



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19459/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 5 March 2020

Decision & Reasons Promulgated
On 20 March 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

TOF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M. Azmi, Counsel, instructed by Wright Justice Solicitors

For the Respondent: Mr. C. Bates, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge I. F. Taylor, promulgated on 26 June 2019, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse a grant of leave to remain on human rights grounds.
2. Permission to appeal was granted as follows:

“It is arguable that in focussing on the medication the judge failed to properly address the question of the relationships developed with the mental health team and the consequences of separation on the wife’s mental health. It is also arguable that in the assessment of proportionality the judge failed to properly consider the decision in Chikwamba [2008] 1 WLR 1420 - see ground 5.

It is arguable that in failing to properly consider the evidence of the appellant’s wife’s mental health and the circumstances surrounding the rape and the fact that the family had been placed in the witness protection programme because of the wife giving evidence in a murder case, the judge has failed to assess all of the relevant evidence. His failure to do so has led to an arguable error of law being made.”

The hearing

3. The Appellant and his wife attended the hearing.
4. At the outset Mr. Bates conceded on behalf of the Respondent that the decision involved the making of material errors of law with reference both to the failure of the Judge to consider the effect on the Appellant’s wife, and also with relation to Chikwamba, as the Appellant would have been exempt from the financial requirements, given that his wife is in receipt of DLA.
5. In the circumstances, I set the decision aside to be remade. I heard further evidence from the Appellant’s wife following which I allowed the Appellant’s appeal. My full decision and reasons are set out below.

Error of Law

6. I find that the grounds of appeal are made out. At [17] the Judge states:

“In paragraph 2, the appellant states that his partner has established relationships with her medical care providers and she would not be able to cope with all the changes specifically surrounding her medical care. She is entitled to free medical care in the United Kingdom which would not be available in Bangladesh. The appellant says that it would be unduly harsh for his partner to be deprived of the level of care and treatment provided. I am satisfied that the medication that the appellant’s partner is prescribed is available in Bangladesh and is affordable.”
7. The Judge goes on to state that he accepts “that it is reasonable to suppose that the medical treatment and care in Bangladesh may be inferior to that provided in the United Kingdom. However, discrepancies of this nature are not sufficient to amount to “insurmountable obstacles”.
8. There is no consideration of the evidence of the Appellant and his wife as to the strength and importance of the established relationships which the Appellant’s wife has with her medical care providers. There is no consideration of her evidence that she would not be able to cope with the changes, specifically surrounding her medical care. There was evidence before the Judge that the Appellant’s wife struggled with

change. I was referred to pages 56 and 57 of the supplementary bundle where there is evidence that the proposed eviction of the Appellant's wife from her accommodation caused a worsening of her depressive illness. The Judge has made no reference to the evidence of the Appellant's wife's inability to cope with change.

9. At [23] the Judge accepts the "summation of the appellant's partner's life which....is truly horrendous". Despite this, he has not considered the effect of the changes in the provision of her medical care given the nature of the traumas which she has endured. The Appellant's wife's ability to cope with change and relocate to Bangladesh is a key issue when deciding whether or not paragraph EX.1(b) is met. I find that the error fully to consider the Appellant's wife's circumstances is a material error of law.
10. In relation to Chikwamba, and the extent to which this should have been considered in the proportionality balancing exercise, there is no consideration of whether or not temporary separation would be a disproportionate interference. There is no consideration of the extent to which the Appellant would meet the requirements of the immigration rules. As accepted by Mr. Bates, the Appellant would be exempt from the financial requirements as his wife is in receipt of DLA. There was no evidence to suggest that the accommodation was not suitable and, at the time, the Appellant had a valid English language test certificate. I find that the failure to consider the effect of temporary separation on the Appellant's wife given the above is a material error of law.
11. I therefore set the decision aside to be remade.

Remaking

12. I heard oral evidence from the Appellant's wife. Both representatives made oral submissions.
13. I have taken into account the documents contained in the Appellant's main bundle (204 pages), his additional bundle (22 pages), his supplementary bundle (58 pages), the Respondent's bundle (73 pages), the skeleton argument and the letter from the Appellant's wife's doctor dated 3 May 2019.
14. The burden of proof lies on the Appellant to show that the Respondent's decision is a breach of his rights, and/or those of his wife, to a family and private life under Article 8 ECHR. The standard of proof is the balance of probabilities.
15. As agreed at the hearing, the issue before me is whether or not the Appellant meets the requirements of paragraph EX.1(b) of the immigration rules. In order to meet this paragraph the Appellant must show that there are insurmountable obstacles to family life with his wife continuing outside of the United Kingdom. Paragraph EX.2 states:

"For the purposes of paragraph EX.1(b) insurmountable obstacles means the 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.”

16. I find that the Appellant meets the requirements of paragraph EX.1(b). I find that his wife would face very significant difficulties which could not be overcome, and which would entail very serious hardship for her.
17. I found the Appellant’s wife to be an honest and credible witness. As acknowledged by Mr. Bates, her oral evidence was detailed, consistent and candid. It is not necessary for me to set out here the traumas which the Appellant’s wife has endured. This evidence is not disputed, and is set out in the witness statements. As a result of these traumas, her mental health is fragile. She suffers from anxiety, depression, PTSD and agoraphobia. She has panic attacks, and has self-harmed. She also has an eating disorder. She is prescribed medication. She also requires constant monitoring, both by friends and family in the form of the Appellant, her “rock” and her “pillar”, and also from qualified medical professionals.
18. I find that the Appellant’s wife is in need of extensive care and support from mental health services. She gave evidence that there was a considerable decline in her mental health following the decision of the First-tier Tribunal, promulgated in June 2019. She became suicidal and was almost admitted to hospital under the Mental Health Act. She stopped eating and started self-harming again. The traumas resurfaced and became “too much”. As a result, her medication was changed and she is now seeing the consultant more regularly. Additionally she is seeing a Community Psychiatric Nurse (the “CPN”) twice a month, and is receiving two types of counselling, one in relation to sexual violence and the other in relation to body dysmorphia. She said that she was very anxious and “very very low” most of the time.
19. The Appellant’s wife gave evidence that the new medication and counselling were helping. Her counselling was getting to the “core problems”. She gave evidence that the improvement was due to her excellent team of medics. She is able to speak to her doctor straight away if she phones on one of her low days. She described the team as brilliant and said that she had a very good rapport with her counsellor and her CPN. She repeatedly described the very good relationship that she has with her mental health team, and said that she was very hopeful that the team would “get me somewhere”. She thought that the new counselling was working, and that her treatment was very good.
20. I find that the Appellant’s wife would simply not receive this level of care in Bangladesh, and I find that this would cause her very serious hardship. I find that the evidence shows that change causes a deterioration in her mental health. There was evidence of this before the First-tier Tribunal. I find that the effect of the First-tier Tribunal decision in June was to cause a significant deterioration in the Appellant’s wife’s mental health, leading to self-harm and the prospect of admission to hospital under the Mental Health Act. I find that medication alone is not what

keeps the Appellant's wife mental health stable. Her mental health is maintained through the extensive support and treatment which she receives from qualified medical professionals in the United Kingdom. It is clear that were she to have to accompany the Appellant to Bangladesh in order to continue family life, she would not receive this treatment. The relationships which she has developed with her treatment team would be broken immediately. Further, she does not speak Bengali, so it would be very difficult for her to establish the same level of rapport with mental health staff. I find that the Appellant's wife has never been to Bangladesh and has no knowledge of mental health services in Bangladesh.

21. It was accepted in the First-tier Tribunal that the mental health services were likely to be inferior in Bangladesh, but that this did not amount to insurmountable obstacles. I find that the Appellant's wife would not be able to access mental health services owing to language difficulties. The Appellant would not be a sufficient "go-between" given the nature of the relationships which need to be built up with healthcare professionals in order for treatment to be effective, especially given the horrendous nature of the traumas which the Appellant's wife has suffered. The Appellant's wife gave evidence that the only man that she will allow near her is the Appellant, owing to the nature of her past traumas.
22. I find that the Appellant's wife would face very serious hardship were she to have to move to Bangladesh. It would result in a significant deterioration in her mental health. It is quite possible that it would lead to self-harm or even suicide. In addition to the significant harm caused to her by breaking the established relationships with mental health professionals, she would not be able to access the care that she needs in Bangladesh given the circumstances outlined above. I find that family life between the Appellant and his wife could not be continued in Bangladesh due to these insurmountable obstacles. I therefore find that the Appellant has shown that he meets the requirements of paragraph EX.1(b) of Appendix FM of the immigration rules.
23. I have considered the Appellant's appeal under Article 8 in accordance with the case of Razgar [2004] UKHL 27. I find that the Appellant has a family life with his wife sufficient to engage the operation of Article 8. I find that the decision would interfere with his family life.
24. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

25. I have taken into account all of my findings above. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the Appellant meets the requirements of paragraph EX.1(b). I therefore find that there will be no compromise to the maintenance of effective immigration control by allowing his appeal.
26. In support of this, TZ (Pakistan) [2018] EWCA Civ 1109 states at [34]:-
- “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.”
27. Further, the headnote to OA and Others (human rights; ‘new matter’; s.120) Pakistan [2019] UKUT 00065 (IAC) states:
- “(1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.”
28. The Appellant speaks English (section 117B(2)). He provided a certificate issued in June 2017 showing that he achieved Level A1. In relation to Chikwamba, it was submitted by Mr. Bates with reference to Appendix O of the immigration rules that this certificate would not now be valid. Notwithstanding its validity, it is evidence of his English language ability.
29. In relation to financial independence (section 117B(3)), it is significant that the Appellant would meet the financial requirements for entry clearance as a spouse as his wife is in receipt of DLA. She gave evidence that they live in a two bedroomed home, just herself and the Appellant, with the occasional visit from her younger daughter. The Appellant would therefore also meet the accommodation requirements of the immigration rules.
30. In relation to sections 117B(4) and 117B(5), the Appellant had leave when he met his wife in June 2016. He had an extant appeal against a previous decision in relation to his Tier 4 visa. Section 117B(6) is not relevant.
31. In relation to Chikwamba, I have found above that the Appellant would meet the financial and the accommodation requirements for entry clearance as a spouse. Although as at the date of the hearing before me his English language certificate is no longer valid, it was as at the date of the hearing in the First-tier Tribunal. Given my findings above in relation to the Appellant’s wife’s inability to cope with change, and

her reliance on the Appellant, I find that even a temporary separation would not be proportionate given the effect on her mental health.

32. Taking all of the above into account, and giving particular weight to the fact that the Appellant meets the requirements of the immigration rules, I find that the balance comes down in favour of the Appellant. I find that the Respondent's decision is not proportionate. I find that the Appellant has shown on the balance of probabilities that the decision is a breach of his rights, and those of his wife, to a family life under Article 8 ECHR.

Decision

33. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
34. I remake the decision, allowing the Appellant's appeal on human rights grounds. The Appellant meets the requirements of paragraph EX.1.
35. Given the circumstances of the Appellant's wife's health, I have made an anonymity direction.

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 him or any member of his 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.



Signed

Date 16 March 2020

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. I have decided to make a whole fee award of £140. The evidence before the Respondent indicated the extent of the Appellant's wife's mental health needs and the difficulties she would face accessing treatment in Bangladesh, with the resulting significant deterioration in her mental health and consequent obstacles to family life with the Appellant continuing there.

Signed

Date 16 March 2020



Deputy Upper Tribunal Judge Chamberlain