



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/18920/2019
UI-2021-000049

THE IMMIGRATION ACTS

**Heard at Field House (hybrid)
On: 21 June 2022**

**Decision & Reasons Promulgated
On: 12 August 2022**

Before

**UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE**

Between

**RS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, counsel instructed by TMC Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Chana, promulgated on 2 February 2021. Permission to appeal was granted by Upper Tribunal Judge Plimmer on 15 November 2021.

Anonymity

2. No direction has been made previously; however, we make a direction now as it is necessary to refer to the mental health issues of a young person in this decision.

Background

3. The appellant entered the United Kingdom on 27 January 2011 with entry clearance as a Tier 4 migrant, valid until 31 July 2013. He made no further applications for leave to remain until 5 August 2019 when he made a human rights claim mainly based on his family life with his partner, now known as NM following a change of name.
4. The Secretary of State refused the appellant's human rights claim in a decision dated 30 October 2019. Considering the application under the Immigration Rules, the respondent noted that it was made when the appellant was in the United Kingdom in breach of immigration law, and he therefore failed to meet the requirements of E-LTRP2.2. The respondent then considered whether paragraph EX.1 of Appendix FM applied. It was accepted that the appellant had a genuine and subsisting relationship with his partner, but it was not accepted that there were insurmountable obstacles to the couple continuing their family life together in India. The application was also refused under paragraph 276ADE (1) and there were found to be no exceptional circumstances justifying a grant of leave to remain.

The decision of the First-tier Tribunal

5. The Secretary of State was not represented. At the hearing, the judge heard that the sole issue before her was whether there were insurmountable obstacles to family life taking place in India between the appellant and his partner. In the decision and reasons, the judge concluded that the appellant and his partner were not in a genuine and subsisting relationship and that there were no insurmountable obstacles to family life taking place in India.

The grounds of appeal

6. The appellant drafted his own grounds of appeal, which he submitted out of time. He made the simple point that his relationship was accepted by the Secretary of State, and it was unfair of the judge to reopen this issue. It was also unfair that the judge had access to documents from the Home Office which the appellant had not seen and which related to invitations to a marriage interview which predated the respondent's decision in his case.
7. The application was admitted and permission to appeal was granted on the following basis:

The decision under appeal dated 30 October 2019 does not appear to dispute the appellant's claimed relationship with his partner. The FTT directed itself accordingly at [14] stating that "the only issue" to determine was whether there were insurmountable obstacles. It is arguable that the FTT has acted unfairly in determining the credibility of the relationship against the appellant.

Although the FTT has addressed the issue of insurmountable obstacles it is arguable that in finding "no evidence" of this, the FTT has failed to take relevant evidence into account.

8. The respondent's Rule 24 response was received on 13 February 2022 and in it, the appeal was opposed. Notwithstanding that, the respondent accepted that the issue of the relationship was not disputed in the reasons for refusal letter and

that Judge Chana 'erroneously directed (herself).' It was said that any error was not material because the judge gave reasons as to why the appellant and his partner would not face insurmountable obstacles.

The hearing

9. Mr Coleman, with reference to the grant of permission, drew our attention to the understanding reached at the hearing between the judge and appellant's counsel, that the only issue was that of insurmountable obstacles. He also made the following points. The respondent had not been represented at the hearing. It was unfair of the judge to make adverse findings on the appellant's relationship without giving him or his counsel an opportunity to give submissions. That finding had a poisonous effect on the judge's findings in respect of insurmountable obstacles.
10. Addressing the materiality of the error identified, Mr Coleman argued as follows. The judge found that the adult children of the appellant's partner lived independently when this was not the evidence before her. Furthermore, the oral evidence was that the partner's daughter suffered from serious mental health issues and was highly dependent upon the support of her mother. The judge referred to the lack of medical evidence and because she had rejected the relationship, she required corroboration of the partner's evidence regarding her daughter. Had the judge properly directed herself to the sole issue before her, this may have led to a different conclusion. The judge had not addressed the partner's concerns regarding living in India as an Iranian Muslim woman. Nor had the judge dealt with the arguments regarding the public interest in requiring the appellant to return to India to seek entry clearance. Those arguments included that the partner had met the financial requirement before having to give up work to care for her daughter as well as the fact that the application had not been refused on suitability grounds, applying *Agyarko* and *Chikwamba*.
11. In reply, Ms Ahmed argued as follows. Reliance was placed on the Rule 24 response. The judge erred in raising the issue of relationship when it was expressly accepted by the Secretary of State. It was not a material error as the judge determined the issue in dispute. There was no mention of the point regarding the adult children in the grounds of appeal to the Upper Tribunal and there had been no application made to amend the grounds. In the decision letter, the Secretary of State had made the point that the adult children would be able to live independent lives if the appellant's partner relocated to India. The reference to *Agyarko* and *Chikwamba* strayed outside the grounds. There was no medical evidence before the judge and therefore the judge's findings were sound and indicated that she had considered the evidence. She emphasised that the judge was wrong to find that there was no subsisting relationship.
12. At the end of the hearing, we announced that we were satisfied that there was a material error of law in the decision of the First-tier Tribunal, and we set aside the decision with no findings preserved. The matter was remitted to the First-tier Tribunal.

Decision on error of law

13. As indicated above, the respondent accepted that the appellant and his partner had a genuine and subsisting relationship. At [5] of the decision and reasons, the judge correctly directs herself as to the issue before her:

'The question that I have to answer is whether there are insurmountable obstacles to family life with the partner continuing outside the United Kingdom'

14. At [14], in her summary of the events at the hearing, the judge reiterates what she said at [5], noting that this was agreed by the appellant's counsel. Yet, at [28] when she began her findings of fact, the judge says the following

'The issue for me to consider, first is whether the appellant and his partner are in a genuine and subsisting relationship. If I find that there (sic) are, I must consider whether the appellant and her (sic) partner can return to India to conduct their family life...'

15. From [30] to [37], the judge considers the genuineness of the appellant's relationship with his partner before concluding that there is insufficient evidence before her to prove that it is genuine and subsisting. In a single paragraph [38], the judge considers the issue of insurmountable obstacles. Her reasons were limited to the following points.

'Both the appellant and her (sic) partner have worked in this country and therefore can support themselves in India. Therefore it would be a decision for the appellant's British partner to accompany the appellant to India. Both the appellant's partner's children are over the age of 18 and lead independent lives. There is no medical evidence before me that the appellant's daughter requires the appellant's constant care as claimed.'

16. Ms Ahmed rightly agreed that the judge erred in determining an issue which was not before her, regarding which the appellant had not been put on notice and regarding which there was no evidence adduced nor submissions made. We find that this is a material error for the following reasons.
17. The judge's findings on insurmountable obstacles were woefully inadequate. We accept the submission that her findings on this issue were likely to have been infected by her conclusion that the appellant's relationship was not genuine and subsisting.
18. In the decision letter the respondent had suggested that the children would be able to live independently if the partner moved to India but did not assert that they were already living independently. The judge's finding that the partner's children lived independent lives was not borne out by the evidence before her. On the contrary, the oral evidence of the appellant's partner at [21] was that her daughter suffered from serious mental health issues including bulimia, that she had made several attempts to take her own life and that she was emotionally reliant on her mother, the appellant's partner. This is far from a finding that the daughter lives an independent life. All that is known regarding the other child is that he is at university which, by itself, does not indicate that he lives independently. It is evident from [38], that the judge rejected the claims regarding the mental health of the daughter because they were not corroborated by medical evidence.
19. A further issue regarding which the judge heard evidence but did not address in her reasons was the concern of the appellant as to whether it was safe for his partner, as a Muslim, to accompany him to India [18]. There were also submissions that the appellant's family had rejected his partner owing partially to her religion [26].

20. We accept the submission that had the judge not erred in considering the genuineness of the relationship, she could well have been prepared to accept the oral evidence she heard as to why family life could not be continued in India and concluded that there were insurmountable obstacles as required by EX.1.
21. A further issue raised in the grounds was the judge's reliance on documents which had not been provided to the appellant. Mr Coleman was not able to assist us any further on this matter. It is an additional cause of concern that the appellant was disadvantaged in this way.
22. In conclusion, the appellant did not have a fair hearing for the reasons set out above. Accordingly, the decision of the First-tier Tribunal is set aside in its entirety.
23. The panel considered whether to retain the matter for remaking in the Upper Tribunal. We were mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010. We also took into consideration the nature and extent of the findings to be made (which are likely to include consideration of medical evidence) as well as that the appellant has yet to have a fair consideration of his human rights appeal at the First-tier Tribunal and we concluded that it would be unfair to deprive him of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 2 hours by any judge except First-tier Tribunal Judge Chana.

Direction Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara

Date: 22 June 2022

Upper Tribunal Judge Kamara