Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10736/2019**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 16 September 2021
Hybrid Hearing with Microsoft Teams

Decision & Reasons Promulgated
On the 19th October 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr C Simmonds, Virgo Consultancy Services Limited

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (RA). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Pakistan who was born on 13 June 1979.

4. The appellant claims that he arrived in the United Kingdom in 2008. He remained in the UK, initially as a student and thereafter on a number of different bases until he was refused leave as a Tier 1 Student on 2 July 2010. On 5 September 2013, he was served with a RED.0001 notice.

5. On 16 February 2018, the appellant made an application for leave based upon his human rights. On 15 June 2018, he also claimed asylum.

6. On 20 October 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under Art 8 of the ECHR.

7. The Secretary of State rejected the appellant's claim to be at risk on return to Pakistan as a member of the United Kashmir People's Party and because of his *sur place* activities in the UK.

8. Further, as regards Art 8, the Secretary of State concluded that the appellant could not succeed under the Immigration Rules (HC 395 as amended) on the basis of his relationship with his British citizen partner because there were not "insurmountable obstacles" to their family life continuing in Pakistan and so para EX.1 of Appendix FM of the Rules did not apply. Finally there were not exceptional circumstances such as to justify the grant of leave outside the Rules under Art 8 of the ECHR.

The Appeal to the First-Tier Tribunal

9. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Davidge on 28 January 2021. In her determination sent on 10 February 2021, Judge Davidge dismissed the appellant's appeal on international protection grounds. She did not accept the appellant's credibility and that, therefore, he would be at risk on return to Pakistan as a result of his claimed political activities. However, Judge Davidge allowed the appellant's appeal under Art 8 on the basis that he met the requirements of the 'partner' rules in Appendix FM because there were "insurmountable obstacles" to his family life with his British citizen partner continuing in Pakistan. As a consequence, since the appellant met the requirements of the Immigration Rules, his removal was disproportionate and a breach of Art 8.

The Appeal to the Upper Tribunal

10. The appellant did not seek to appeal against the dismissal of his appeal on international protection grounds.

11. However, the Secretary of State appealed against Judge Davidge's decision to allow the appellant's appeal under Art 8. The Secretary of State relied upon two grounds.

12. First, the judge failed properly to consider the issue under para EX.1 of whether there were "insurmountable obstacles" to the appellant's family life continuing in Pakistan with his wife. Applying the approach set out by the Court of Appeal in Lal v SSHD [2019] EWCA Civ 1925 at [35] – [37].

13. Secondly, the judge failed to give adequate reasons why the appellant should succeed under Art 8 and failed properly to have regard to the public interest.

14. On 8 April 2021, the First-tier Tribunal (Judge Scott-Baker) granted the Secretary of State permission to appeal.

15. The appeal was listed for a face-to-face hearing at Cardiff Civil Justice Centre before me on 16 September 2021. In advance of the hearing Mr Simmonds, who represented the appellant, requested that he (and the appellant) be allowed to join the hearing remotely by Microsoft Teams. I acceded to that request. They, therefore, joined the hearing remotely by Microsoft Teams. Mr Diwnycz, who represented the Secretary of State, attended the hearing in person.

Paragraph EX.1

16. The relevant Immigration Rule in this appeal the 'partner' rule in Section R-LTRP of Appendix FM. It was not in dispute before the judge that the appellant had a genuine and subsisting relationship with his British citizen wife. The only live issue under the Rules was, as a result of the appellant not having leave to remain, whether para EX.1 applied. So far as relevant, para EX.1 provides as follows:

> "EX1. This paragraph applies if
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> (a) ….; or
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> (b) The applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, …. and there are insurmountable obstacles to family life with that partner continuing outside the UK."

17. Paragraph EX.2 defines "insurmountable obstacles" as follows:

> "For the purposes of paragraph EX.1.(b) 'insurmountable obstacle' 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."

18. In Lal, the Court of Appeal explained the proper approach to applying the "insurmountable obstacles" test in para EX.1 at [35]-[37] as follows:

> "35. Mr Malik submitted that "insurmountable obstacles", as that phrase is defined in EX.2. of Appendix FM, can take two forms: first, a very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant's partner to continue overseas (for example, because they would not be able to gain entry to the proposed country of return); or second, a very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but to do so would entail very

> serious hardship for one or both of them. This submission reflects the current guidance for officials published on 23 September 2019, "Family Policy: Family Life (as a partner or parent, private life and exceptional circumstances)", version 3.0. We accept that it is an appropriate explanation of the effect of paragraph EX.2. and accordingly of what is meant by "insurmountable obstacles" in paragraph EX.1.(b) of Appendix FM.
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> 36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).
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> 37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned…."

19. The Court of Appeal held that a two-stage approach should be adopted. First, the decision maker should determine whether the obstacles to the individual's family life continuing outside the UK amount to "a very significant difficulty". Secondly, if they do, the decision maker must then determine whether the difficulty is:

    (i) one which makes it impossible for the applicant or their partner to continue family life outside the UK; and, if not,

    (ii) whether taking account of any steps which could reasonable be taken to avoid or mitigate the difficulty, it would nevertheless entail a 'very serious hardship' for the applicant or their partner (or both).

The Judge's Reasons

20. Judge Davidge gave her reasons for allowing the appeal under Art 8 on the basis that the appellant met the requirements of the Rules, in particular EX.1, at paras 59-61 as follows:

> "59. In the context of the Immigration Rules, the respondent accepts that the appellant has a partner and so the dispute before me has been about whether or not the partner would face 'very significant difficulties' in continuing family life with the appellant in Pakistan, difficulties which could not be overcome or which would entail very serious hardship for her.
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> 60. At the time of giving her evidence before me, the partner had very recently lost her mother and had expressed emotional vulnerability as a result. She has a son from her former relationship who is now an adult and is living in the United Kingdom. In terms of her position vis-à-vis living in Pakistan in order to be able to continue her family life with the appellant, she was very clear that she would be unable to do so. Asked why, her explanation was that she has suffered a multiple rape and assault when she had been in Pakistan in the context of her previous relationship and was not prepared to go there because it would be re-traumatising for her.

> 61. The respondent's representative did not cross-examine her on this point, and surprisingly, as there was nothing in the background of the case which gave rise to any suggestion that she was anything other than an entirely credible witness. On the basis of her evidence, I find that it would indeed cause her very serious hardship which could not be overcome were she to relocate to Pakistan. Even allowing that she has a good relationship with the appellant's parents, her subjective assessment that she would be re-traumatised by going to Pakistan is not inherently implausible and has the ring of truth."

21. At para 64, the judge applied those findings to allow the appellant's appeal under Art 8 as follows:

> "64. Applying my facts to the law it is apparent that, although the appellant loses his international protection grounds of appeal, he succeeds on the Article 8 ground of appeal. The decision to refuse him leave to remain is contrary to the corrected Rules-based decision. In those circumstances, there is no public interest in requiring the appellant to leave and the corrected Rules-based outcome is determinative of the proportionality Article 8 position, and indeed the respondent has not argued otherwise."

Discussion

22. Mr Diwnycz adopted the Secretary of State's grounds which he did not seek to elaborate upon. He did, however, accept that ground 2 was entirely dependent upon ground 1. He accepted that if the judge had been correct to find that the appellant met the Immigration Rules, in particular para EX.1, then there was no public interest in his removal and the decision breached Art 8. Ground 2 only arose if the judge was engaged in determining whether, despite not meeting the requirements of the Rules, the appellant could nevertheless succeed under Art 8 outside the Rules when the public interest would be engaged.

23. As is clear from para 64 of the judge's determination, she allowed the appeal on the sole basis that the appellant met the requirements of the Rules and, therefore, there was no public interest in his removal which was accordingly disproportionate. That was undoubtedly a correct approach, assuming her findings in relation to para EX.1 are sustainable, as the Court of Appeal stated in TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34] where the Senior President of Tribunals (Sir Ernest Ryder) with whom Longmore LJJ and Moylan LJJ agreed said:

> "… 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."

24. Consequently, the Secretary of State's appeal turns upon whether ground 1 is established.

25. In this appeal, the judge, did adopt the two-stage approach set out in Lal. She identified the "very significant difficulty" as being the effect upon the appellant's partner of returning to Pakistan who would be "re-traumatised" as a result of having suffered a multiple rape and assault in Pakistan in the context of her previous

relationship. The judge set this out at para 60 and concluded at para 61 that this would "indeed cause her very serious hardship" but which "could not be overcome" were she to return to Pakistan.

26. The potential difficulty with this reasoning is that it appears to turn entirely upon the "subjective assessment" made by the appellant's partner as to the impact upon her of returning to Pakistan which the judge accepted as "not inherently implausible" and having "the ring of truth" about it. However, in Lal, the Court of Appeal rejected the contention that the assessment of whether "insurmountable obstacles" was not to be understood "as subjective".

27. In Lal, a central feature of the applicant's case was that there were "insurmountable obstacles" because the applicant's partner had a sensitivity to hot weather and, given the hot climate in India, he was not prepared to live there because of the impact upon him. Having set out the approach, as I have cited above at [35] – [37], the Court of Appeal dealt with this issue at [37] – [39] as follows:

> "37….Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together.
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> 38. On the basis of the evidence of Mr Wilmshurst and his children, we accordingly consider that the FTT judge was entitled to find, given the general knowledge that India has a hot climate, that Mr Wilmshurst's sensitivity to hot weather would represent a very significant difficulty if he were to move to India but not that it would make it impossible for him to move there. To decide whether the obstacle would entail very serious hardship for Mr Wilmshurst and was for that reason "insurmountable", it was necessary in our view to examine the facts in more detail and to consider questions such as these: if the couple had to move to India, where in India could they reasonably be expected to live? What are the average temperatures in that part of India during different periods of the year? Are there steps which could reasonably be taken to mitigate the heat during hot weather, such as air conditioning, and how adequate would such steps be to meet the difficulty? Are there any cooler places in which it would be practicable for Mr Wilmshurst and Ms Lal to live for all or part of the year? The ultimate question is whether, in all the circumstances, the climate would entail not merely a significant degree of hardship or inconvenience for Mr Wilmshurst but "very serious hardship".
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> 39. The FTT did not undertake a factual enquiry of this sort. That no doubt reflected the fact that the predominant focus of the hearing in the FTT was on whether there was a genuine and subsisting relationship and the question of insurmountable obstacles was treated as a peripheral issue. But the upshot of this is that the basis on which the FTT concluded that paragraph EX.1.(b) applied was indeed deficient and the Upper Tribunal was right to set aside the FTT's decision."

28. The Secretary of State's first ground in this appeal amounts, in effect, to a similar contention that was made in Lal concerning the First-tier Tribunal's approach in that appeal to the evidence of that applicant's partner as to the perceived difficulties he would face by the hot climate in India. As is clear from [38] – [39], the Court of Appeal concluded that the First—tier Tribunal in that appeal had erred in law by accepting the subjective assessment by the applicant's partner without engaging in an assessment of the background and implications of his living in India and what steps might be taken to avoid the impact upon him of the hot climate. I am not persuaded that the same criticism can be made of Judge Davidge in this appeal.

29. First, the Secretary of State's representative did not cross-examine the appellant's wife in relation to her claim that she would be re-traumatised if she returned to Pakistan. That was, perhaps, a recognition that the Secretary of State did not challenge the evidence from the appellant's wife that, in her own mind, she would be re-traumatised. It did not, however, remove the judge's obligation to assess whether objectively, despite that genuine subjective fear, steps could be taken to assist the appellant's wife to live in Pakistan despite the traumatic events that had occurred to her and that she, in her own mind, would be re-traumatised. To that extent, it could be contended that the judge did not fully engage with the "factual enquiry" which the Court of Appeal in Lal set out at [37] – [39].

30. Second, however, the Secretary of State's grounds do not assert any objective factual matters of the sort referred to by the Court of Appeal in Lal at [38] in the context of the issue in that appeal, which the judge should have engaged with in determining whether there were, in fact, ways in which the genuine fear of the appellant's wife could be overcome without "very serious hardship". The only suggestion is the "good relationship that the partner has with the appellant's family in Pakistan" and that that would allow the appellant's family life to continue "with all the support and love available". That would allow, it is contended, the appellant's wife to overcome her claimed trauma arising from her past. Although she did so briefly, the judge did take this possibility into account in para 61 of her determination. The judge made specific reference to the "good relationship" with the appellant's parents. It is important to bear in mind that there was no cross-examination of the appellant's wife by the Presenting Officer at the hearing challenging the evidence of the appellant's wife that, in her family circumstances in Pakistan, she would nevertheless be re-traumatised, because of the horrific events that previously took place in Pakistan.

31. I have not found this an altogether easy point to resolve. But, it seems to me that the judge did, in fact, address the very issue that the Secretary of State now contends she ought to have considered applying Lal. The Secretary of State has not, either in the grounds or in any submissions before me, criticised the judge for not taking into account background evidence or other social or public/governmental mechanisms by which the appellant's wife could, without very significant hardship, overcome what the judge accepted would otherwise be the case, namely that she would be "re-traumatised" on return and that amounted to "insurmountable obstacles" to family life continuing in Pakistan. In those circumstances, even though the judge's reasoning is sparingly brief, I am not persuaded that there was any material error of

law and that the Secretary of State's grounds and submissions create any possibility that a judge, on the material before Judge Davidge, would reach any view in respect of para EX.1 other than its requirements were met and that, therefore, the appellant's appeal under Art 8 should be allowed following TZ(Pakistan) (at [34]) as he met the requirements of the 'partner' rule in Appendix FM.

32. For those reasons, the judge did not materially err in law in reaching her findings and in allowing the appellant's appeal under Art 8.

Decision

33. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of a material error of law. That decision stands.

34. The judge's decision to dismiss the appellant's appeal on international protection grounds is not challenged and also stands.

35. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
22 September 2021