



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004272

First-tier Tribunal No: EA/00437/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of June 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MAHMED JUBER SABBIRAHMED SHAIKH
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jafferji - Direct Access Barrister.

For the Respondent: Mr Lawson, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 21 May 2024

DECISION AND REASONS

1. The Appellant, a citizen of India born on 11 March 1976, appeals with permission a decision of First-tier Tribunal Judge Athwal ('the Judge'), promulgated on 25 July 2023, in which she dismissed his appeal against refusal of his application for leave to remain in the United Kingdom on the basis of his family life with his wife, a British citizen.
2. Having considered the documentary and oral evidence the Judge sets out her findings of fact from [9] of the decision under challenge. In that paragraph the Judge writes "*I have considered the evidence as a whole and I am not on balance satisfied that there are very significant difficulties that would be faced by the Appellant or his wife in continuing their family life together outside the UK which could not be overcome would entail very serious hardship for them. I have arrived at this decision for the following reasons.*" The Judge sets out those reasons at [10 - 16] of the decision.
3. The Judge undertakes a proportionality assessment from [17] concluding, following having undertaken the necessary balancing exercise, that the public

- interest in maintaining effective immigration control outweighs the individual rights of the Appellant. Removal was therefore found to be proportionate [27].
4. The application for permission to appeal noted the issues before the Tribunal were (i) insurmountable obstacles pursuant to EX.1 and (ii) proportionality of interference with Article 8 ECHR rights.
 5. The factors relied upon by the Appellant in relation to insurmountable obstacles were (i) the impact on his wife's health and access to healthcare in India, (ii) that the couple will not be able to afford IVF treatment in India, (iii) that the Appellant's wife has vulnerable family members in the UK who rely on her for physical and emotional support, (iv) the Appellant's wife is concerned about her safety as a Muslim in light of what she has read and heard of the treatment of Muslims in India, and (v) the Appellant's wife's concerns about her ability to work and live freely as a Muslim woman in the Appellant's home in India, a small village of about 5000 people.
 6. The Appellant also relied on further factors said to be relevant to proportionality exercise, being length of residence in the UK of 18 years, serious difficulties the Appellant will encounter if required to return to India after an 18 year absence, and his presence positively benefiting the public interest due to the care and support he provides along with his wife, to his brother-in-law, mother-in-law and stepmother in law. It is said but for such assistance family members would likely require support from social services, placing additional strain on public funds.
 7. The Judge sets out consideration of EX.1 of Appendix FM of the Immigration Rules from [9]. In relation to medical issues, the Judge was not satisfied the Appellant had established that his wife's health of itself was an insurmountable obstacle for the reasons set out at [10 (i) and (ii)] of the decision under challenge. The Judge noted that the Appellant's representative confirmed that his wife was not suffering from a current medical condition for which she was receiving ongoing treatment and that the evidence did not enable the Judge to be satisfied they will be unable to access affordable healthcare if living in India. The Appellant's representatives confirmed that neither the Appellant nor his wife had made specific enquiries into the cost of healthcare and the Judge found she had only been provided with anecdotal evidence about the cost of private healthcare.
 8. In relation to the fertility issues, the Judge considers these at [11] of the decision under challenge. The evidence before the Judge was that the Appellant and his wife do not currently qualify for IVF because of his immigration status. It was claimed that if they were removed from the UK, they would not be able to afford IVF treatment in India. The Judge raised with the Appellant's representatives the fact she had not been provided with evidence of the cost of IVF treatment and was not satisfied on the evidence that the Appellant and his wife would be unable to afford IVF treatment in India.
 9. At [12] - [13] the Judge writes:
 12. I have nevertheless considered the Appellant's case at its highest, on the basis that IVF was unaffordable. I referred Mr Jafferji to R (on the application of Erimako) v SSHD 2008 EWHC Civ 312. The court held that the burden on a person seeking to obtain leave to remain on Article 8 grounds was very high. It could not be the case that the Home Secretary was under a duty to grant leave to remain, even for a limited period, in cases such of that of Mr Erimako and his wife. That was particularly so where the prognosis for the success of the treatment was uncertain. Moreover, the case had to be placed in the context of other cases involving immigration control where persons suffering from life-threatening illnesses had been refused leave to remain in the UK.
 13. Mr Jafferji submitted that Erimako did not carry legal weight because it was a judicial review and in any event the Appellant's situation is different. In Erimako the

couple did not wish to live in the UK but only stay here for a short period of time whilst treatment was obtained, the Appellant and his wife wish to live here. I reject Mr Jafferji's submissions, *Erimako* does carry legal weight, in *SN (South Africa) v Secretary of State for the Home Department* [2016] CSOH 38, the Court of Session cited *Erimako* with approval and found even if the appellant's propositions in relation to their child and their desire to add to their family were considered as aspects of family life, they were of limited weight and the Respondent was entitled to conclude that they were substantially outweighed by the requirement for effective immigration control. Furthermore, the fact that the Appellant wishes to stay here permanently does not reduce the public interest in removing him. I therefore find that the unavailability of IVF treatment in India is not an insurmountable obstacle to their continuing their family life, as husband and wife, in India.

10. In relation to the claim concerning vulnerable family members in the UK, the Judge noted the evidence that the vulnerable family members do not live with the Appellant and his wife and that she is not the legal carer for them. The Appellant's wife's brother is with their mother and another named individual or legal carers for her husband, the Appellant's wife's father. The Judge finds that as both are British citizens they are entitled to support from social services if the legal carer was unable to adequately care for them, leading the Judge to find this did not amount to an insurmountable obstacle [14].
11. In relation to the argument that as a Muslim woman the Appellant's wife would not be safe in India, the Judge discusses the weight that could be attached to the evidence provided and confirms she has also considered news articles provided about the treatment of Muslims in India and the CIPU India: Religious Minorities and Scheduled Castes and Tribes, version 3.0, November 2021. The Judge also notes the Appellant's oral evidence relating to his family living in India who they have visited and with whom he is still in contact, with no evidence they have been targeted or harmed because they are Muslims. The Judge correctly notes that the fact the Appellant's wife has a subjective fear about the treatment of Muslim women in India, and as a result may not wish to live there, is not the material issue before her. The Judge finds the subjective fear not objectively well founded or justified and that the situation in India was not serious enough to amount to an insurmountable obstacle to family life continuing outside the UK [15 - 16].
12. Having concluded the Appellant could not succeed under the Immigration Rules, the Judge goes on to consider Article 8 ECHR outside the Rules between [17 - 28] which I shall discuss in further detail below.
13. The Appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 3 November 2023, the operative part of the grant being in the following terms:
 3. The grounds of appeal criticise the judge's approach to the issue of insurmountable obstacles. Further, that there was procedural unfairness because the judge relied on a case that was not relied on by either party and on which neither party had been given the opportunity to address the judge. Having considered the documents before me I am satisfied that the grounds disclose an arguable error of law. The grant of permission is not limited.

Discussion and analysis

14. The first Ground relied upon by the Appellant is an assertion the Judge erred in failing to carry out an overall cumulative assessment of the obstacles that the couple would face in continuing their family life in India. It is claimed the Judge considered each factor individually, reaching an assessment as to whether each

- factor amounted to an insurmountable obstacle at [10, 13, 14 and 16] where the judge concludes on each individual factor, using language such as “I am not satisfied that this amounts to an insurmountable obstacle” at [14] with no cumulative assessment which is what is required under the Rules.
15. I advised Mr Jafferji, after he had made submissions on the point, that I was not with him on this head of challenge.
 16. It is important when considering the question of whether a judge below has made an error of law material to their decision to consider the guidance provided by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 462 at [2] and *Ullah v Secretary of State the Home Department* [2024] EWCA Civ 201 at [26]. I have done so.
 17. It is also important that the decision is read as a whole. This ground of challenge is really a challenge of form over substance and begs the question of what in the mind of the author of the grounds he was expecting the Judge to do.
 18. The Appellant relied upon a number of distinct elements in support of the claim that there are insurmountable obstacles to family life continuing outside the UK. I have referred to those above and it is clear from the reading of the determination that the Judge took each of those into account. Although they are related as a whole, they are quite distinct in themselves. For example, the question of fertility treatment in the UK is not in any way related to assistance given to other family members. No error in the Judge’s approach is made out.
 19. It was argued before the Judge that those matters, both individually and cumulatively, were sufficient to satisfy the test of showing there were insurmountable obstacles. The Judge was well aware of the legal test and approached the determination to assess whether those points individually and cumulatively meant the Appellant was entitled to leave on this basis.
 20. It was nothing procedurally unfair or wrong in the approach adopted by the Judge. It is also important to note that the reference in the grounds of challenge to [10, 13, 14 and 16] fails to refer to the Judges actual findings at [9], in which to Judge specifically states that she has considered the evidence as a whole and was not on balance satisfied that there are very significant obstacles that will be faced by the Appellant or his wife in continuing their family life together in India which could not be overcome or would entail very serious hardship for them. That is a cumulative assessment. What followed thereafter is the Judge’s reasons for coming to that conclusion. Focusing on paragraphs 10, 13, 14 and 16 ignores the fact that those are the findings on the individual points relied upon by the Appellant that led to the conclusion that overall insurmountable obstacles had not been made out. I find the Appellant fails to establish legal error material to the determination on this point. The individual points were clearly considered by the Judge who then undertook the necessary holistic assessment. The Judge clearly did what she is accused of not having done.
 21. As noted in the guidance on the Court of Appeal First-tier Tribunal judges are recognised experts in the field of immigration and asylum law. There is no need to set out relevant legal provisions in a determination and they are to be taken as having understood and applied to correct law to the facts as found unless it is shown otherwise. The Judge was clearly aware of the insurmountable obstacles test, and it has not been shown there was any legal misdirection or misunderstanding in a way in which it was applied.
 22. The claim in the Grounds that the Judge failed to consider health issues is without arguable merit as it is clear from reading the determination that the Judge took all the evidence that she was provided with into account with the required degree of anxious scrutiny. Evidence produced after the hearing which was not before the Judge does not establish legal error on the basis of the material the Judge was provided with. The claim at [3] of the Grounds that the

Judge did not properly weigh the medical issues into account is without arguable merit.

23. The Judge considered the issue of fertility treatment. Neither the Judge nor myself was referred to any authority which establishes that a person has a right to fertility treatment. Mr Jafferji accepted it could not come within Article 8 in relation to family life, which is correct as that protection only applies to family life of an individual who has been born. It may form part of the Appellant's wife's private life but, even if this was the case, the proportionality exercise would be the same. The Judge clearly took into account the evidence in relation to the fertility treatment both in the UK and India. At [4] of the Grounds seeking permission to appeal is reference to the cost of treatment in India. The Grounds assert the Secretary of State failed to provide any evidence on this issue when the burden of establishing proportionality rested upon the Secretary of State. The reality of the situation is that the Judge clearly records that evidence in relation to the cost of fertility treatment in India was not forthcoming. Even if the Appellant and his wife's claims in relation to the cost of the same was not challenged in cross examination, the weight to be given to the evidence was a matter for the Judge. The Judge's approach was not flawed, as alleged in the Grounds, but an approach and findings based upon the evidence that was available when exercising judgement. That is what the Judge was required to do. No material legal error is made out.
24. It was not for the Secretary of State to prove the Appellants case in relation to the costs of IVF treatment, that was a matter for him. There is nothing arguably irrational in relation to the Judge's conclusions that the issue of IVF treatment in India was not an insurmountable obstacle, contrary to the allegation at [9] the Grounds seeking permission to appeal, which also clearly contain a disagreement with the weight to Judge gave to that aspect of the evidence, when weight was a matter for the Judge.
25. Between [5] – [7] of the Grounds seeking permission to appeal is the assertion of legal error which occupied the majority of the error of law hearing. In those paragraphs it is written:
 5. The Judge also erred in her reliance upon the decision in Erimako at §§12-13. The Appellant's submission was not that the case "did not carry legal weight because it was a judicial review". The Appellant's submission was that no relevant principle of law had been established by that decision; that the facts before the court were not clear from the judgment; that it would appear that both parties to the proposed IVF treatment in that case did not have any leave to remain in the UK which is very different to the Appellant's case; that that case did not involved an assessment under the SSHD's own Rules; and that thus the case was of no assistance in evaluating the impact of the loss of the opportunity to pursue IVF treatment on the proportionality assessment in this particular case.
 6. The Judge further considered the case of SN (South Africa) at §13 without giving either party any opportunity to address her on it. This case was identified by her after the hearing. The failure to draw the case to the attention of the parties, and give them an opportunity to address it, renders the determination procedurally flawed, a serious error of law in the circumstances of this case where the Judge is researching and then relying on cases she considers to be detrimental to the Appellant's claim- see AM (fair hearing) Sudan [2015] UKUT 00656 (IAC) where the following guidance is given:
 - “(i) Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.

- (ii) If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date.
- (iii) Judges are entitled to form provisional views in advance of a hearing provided that an open mind is conscientiously maintained.
- (iv) Footnotes to decisions of the Secretary of State are an integral part of the decision and, hence, may legitimately be considered and accessed by Tribunals.
- (v) Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

7. Even if the Judge was entitled to carry out independent research with respect to the caselaw (which the Appellant does not accept), at the very least the Judge should have canvassed the second case she identified with the parties, and given them an opportunity to address it.

26. The Judge's findings at [12 - 13] of the determination are set out above.

27. It is not disputed that, in principle, where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal to be set aside. The question is whether any such error was made in this decision.

28. The type of cases where the issue of post hearing research has arisen, and been found to be a procedural irregularity, are those cases in which a hearing has been concluded and a judge gone on to undertake research, on the Internet or otherwise, and obtained evidence that was not available to the parties at the date of the hearing, and which a party therefore had not had the opportunity to comment upon, which was used as part of the decision making process by the judge.

29. In this case the Judge clearly referred Mr Jafferji the decision of the High Court in Erimako. It cannot therefore be claimed that there was any form of ambush in the Judge discussing this case in the determination or including it as part of the overall assessments of the merits of the case.

30. It is also the case that Erimako was not arguably required in assessing the issue of insurmountable obstacles where no right to IVF treatment had been established, on any basis, in law before the Judge. In R (on the application of Erimako) v SSHD [2008] EWHC Civ 312 Burnton J said that it was not disproportionate to remove the Appellant, whose wife her in 40's had leave to remain, when they were undergoing fertility treatment here that would not be as effective in his home country, particularly in this case where the prospects were at best uncertain. Although the factual matrix in that case was therefore different to the current appeal, the principal that the desire for IVF treatment, per se, was not sufficient to render a decision disproportionate was the point taken by the Judge at the hearing which was one properly open to her.

31. At [13] the Judge records Mr Jafferji's submissions in relation to the weight she could put upon the decision in Erimako which is rejected as the Judge found that the decision could have weight placed upon it. It is accepted decisions of the High Court are not binding, and are mainly persuasive, but that does that does not prohibit the Judge considering Brunton J's judgement.

32. In relation to the reference to SN (South Africa), even if this is a decision that was not specifically discussed with Mr Jafferji at the hearing it is clearly a case

of which the Judge had judicial notice and was accordingly entitled to take into account subject to the principle of fairness.

33. The difficulty with the challenge in the Grounds is that they failed to identify anything that arises from the Judges reference to SN (South Africa) that could be classed as procedural unfairness or an ambush. The case involved an application for judicial review of a decision of the Secretary of State considered by the Outer House of the Court of Sessions in Scotland. At [24] and [32] of that decision it is written:

[24] Counsel went further and submitted that the desire to add to one's family could never give rise to an article 8 claim, suggesting that the decision in R. (on the application of Erimako) v Secretary of State for the Home Department provided vouching for his proposition. That case had been noticed by Lord McEwan in RL v Secretary of State for the Home Department [2015] CSOH 145.

...

[32] Whilst I do not consider that the decision in *Erimako* carries the implication suggested by Mr Maciver, because it resolves the issue on grounds of proportionality, even if the propositions put forward by the petitioners in relation to their child and their desire to add to their family are considered as aspects of family life (which is how they were treated by the respondent), they can only be of limited weight. Quite how limited is their weight is demonstrated in the first of the two paragraphs which I quote from the decision letter at para [10] above. The respondent was entitled to conclude that they were substantially outweighed by the requirement for effective immigration control which can readily be recognised as a necessary measure in pursuit of several of the justifications found in article 8.2.

34. The point being made by the Outer House of the Court of Sessions is that the desire to have a child would only be of limited weight within the proportionality assessment. That is not a new point.
35. The submission that as no relevant legal principle of law had been established by Erimako the Judge was not entitled to give that judgement the weight she though appropriate, which she did, is without merit. That was the exercise of judicial discretion and judgement. There was nothing to suggest the Judge was not able to take that decision into account or give it due weight. Attempting to distinguish the decision on the facts of the individual parties is noted at [5] of the Grounds seeking permission to appeal, but the point made by Brunton J was not fact specific.
36. Even if the Judge did not reconvene the hearing or invite written submissions upon SN (South Africa) I do not find this has been shown to amount to procedural unfairness sufficient to amount to an error of law. There was nothing that had not been considered that arose from that decision that required the Judge to seek further submissions.
37. The guidance set out at [6] of the Grounds seeking permission to appeal, by reference to AM (fair hearing) Sudan [2015] UKUT 00656, does not establish arguable legal error on the facts of this case. It is not disputed independent judicial research inappropriate. As noted in the head note of AM:

“(i) Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.

(ii) If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date.

(iii) Judges are entitled to form provisional views in advance of a hearing provided that an open mind is conscientiously maintained.

(iv) Footnotes to decisions of the Secretary of State are an integral part of the decision and, hence, may legitimately be considered and accessed by Tribunals.

(v) Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

38. The question of the weight that could be given to IVF and the decision of Brunton J was a matter that was canvassed with the parties and submissions made upon the same before the Judge. No procedural unfairness arises sufficient to amount to a material error of law.

39. The Grounds also criticise the Judge's assessment of the level of care the Appellant and his wife provide to family members, but the Judge clearly took all the evidence into account. At [10] is reference to paragraphs of the relevant witness statements but the Judge was not required to set out each and every aspect of the evidence in the determination. The Judge was aware of the claims being made but did not accept they were determinative. The Judge's findings are adequately reasoned.

40. In relation to the impact upon the Appellants wife as a Muslim, the claim at [12] the Judge failed to properly consider the impact of the deterioration in India in respect of the treatment of Muslims is without merit. The Judge clearly considered the evidence, both subjective and objective, in relation to this issue. The Grounds make specific reference to one sentence set out by the Judge at [16] of the determination. In that paragraph the Judge writes considerably more where she finds:

16. I have considered the background information together with the Appellant's oral evidence. He stated that his family, which consists of mother, brother and three sisters-in-law all live in India. His wife visited them when she attended his brother's wedding in December 2015 and lived there for 6 weeks. The Appellant is still in contact with his family and there is no evidence before me that the Appellant's family have been targeted or harmed because they are Muslims. The fact that the Ms Hajat has a subjective fear about the treatment of Muslim women in India and as a result may not wish to live there is not the material issue before me. The Appellant has to establish that the objective evidence establishes, on balance that he and Mrs Hajat would face very significant difficulties in India because Ms Hajat would be unable to live or work in India because of the way Muslim women are treated. I have considered the evidence as a whole and whilst I accept that there has been an increase in prejudice and attacks upon Muslims I am not satisfied that the situation is serious enough to be an insurmountable obstacle to family life continuing outside the UK.

41. It is an established principle that a determination should be read as a whole and that it is not appropriate to cherry pick parts of a decision that may support a person's argument if such an argument is not supported when all matters are taken into account. The Judge is criticised for finding the Appellant or his wife would not face very significant difficulties because she would be unable to work which is said not to be the test under EX.1 (B), as the test is of very significant difficulties that will be faced. The point about being able to work was one aspect of the evidence the Judge took into account and is part of the reasons that were

- advanced when considering the insurmountable obstacles test. A reading of [16] as a whole shows the Judge clearly applied the correct test.
42. There is no merit in the claim the Judge failed to assess all relevant factors when considering whether there were insurmountable obstacles including those relating to the appellant's home area. It is not made out the Judge did not give consideration to the evidence relating to safety and security issues for women in India.
43. It is not made out the Judge, when assessing the overall proportionality, failed to take into account all relevant circumstances weighing in the Appellant's favour. The claim the Judge's consideration was limited to the factors at [25] is an artificial separation of the matters the Judge actually did consider. At [25] the Judge sets out the factors weighing in the Appellant's favour but also set out those weighing against the Appellant at [26]. The Judge sets out the correct legal test and would have had in her mind the earlier findings in relation to the lack of insurmountable obstacles to family life continuing outside the UK, following her assessment under the Immigration Rules.
44. The Judge clearly undertook the necessary balancing exercise when considering the proportionality of the decision. I do not find it made out the Judge did not consider relevant issues or in any way materially misdirected herself in the manner in which the exercise should be conducted, and how it was conducted.
45. Whilst the Grounds of appeal have attempted to pick apart a number of findings made by the Judge, and the Judge's overall approach to determining the merits of the appeal, I do not find it is made out that the Judge has erred in law in a manner material to the decision to dismiss the appeal. It is not made out the Judge's overall conclusion that the decision is proportionate is one that is rationally objectionable in law.

Notice of Decision

46. No error of law material to the decision to dismiss the appeal is made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 June 2024

