



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003744

First-tier Tribunal No: HU/57919/2022
LH/00877/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17 September 2024**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**Obaid Saleem
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Mrs Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 9 September 2024

DECISION AND REASONS

1. This matter was listed under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 for the appellant's appeal against the decision of the Secretary of State dated 24 October 2022 to refuse a human rights claim to be remade. The appeal was originally heard and dismissed by First-tier Tribunal Judge Thorne by a decision dated 30 July 2023. By a decision promulgated on 7 December 2023, Deputy Upper Tribunal Judge Skinner set the decision of Judge Thorne aside, and directed that the decision of the First-tier Tribunal be remade in the Upper Tribunal, with certain findings of fact preserved. A copy of DUTJ Skinner's decision is annexed to this decision. Please see that decision for the full factual background to this matter.
2. The matter was listed before me for the appeal against the refusal of the human rights claim to be reheard at Birmingham on 9 September 2024.

3. By an email dated 4 September 2024, the appellant's new representatives, Bukhari Chambers, stated that the appellant's case was to be withdrawn. The correspondence was passed to me for review shortly before the hearing. The matter remained in the list and I dealt with the withdrawal application at the hearing. The appellant was not in attendance. I decided that it was in the interests of justice to proceed with the matter in his absence, since it was clear that he no longer sought to prosecute this appeal.
4. At the hearing, I consented to the appellant's withdrawal of his case.

Impact of the withdrawal of the appellant's case

5. Under rule 17(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008, a party may give notice of the withdrawal of its "case", or any part of it, by delivering a written notice of withdrawal to the Upper Tribunal.
6. In contrast to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in which an appellant may withdraw an "appeal" (see rule 17(1)(a)), a party's withdrawal of its "case" in the Upper Tribunal does not automatically have the effect of bringing the proceedings to an end. In circumstances where (as here) the Upper Tribunal has acted under section 12(2) (a) to set aside a decision of the First-tier Tribunal, it must either remit the appeal (subsection (2)(b)(i)) or remake the decision (subsection (2)(b)(ii)). The Upper Tribunal remains seized of that obligation even where a party has withdrawn its case.
7. Accordingly, notwithstanding the withdrawal of the appellant's case, this tribunal remains seized of an appeal brought by the appellant against a decision of the Secretary of State to refuse the human rights claim he made on 17 September 2021 on the basis of his family life. Since the appellant has withdrawn his case, it follows that the appellant no longer prosecutes this appeal. There is no operative challenge to the decision of the Secretary of State to refuse the appellant's human rights claim. I therefore remake the decision by dismissing the appeal.

Notice of Decision

Pursuant to the decision of DUTJ Skinner promulgated on 7 December 2023, the decision of the First-tier Tribunal involved the making of an error of law and was set aside.

I consent to the withdrawal of the appellant's case.

I remake the decision of the First-tier Tribunal, dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 September 2024



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Case No: UI-2023-003744

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THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

MR OBAID SALEEM
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohammed Azmi, counsel, instructed by Wright Justice Solicitors

For the Respondent: Ms Alexandra Everett, Senior Home Office Presenting Officer

Heard at Field House on 14 November 2023

DECISION AND DIRECTIONS

Introduction

1. The Appellant is a national of Pakistan. He originally came to the UK in 2013 as a student and then in 2019 overstayed. The Appellant and his wife married in July 2020 and on 17 September 2021 he made a human rights claim to remain in the UK on the basis of their family life.
2. The Respondent refused that claim by decision dated 24 October 2022 and the Appellant appealed to the First-tier Tribunal ("FTT"). By a decision dated 30 July 2023 ("the FTT Decision") FTT Judge Thorne ("the Judge") dismissed the Appellant's appeal. The Appellant now appeals, with permission, to this Tribunal.

3. The hearing before me took place remotely. There were no technological issues and I was satisfied that everyone could see and hear each other and that the parties were properly able to put their respective cases.
4. I was not asked to make an anonymity order and I do not consider, given the importance of open justice, and the issues arising in this case, that there is any reason to do so of my own volition.

The FTT Decision

5. After setting out the Appellant's immigration history and other background, the Respondent's reasons for refusal, the notice of appeal, the burden and standard of proof, what took place at the hearing and the documentary evidence before the Tribunal, the Judge turned to his findings at para.22. At paras. 23-33, the Judge concluded that the Appellant could not meet the eligibility requirements of Appendix FM, accepted that the Appellant enjoyed a family life in the UK with his wife as well as a private life within the meaning of Article 8 and that the refusal interfered with that right and held that such an interference had a legitimate aim and was prescribed by law. There is no challenge to any of those conclusions.
6. At para. 34 the Judge turned to the question of the proportionality of the interference. His reasoning, so far as material to the appeal to this Tribunal, was as follows:

36. The Proportionality Balancing Exercise

37. In considering proportionality in the context of the specific facts of this case I take into account the following matters:

- (i) There is a legitimate interest in maintaining effective immigration control and the economic wellbeing of the UK.
- (ii) There is a general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one claimant and another.
- (iii) The evidence does establish that the appellant can speak English.
- (iv) The evidence does establish that the appellant can be adequately supported and accommodated in the UK. The specified evidence required under the Immigration Rules to establish this matter has not been supplied.
- (v) A's private life in the UK was established at a time when his immigration status was precarious and was known to be by S.
- (vi) There is inadequate evidence that S or A suffer from any physical or mental condition for which suitable medical treatment would not be available in Pakistan. There is evidence that S suffers from depression but there is inadequate evidence to establish that appropriate medical treatment is not available in Pakistan. The CPIN refers to problematic societal attitudes, but adequate treatment is available. In addition it remains the case that S could remain in the UK or make periodic visits if she wished to receive such treatment.
- (vii) I accept that A&S are seeking fertility treatment in the UK. However there is inadequate evidence to establish that similar treatment is not available in Pakistan or that S could not remain in the UK or make periodic visits if she wished to receive such treatment.
- (viii) I accept that S is a carer for a member of her family in the UK. However this appears to have begun only recently and in any event there is inadequate evidence to establish that alternative arrangements could not

be made or that S could not remain in the UK if she wished to continue in this caring role.

(ix) A is a citizen of Pakistan and has family still living there. It has not been established on the balance of probabilities that he and S would not be able to find accommodation and employment in Pakistan.

(x) A has lived for most of his life in Pakistan.

(xi) It may be that A&S would prefer to live and work in the UK but there is inadequate evidence that they would not be able to do so in Pakistan.

38. Insurmountable obstacles

39. In light of the above considerations, (which I have considered individually and cumulatively) I conclude that there is inadequate evidence to establish on the balance of probabilities that there are insurmountable obstacles to A and S continuing their family life outside the UK.

40. The term insurmountable obstacles appears in the Immigration Rules (in relation to Article 8) under Appendix FM paragraph EX.1. It was held in **Agyarko [2017] UKSC 11** that the definition of “insurmountable obstacles” at EX.2 was “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”. 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 “insurmountable obstacles” (as defined) in continuing their family life together outside the UK. Alternatively leave to remain could be granted outside the rules (according to the IDIs) in “exceptional circumstances” i.e., “circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate”.

41. “Exceptional circumstances” did not mean that a unique or unusual feature was to be sought and in its absence the application rejected. A proportionality test had to be carried out. A court or tribunal considering whether a refusal of leave to remain was compatible with Article 8 in the context of precarious family life had to decide whether the refusal was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life.

42. In doing so, whilst also considering all factors relevant to the specific case in question, it should give appropriate weight to the Secretary of State’s policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are “insurmountable obstacles” or “exceptional circumstances” as defined. “The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control”.

43. In coming to the conclusion that there is inadequate evidence to establish on the balance of probabilities that there are insurmountable obstacles to A and S continuing their family life outside the UK, I take into account the matters outlined above in the proportionality assessment.

Although they do not want to live in Pakistan for the reasons they gave, nonetheless there is inadequate evidence to establish that S & A could not enjoy their family life together in that country. A has family in Pakistan who could assist in the short term and psychiatric and fertility treatment is available in Pakistan for S.

44. In addition, I conclude that it would not be disproportionate to require A to return to Pakistan on his own (or with S if they wished) for the limited period required for A to make the appropriate application under the Immigration Rules. It may be inconvenient and upset them but set against the public interest in maintaining immigration control, I conclude that it would be proportionate.

45. Moreover, there is inadequate evidence to establish that S & A could not continue their relationships with any family and friends in the UK by long distance communication or periodic visits.

46. I therefore conclude that A has failed to establish on the balance of probabilities that there are insurmountable obstacles to A and S continuing their family life in Pakistan.

47. In addition, for similar reasons to those outlined above, I conclude that there are no exceptional circumstances and in relation to the appellant's private life, (looked at through the prism of 276ADE), I conclude there is inadequate evidence to establish that there are very significant obstacles to A integrating into Pakistan. He is a citizen of Pakistan and has lived most of his life in that country. He speaks the languages of Pakistan and has family there.

48. I also conclude that there are no exceptional circumstances or other factors which would allow me to allow the appeal either inside or outside the Immigration Rules.

49. The public interest in maintaining a workable, predictable and consistent immigration system which is fair as between one claimant and another, is particularly important. Bearing in mind all of the above factors, I conclude that the human rights of the appellant and S are outweighed by the public interest.

50. There is a strong public interest in maintaining effective and fair immigration control and protecting the economic wellbeing of the UK. I am driven in light of the matters outlined above to conclude that the public interest does outweigh the human rights of the appellant and S.

7. The Judge accordingly dismissed the appeal.

Appeal to the Upper Tribunal

Grounds of Appeal

8. The Appellant sought permission to appeal on the following grounds (the numbering of which is mine):
- a. Ground 1: The Judge has wrongly conflated the insurmountable obstacles test with an assessment of Article 8 proportionality outside of the Immigration Rules.
 - b. Ground 2: The Judge has failed to consider the cumulative effect of the obstacles relied on by the Appellant as amounting to insurmountable obstacles.

- c. Ground 3: The Judge has failed to take into account material evidence, namely (a) the evidence of Dr Nabavi and (b) the parts of the Respondent's CPIN entitled "Pakistan: Medical and Healthcare Provision (version 2, September 2020)" cited to him in the Appellant's skeleton argument.

Permission

9. Permission to appeal was granted on all grounds by FTT Judge Dempster on 1 September 2023. She considered in particular that it was arguable that the Judge conflated the tests for insurmountable obstacles with that for proportionality.

Rule 24 response

10. The Respondent has filed a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In relation to Ground 1, this submitted, in summary, that the Judge had not conflated the two tests, but had rather referred back to only those factors set out in relation to proportionality which applied also to the insurmountable obstacles test. As to Ground 2, the Respondent submitted that the Judge did look at matters cumulatively. In relation to the alleged failure to take account of material evidence, it is said that the Judge did properly take these into account.
11. That is accordingly the basis on which this appeal came before me to determine whether the FTT Decision involved the making of an error of law.

Discussion

Ground 1

12. I would start by observing that it is unusual for a judge to consider whether removal would be disproportionate outside of the rules before considering whether an appellant is entitled to leave within the scope of the rules. It does not seem to me that that question of sequencing is, of itself, an error of law, but given that the question of whether someone meets the immigration rules or not is something to which great weight must be given in considering Article 8 outside of the rules, it does run the risk of (a) failing to give sufficient weight to the Respondent's policy as to who should and should not be permitted to come to or remain in the UK, and of (b) causing a judge to take into account matters relevant to proportionality outside of the rules when considering whether the particular, and narrower, test within the rules is met.
13. By Ground 1, the Appellant argues in essence that the Judge fell into the second of these traps. As already noted, the Respondent's submission in the rule 24 response was that, in effect, the Judge must have been referring back to only those factors which are relevant to the insurmountable obstacles test. Ms Everett sought to bolster that by noting, correctly, that it was not the case that the Judge had said that there were various obstacles but that these were then outweighed by the public interest.
14. In considering this ground, I must assume, unless I detect an express misdirection, or unless I am confident, from the Judge's express reasoning, that his decision must be based on an implicit misdirection, that the Judge knew, and has applied, the relevant law (see ASO (Iraq) v SSHD [2023] EWCA Civ 1282 at

[41]). I am however satisfied that the Judge has taken into account irrelevant public interest factors in considering whether there were insurmountable obstacles to the Appellant and his wife continuing to enjoy family life in Pakistan and conflated the test for insurmountable obstacles and for proportionality outside of the Immigration Rules. The factors listed in relation to proportionality at para. 37(i)-(v), set out above, are not relevant to the question of whether there are insurmountable obstacles to the Appellant and his wife continuing their family life in Pakistan, but in my judgment they have been taken into account in determining that question. This is made clear by two aspects of the FTT Decision:

- a. First, at para. 39, the Judge expressed his conclusion in relation to insurmountable obstacles “in light of the above considerations (which I have considered individually and cumulatively)”. On a plain reading of the Decision this would include the factors at 37(i)-(v). Ms Everett’s approach, that he must have been referring to only those factors which are relevant to the insurmountable obstacles requires reading that caveat into what the Judge said, but there does not seem to me to be any real basis for doing so.
- b. Second, at paras. 40-42, the Judge sets out aspects of the law relating to Article 8, and in particular that in deciding whether there are exceptional circumstances it is necessary to give due weight to the public interest in effective immigration control. Immediately following that, the Judge stated “In coming to the conclusion that there is inadequate evidence to establish on the balance of probabilities that there are insurmountable obstacles to A and S continuing their family life outside the UK, I take into account the matters outlined above in the proportionality assessment.” That is a further indication that the Judge considered that the matters relating to the public interest were to be (and were) taken into account in the analysis of insurmountable obstacles. Again, there is no reason to read in Ms Everett’s caveat to this. I take the Judge to have meant what he said.

15. Ms Everett’s fallback submission was that any such error was not material because the Judge was plainly aware of and had made findings as to the situation that the Appellant and his wife would face in Pakistan and no rationally directed Tribunal could, on those facts, find that there were insurmountable obstacles. As this depends on whether there were errors in relation to the Judge’s findings to which Ground 3 is relevant, I will consider this below. Subject to the question of materiality, Ground 1 therefore succeeds.

Ground 2

16. It is well established (and the Respondent did not contend otherwise) that the insurmountable obstacles test requires all the obstacles relied on to be considered cumulatively in determining whether they are ‘insurmountable’. By this ground the Appellant submits that the Judge did not do so. I cannot accept this. The Judge stated expressly in para. 39 that he took into account all of the factors noted in para. 37 “individually and cumulatively”. In light of that, I would need to be satisfied from something in the FTT Decision showing that, while the Judge plainly intended to take that approach, he had not in fact done so. The Appellant has not identified anything in the FTT Decision which so indicates. This Ground accordingly fails.

Ground 3

17. By this ground the Appellant submits that two pieces of evidence, namely the expert report of Dr Nabavi (including the addendum report) and the Respondent's CPIN which indicates that in Pakistan there is a stigma around mental ill-health which prevents people, especially women, getting treatment therefor.
18. In considering this ground, it is necessary to have well in mind that as an appeal court, I am bound, unless there is compelling reason to the contrary, to assume that a trial judge (which includes an FTT Judge exercising a fact-finding jurisdiction) has taken the whole of the evidence into consideration and the fact that a judge does not mention (*a fortiori* reproduce or expressly weigh up) a specific piece of evidence does not mean that they overlooked it: see Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2(iii)] and the many cases cited for that proposition at [3] thereof.
19. I do not accept that the report of Dr Nabavi or the Respondent's CPIN were left out of account, as alleged:
 - a. The Appellant accepts in his Grounds that at para.20 of the FTT Decision, the Judge references Dr Nabavi's report. There is nothing in the FTT Decision, let alone a compelling reason, to suggest that, despite this reference, it was not considered. It is tolerably clear that this fed into the Judge's finding at paras. 37(vi) and 43. These findings are briefly, but in my view adequately, reasoned.
 - b. Similarly, the CPIN is expressly referred to by the Judge in para. 37(vi). The "problematic social attitudes" referred to in that paragraph can only be a reference to the stigma in relation to mental health on which the Appellant relied. There has in my view been no failure to take this into account.

Materiality and relief

20. The Respondent urged on me that the error that I have found in relation to ground 1 is immaterial and that accordingly the appeal should be dismissed in any event. I have considered the Judge's findings in relation to the obstacles that the Appellant and his wife would face on return to Pakistan and plainly this is not an obviously meritorious claim in that regard. However, as the Court of Appeal in ASO, cited above at [43], has recently reiterated, the test for immateriality is a high one and I am not satisfied that any rational tribunal would have come to the same conclusion on the materials before the Judge when he made the FTT Decision.
21. It follows that the FTT Decision must be set aside. The primary findings are however unaffected by the error of law on which I have allowed this appeal and, applying AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 268 (IAC), are therefore preserved.
22. Given the scope of the limited fact-finding necessary on the redetermination of this appeal, in my judgment this appeal is appropriate to be retained in the Upper Tribunal. In that respect, I make the directions set out below.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
- (2) The Judge's findings of fact are preserved.
- (3) I direct that the appeal be re-made in the Upper Tribunal.
- (4) The Appellant is to provide his dates to avoid (including those of any witnesses and his counsel) within 5 working days of the promulgation of this decision.
- (5) The remaking hearing will be fixed with a time estimate of 1.5 hours. It is suitable for hearing by a single Judge or Deputy Judge of the Upper Tribunal.
- (6) If either party wishes to adduce any further evidence, this must be served in electronic format on the other party and the Upper Tribunal at least 10 working days before the next hearing, accompanied by an application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
- (7) If the Appellant wishes to give oral evidence or to call any other witnesses, he must provide a witness statement capable of standing as evidence-in-chief, to be served in accordance with direction (6) above, and must inform the Tribunal if an interpreter is required and if so, for which language.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 November 2023