot meet the requirements of the immigration rules. He went on to address the Article 8 claim outside the immigration rules. He was impressed by the evidence of Ms Valerie [C] in particular, and found that the relationship between the appellant and her sponsor is genuine. At paragraph [29], Judge Clarke said:

“The unconventional living arrangements of the Appellant, the Sponsor and the Sponsor’s ex-wife living under one roof in the former matrimonial home of the Sponsor and Ms [C] does not mean that the relationship between the appellant and the sponsor is not genuine. Taking all the evidence before me, I find that there is a genuine and subsisting relationship between the appellant and sponsor and the marriage between the sponsor and Ms [C] has broken down irretrievably and they are not in a relationship. They live together as friends.”

7. Judge Clarke found the appellant and her sponsor have established a family life together. He found the Article 8(1) rights of the appellant are engaged. He noted, at paragraph [37], that his decision turns on the issue of proportionality. He found that the public interest requires effective immigration control, the appellant can speak English, and that she is financially independent in the sense that she is not dependent on the British taxpayer. In adopting the ‘balance sheet approach’ endorsed by the Supreme Court in Hesham Ali v SSHD [2016] UKSC 60, Judge Clarke noted the strong public interest in the maintenance of effective immigration controls and that the appellant’s inability to meet the requirements of the immigration rules militate against the appellant. On the other side of the balance, Judge Clarke noted the appellant is in a genuine and subsisting relationship with her sponsor and she has a subsisting parental relationship with her son who is a British citizen. At paragraphs [45] to [47] of his decision, Judge Clarke said:

“45. I have firstly considered the best interests of the appellant and sponsor’s son and remind myself of the Section 55 duty and that [N’s] best interests are a primary, but not the paramount, consideration.

46. In terms of the best interests of the appellant’s son, I rely on the fact that he is a British citizen and therefore has the right to come to the United Kingdom, even if his mother is denied entry clearance. I also remind myself that it is normally in the best interests of a child to be brought up by both parents, if at all possible, as was held in Azimi-Moayes and others (decisions affecting children; onward appeals) [2013] UKUT 197.

47. The refusal of entry clearance means that either the British child of the appellant will remain in the care of the appellant, separated from his British father or the appellant and sponsor will decide that their son should leave his mother and live with the sponsor here in the United Kingdom, separated from his mother.”

8. Judge Clarke acknowledged there is a strong public interest in maintaining effective immigration controls, but found the refusal of entry clearance is a disproportionate interference with the appellant's Article 8 rights.
9. The respondent claims that in reaching his decision Judge Clarke failed to assess whether there are any insurmountable obstacles to family life between the appellant and her sponsor continuing in Pakistan. The respondent refers to the decision of the Court of Appeal in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, in which the Court of Appeal held that Article 8 does not guarantee a right to choose one's country of residence, and, that where Article 8 is engaged the Tribunal should consider whether there are insurmountable obstacles to the continuation of family life abroad, before considering the exceptional circumstances test outside the Rules. The evaluation of whether there are insurmountable obstacles would be relevant to the question of exceptional circumstances.
10. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 5<sup>th</sup> May 2020. It was noted:

“The Appellant’s appeal against refusal of entry clearance was allowed on Article 8 grounds outside the immigration rules. It is arguable that the Judge has erred in law when undertaking the Article 8 proportionality balancing exercise in failing to assess whether there are any insurmountable obstacles to family life continuing in Pakistan especially so as the marriage is found to be polygamous when it was entered into and does not satisfy the requirements of said rules..”
11. Mr Howells submits that the appellant cannot satisfy the requirements of the immigration rules and in reaching his decision, Judge Clarke only considered two alternatives at paragraph [47] of his decision. The first is the child remaining in Pakistan in the care of the appellant, separated from his father. The second is the child leaving his mother in Pakistan to live with his father in the UK, separated from his mother. Mr Howells submits that at no point in the decision does Judge Clarke address the fundamental question and third alternative. That is, whether the appellant her sponsor and the child could live together as a family unit in Pakistan. He submits that in the respondent’s decision, the respondent had noted

that in the covering letter to the application, the appellant's representatives claimed it would be difficult for the sponsor to relocate to Pakistan as he lives and works in the UK. The respondent had addressed that claim and had noted in the decision that although the appellant may wish to live in the UK rather than Pakistan, Article 8 does not oblige the UK to accept the choice of a couple as to which country they prefer to reside in.

12. Mr Howells refers to the decision of the Upper Tribunal in SD (British citizen children – entry clearance) Sri Lanka [2020] UKUT 00043 in which the Tribunal held that in assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor. In SD, the appellant was a national of Sri Lanka who had married a British citizen and there were two children of the relationship, both British citizens. SD applied for entry clearance as a spouse under Appendix FM of the Immigration Rules and her application was refused. As here, the two British citizen children were residing with the appellant abroad, and so the issue of the significance or otherwise of their British citizenship arose in the context of the refusal of the application made by children's mother to join her husband and their father in the UK. At paragraphs [93] and [94], the Upper Tribunal considered the submission made on behalf of the SSHD that it was reasonable to expect the sponsor to move to or go and live in Sri Lanka in order for their family life to take place in that country. The Tribunal said:

"93. Mr Lindsay has submitted that it was reasonable to expect the sponsor to move to or go and live in Sri Lanka in order for their family life to take place in that country. Mr Lewis opposes that, submitting that that there would be insurmountable obstacles in the way of the sponsor doing so. He highlights that the sponsor is categorical that he does not want to go back and live in Sri Lanka. We find the evidence relating to this issue somewhat mixed. The sponsor had lived there before: between 2011 and November 2017 he appears to have spent a considerable amount of time there. He says he has learnt Tamil. Even though he expressed concerns about being able to find properly remunerated employment there, he did have a job there for two months and he has not raised any other

concerns about his own position if residing there. Although the sponsor suffers from depression and psychological problems, both he and his GP describe this as resulting from his separation from his wife and children. Even if being reunited with his family did not relieve or reduce his depression, there was no medical evidence, and it was not suggested by Mr Lewis, that he would be unable to access medical help for this condition in Sri Lanka. Notwithstanding his depression, he had worked and even after his recent accident, he said he was hopeful of finding work soon. On the other hand, it is clear that both the sponsor and the appellant badly want to live together as a family in the UK and that is also the keen wish of their children. If he returns to Sri Lanka to be with them, even though it is likely he will be able to find employment there, as he did before, it may well be at a level of remuneration lower than that required to meet the MIR.

94. Weighing up the above considerations, we are satisfied that the sponsor returning to live in Sri Lanka would cause difficulties. But we are not satisfied that for him to go and live in Sri Lanka with his family would pose insurmountable obstacles or result in unjustifiably harsh consequences. We remind ourselves what was said in relation to the test of “insurmountable obstacles” in *R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department (Respondent)* [2017] UKSC. The Supreme Court stated at [45] that:

“By virtue of paragraph EX.1(b), “insurmountable obstacles” are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship.”

13. In reply, Mr Jesurum quite properly in my judgment, acknowledged that Judge Clarke does not directly and expressly consider whether family life between the appellant, sponsor and their child can continue in Pakistan. However, he submits it is implicit when the decision is read as a whole that the Judge had considered that possibility, and in any event, given what else is said by the judge in the decision, that omission, if there is one, is immaterial. Mr Jesurum submits the focus at the hearing of the appeal appears to have been upon whether the appellant and her sponsor are in a genuine and subsisting relationship. Judge Clarke found the marriage was not a valid marriage but accepted the relationship between the appellant and sponsor is genuine and subsisting. Mr Jesurum submits Judge Clarke found, at [22], that the appellant cannot meet the requirements of the

immigration rules, and at [43], acknowledged the strong public interest in the maintenance of effective immigration controls. He submits Judge Clarke carefully considered the evidence before the Tribunal and it was undoubtedly open to him to have regard to the fact that the appellant can speak English, and is financially independent. He submits Judge Clarke properly adopted the balance sheet approach and although he accepts there is no explicit reference to the ability of the appellant, her sponsor and their child to live together in Pakistan, it would be astonishing if that was not in the mind of the judge. Mr Jesurum submits the fact of British Citizenship can only ever be a matter of great weight, and the judge was plainly aware that the appellant has a job and home in the UK, when reaching his decision. He submits that reading the decision as a whole, it must be implied that the Judge considered whether the family unit could live together in Pakistan. He submits the public interest is not fixed and here, although the appellant's sponsor was not divorced when he entered into the marriage with the appellant, he is now divorced, and any concern regarding the genuineness of the relationship was addressed by the Judge.

14. I reject the submission made by Mr Jesurum that it is implicit when the decision is read as a whole, that the judge did have in mind whether it might be possible for the family unit to live together in Pakistan. It is correct that at paragraph [7], Judge Clarke recorded that the entry clearance officer had noted it was submitted that the sponsor would find it difficult to relocate to Pakistan as he lives and works in the United Kingdom and the child needs the love and support of his father and cannot migrate to the United Kingdom without his mother. Beyond the very broad assertion made by the appellant's representative in the covering letter dated 31<sup>st</sup> January 2019, there appears to have been no evidence before Judge Clarke to support a claim that there are insurmountable obstacles to family life between the appellant and the sponsor continuing outside the UK or that living in Pakistan together would result in unjustifiably harsh consequences. There is in my judgement, nothing said in paragraphs [30] to [48] of the decision of Judge Clarke that even begins to suggest that the judge had in mind or considered whether it



might be possible for the family unit to live together in Pakistan, let alone whether there are insurmountable obstacles to them doing so or that it would be unjustifiably harsh.

15. Although in TZ (Pakistan) and PG (India) v SSHD, the Court of Appeal was concerned with appeals and decisions upholding the SSHD's refusal to grant leave to remain, Sir Ernest Ryder said:

"31. Where article 8 is in issue within the Rules there will of necessity have to be a conclusion on the question of whether there are insurmountable obstacles to the relocation of the appellant and his or her family. That involves an evaluation or value judgment based upon findings of fact. When a tribunal goes on to consider an article 8 claim outside of the Rules (as it will do where article 8 is engaged, see *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 at [80]), it will factor into its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles – that being a relevant factor both as a matter of policy and on the facts of the case to the question of exceptional circumstances.

32. In the circumstance that an FtT does not need to make an evaluation about insurmountable obstacles, the question arises: how does that tribunal or a subsequent tribunal relying on the same facts approach the question of exceptional circumstances outside the Rules? Again, the answer is to be found in *Agyarko* at [47] and [48]. By reference to *Hesham Ali* at [44 to 46], [50] and [53], Lord Reed made it clear that in striking a proportionality balance (i.e. when undertaking an article 8 evaluation outside the Rules) a tribunal must take the Secretary of State's policy into account and attach considerable weight to it 'at a general level'.

33. This means that a tribunal undertaking an evaluation of exceptional circumstances outside the Rules must take into account as a factor the strength of the public policy in immigration control as reflected by the Secretary of State's test within the Rules. The critical issue will generally be whether the strength of the public policy in immigration control in the case before it is outweighed by the strength of the article 8 claim so that there is a positive obligation on the state to permit the applicant to remain in the UK. The framework or approach in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 at [17] is not to be taken to avoid the need to undertake this critical balance.

34. That leaves the question of whether the tribunal is required to make a decision on article 8 requirements within the Rules i.e. whether there are insurmountable obstacles, before or in order to make a decision about article 8 outside the Rules. The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about article 8 is to be made outside the Rules. An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of

State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted leave to remain. Accordingly, the tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control ' in the case before it' , which is what the Supreme Court in Hesham Ali (at [50]) held was to be taken into account. That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1) , for the very reason that it would then be disproportionate for that person to be removed."

16. By analogy, here, Judge Clarke failed to carry out any evaluation of the question whether there are insurmountable obstacles to family life continuing in Pakistan, and thus an evaluation of the insurmountable obstacles test within the Rules that is required in order to inform an evaluation the Article 8 claim outside the Rules. There is quite simply nothing in the decision of Judge Clarke that supports the submission made by Mr Jesurum that the judge implicitly had in mind whether the parties could live together as a family unit in Pakistan. There is in any event a complete absence of any reasons to support a conclusion that there are insurmountable obstacles to family life continuing in Pakistan. The Judge noted the sponsor is in employment and has a home in the UK but that does not even begin to imply that the judge considered whether family life could continue in Pakistan.
17. In my judgement the decision of Judge Clarke to allow the appeal on Article 8 grounds outside the immigration rules is vitiated by an error of law and must be set aside.
18. It follows that I allow the appeal by the SSHD. As to disposal, the parties agree that the appropriate course is for the matter to be remitted to the FtT for hearing afresh. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

19. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

**Notice of Decision**

20. The appeal is allowed and the decision of FtT Judge Clarke promulgated on 3<sup>rd</sup> April 2020 is set aside.
21. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

Signed *V. Mandalia*

Date; 24<sup>th</sup> September 2020

**Upper Tribunal Judge Mandalia**