IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004920

First-tier Tribunal Nos:
HU/53673/2022 LH/00608/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

19th January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

MOHAMMAD ALI
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Martin, counsel (instructed by Zyba Solicitors)
For the Respondents: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 19 December 2023

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 9 June 2022, refusing the Appellant's application made on 31 October 2020.

2. The Appellant applied for leave to remain on the basis of his private and family life, relying on his relationship with his partner Farzana Neely Begum.

3. The Respondent refused the Appellant's claim by letter dated 9 June 2022 ("the Refusal Letter"). This set out the Appellant's immigration history and stated that the application had been considered with reference to Article 8 ECHR and under Paragraphs EX.1 and 276ADE of the UK Immigration Rules. The Refusal Letter accepted that the Appellant and his partner were in a genuine and subsisting relationship. However it did not accept that they would face insurmountable obstacles to continuing their family life outside the UK, nor that the Appellant would face significant obstacles to re-integrating into life in Bangladesh.

4. The Appellant appealed the refusal decision.

5. His appeal was heard by First-tier Tribunal Judge Borsada at Birmingham on 16 January 2023. Judge Borsada subsequently allowed the appeal in his decision dated 24 January 2023.

6. The Respondent appealed. Permission to appeal was granted and the matter was heard by Deputy Upper Tribunal Judge Chapman, whose decision promulgated on 25 June 2023 allowed the appeal. The decision of Judge Borsada was set aside and remitted to the First-tier Tribunal for hearing afresh on all issues.

7. The remitted appeal was heard by First-tier Tribunal Judge Anthony ("the Judge") at Nottingham on 8 September 2023. The Judge subsequently dismissed the appeal in her decision promulgated on 14 September 2023.

8. The Appellant applied for permission to appeal to this Tribunal on grounds which may be described as follows:

   (a) the Judge erred in her consideration of EX.1 and article 8 ECHR.

   (b) the Respondent had conceded in the Refusal Letter that the Appellant's partner could not leave the UK during her studies. In [11-17] the Judge did not properly consider the full definition in EX.2; in particular the second half of the definition in saying "or would entail very serious hardship for the applicant or their partner". The evidence was that there would be very serious hardship due to the separation of the couple during the partner's studies and the subsequent impact on her, which included her having failed part of her course. The Judge also erred in failing to take into account the impact on the partner caused by the worry concerning the Appellant's potential removal when dealing with article 8.

   (c) the Judge failed to properly interpret the meaning of "could not be overcome" in relation to the obstacles required by EX.2. These fell to be considered as at the date of the hearing, when the partner's course was continuing. The Respondent had accepted the partner could not go to Bangladesh during her studies which meant this was an obstacle that, at the time of the hearing, could not be overcome. It was an error for the Judge to consider the position as at the end of the partner's course.

   (d) the Judge erred by failing to consider that, as at the date of application, the partner had two years of her course left to run and that it was not her fault that there was delay in the appeal coming to a hearing. The prospect of two years apart was an obstacle for the purposes of EX.1.

9. Permission to appeal was granted by First-tier Tribunal Judge Seelhoff on 18 October 2023, stating:

> "1. The application is in time.
>
> 2. The grounds assert that the judge erred in first going behind a concession that the sponsor could not reasonably be expected to leave the UK due to her ongoing studies when considering EX.1 of the rules.
>
> 3. It is arguably an error to go behind a concession in this way.
>
> 4. The grounds further assert that the approach to EX.2 is flawed because the judge focused on the first half of the definition.
>
> 5. At paragraph 11 it is arguable that finding that an obstacle would need to be permanent in order to be relevant is incompatible with the second half of the definition EX.2 which includes obstacles that "would entail very serious hardship".
>
> 6. Permission to appeal is granted on all grounds".

10. The Respondent filed a rule 24 response opposing the grounds of appeal and asserting that:

> "5. With regards to the concession, it is important that it is considered in the full context and not the limited context stated in the grounds at paragraph 4 and 8. The refusal letter states the following:
>
> *"You have provided evidence which proves your partner is currently studying Accounting and Finance at the University of Bedfordshire and therefore, your partner is not in a position to move to Bangladesh. However, the documents provided indicate that your partner is in full time education until 24 July 2023. During your partners studies, your relationship can continue overseas via other methods of communication to ensure there is no interference with your partners higher education. Whilst your partner continuing her studies in the United Kingdom on your return to Bangladesh will cause some degree of interference to your relationship, this would not amount to an insurmountable obstacle in accordance with paragraph EX.2. of Appendix FM."*
>
> 6. It is clear from the determination that the Judge did not go behind any concession. It is noted at the time of the refusal the evidence was that the partner was due to finish her course in July 2023. It is now 2024. The appellant having to take her to university 2 days a week is not a reason for him to remain in the UK. The Judge considers temporary separation and reaches findings open to be made. The appellant has family in Bangladesh and so does his partner.
>
> 7. With regards to the consideration of Ex2, the Judge is entitled to find that the partner's enrolment in a course meets the threshold. The Judge finds that if they both return to Bangladesh, they both have family support. There will be no language or cultural barriers. On the evidence provided the Judge was entitled to reach this decision and dismiss the appeal."

The Hearing

11. The matter came before me for hearing on 19 December 2023 at Field House.

12. Mr Martin took me through the grounds of appeal. I asked him where the evidence was as to the impact on the Appellant's partner caused by the worry of

separation. He said it did not feature in the witness statements but there was a letter dated 16 January 2023 submitted with an updated skeleton argument showing that the end date of the partner's course was now in 2024; he admitted the letter did not give any reasons for the end date having changed and submitted that this referred to in the partner's oral evidence.

13. Mr Martin also clarified that the Appellant's application for leave had been made whilst his former leave was extant and that the same matters were relied on for each of rules EX.1, 276ADE and article 8; these were all concerning the partner's course and difficulties she had which were caused by the uncertainty, including the support the Appellant had provided by taking her to her studies, cooking and otherwise providing for her.

14. Mr Parvar took me through the rule 24 response and emphasised that:

(a) the Judge sets out the correct wording for EX2 in [11] which shows she is aware of the full test; she then conducts the assessment in [12]-[17] including that there would be no serious hardship; she goes into the practical difficulties of relocation for both the Appellant and her partner and finds that the partner's course is only a temporary obstacle. Her conclusions are sound and adequately reasoned.

(b) The "concession" in the Refusal Letter did not say the partner could not travel to Bangladesh during her course but simply accepted that she could not relocate; the words "moved to" have been stretched. There was no concession that the partner could not travel outside term time, which is recognised in the final sentence of [31] of the Judge's decision. There is clearly a difference between someone abandoning their course in order to move, and a student travelling abroad outside term time.

(c) As regards the submission that the partner has been affected and that this was said in oral evidence, this has not been substantiated with any record of proceedings or witness statement such that there is no evidence that it was advanced.

(d) As regards consideration of the passage of time since the application, having checked the skeleton argument, there is no evidence that there were any submissions made to this effect. The Respondent could equally not be blamed for any delay in the appeal been heard (a discussion followed the effect that a copy of the skeleton argument and updated University letter had not been provided to me; I asked Mr Martin to feed this back to the Appellant's solicitors).

(e) The Judge was entitled to consider the date on which the course would end, which is only a short period. Many people leave their families behind whilst studying.

15. Mr Martin replied to repeat that any consideration of 'serious hardship' is simply absent from the decision. The wording of EX.2 refers to family life being enjoyed 'together' which is of course not possible if the partner cannot go to Bangladesh whilst studying; the hardships of separation fell to be considered as at the date of the hearing.

16. At the end of the hearing, I reserved my decision.

Discussion and Findings

17. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the decision under challenge.

18. The Judge sets out the background to the appeal at [1]-[5] of her decision, and the evidence at [6], which included the letter from the partner's university stating her course end date as being 24 July 2024. The Judge records at [7] that she heard oral evidence from the Appellant and his partner, and submissions, none of which she describes any further at this point.

19. The Judge's findings of fact are contained in [8]- [33] divided into two headings, 'EX.1' and 'Article 8'. I accept that the Judge's findings under 'EX.1' fed directly into her findings under 'Article 8' because, had the Appellant been found to have met the immigration rules, this would have been determinative for the purposes of the proportionality assessment under article 8 pursuant to the case of TZ (Pakistan) [2018] EWCA Civ 1109.

20. The Judge describes each party's position concerning EX.1 in [8], and the oral evidence in [9]-[10]. In [11] she correctly sets out the full definition of 'insurmountable obstacles' under EX.2 as being:

> "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."

21. She then makes the following findings:

(a) the phrase "which could not be overcome" denotes an obstacle that is likely to be a permanent obstacle to relocation [11].

(b) the partner's course is not a very significant difficulty that could not be overcome but is a temporary obstacle which could be overcome in June 2024 once she completes the course [12].

(c) it would be open to the couple to relocate either to the Appellant's family home in Bangladesh or to the apartment owned by his partner's family; they would have the support (including financial) of both families in re-integrating [13].

(d) there are no language or cultural barriers to reintegration [14].

(e) although the partner is a British citizen who has lived in the UK all her life, she has Bangladeshi heritage and her family has social and cultural ties to Bangladesh [15].

(f) there are no health related obstacles to relocation [16].

(g) the couple's preference for living in the UK does not amount to significant difficulties or hardship. There would not be insurmountable obstacles to family life continuing in Bangladesh [17].

22. Under the heading 'Article 8', in [18] Judge sets out the correct questions to be asked pursuant to the case of (Razgar) v Secretary of State for the Home Department [2004] UKHL 27. She then makes the following findings:

(a) the couple have an established family life and article 8 is engaged [19].

(b) the issue in dispute is that of proportionality and in addressing this, the Judge has had regard to Part 5A of the '2002' Act (which is presumed to be the Nationality Immigration and Asylum Act 2002, earlier referred to in [3] of the decision) [20].

(c) the Appellant speaks English which is a neutral factor [21].

(d) the Appellant does not work and is financially dependent on his partner, his family and her family [22] (it is not stated in what way this weighs in the balance but this is not a matter of challenge before me).

(e) weight can be given to the Appellant's relationship because it was formed whilst he had leave such that s.117B(4) does not bite [23].

(f) s.117B(6) has no application because there are no children [25].

(g) little weight should be given to the Appellant's private life because his status is precarious [24].

(h) the same findings of fact are made as under the rules; there is no reason why the couple could not continue their family life in Bangladesh. The partner's course is a temporary obstacle until June 2024; no other more permanent obstacles have been identified which would interfere with their family life [26].

(i) contact between the couple could continue if the Appellant had to return alone to Bangladesh to make an entry clearance application [29].

(j) there is nothing to suggest the partner could not move to be closer to her university in order to avoid her commute [and subsequent reliance on the Appellant in this regard] [30]

(k) separation is likely to cause some emotional impact in the short term but not such as to make the refusal decision disproportionate; any emotional impact is likely to be a short-term issue and resolved once a successful entry clearance application is made or alternatively the partner could visit Bangladesh out of term time and once her course is over [31]. There is no cogent evidence as to why the couple could not endure a period of temporary separation; the partner can remain here and support the Appellant's application from abroad [32].

(l) it would be reasonable and proportionate for the Appellant to make an entry clearance application from abroad. It had not been proved on balance that a short and temporary absence from the UK would cause the Appellant and his partner any hardship or grave consequences.

23. The Judge does not separately or specifically address whether the Appellant meets the requirements of 276ADE, however this was not the subject of challenge before me. In any event, Mr Martin confirmed that the same obstacles were relied upon for this rule as for both EX.1 and article 8 such that it is difficult to see that inclusion of a discussion likely to have made repeated findings would have changed the outcome of the decision. If there were found to be no obstacles to both the Appellant and partner reintegrating into Bangladesh, and also none to the Appellant returning alone to make an entry clearance application, it is difficult to see on what basis the Judge would have concluded anything other than that the Appellant would not have met 276 ADE(1)(iv).

24. As was discussed in the hearing before me, I cannot see any indication of the partner giving oral evidence to the effect that her studies or mental health were being impacted by worry caused by the Appellant's circumstances and potential separation from him. This appears to be the main factor said to have gone towards comprising "serious hardship" for the purposes of EX.1/EX.2 (the Judge refers in [26] to no other more permanent obstacles having been identified beyond the partner's course).

25. There is no evidence that this was a matter raised before the Judge. Having reviewed the documentary evidence, I note the partner's witness statement dated 23 August 2022 merely states that:

> "my partner's presence is essential for the sake of established family life and all my ongoing career to establish so that I can cherish my career in my established field".

26. As was also discussed at the hearing, in [6] the Judge refers to a letter from the partner's university dated 16 January 2023 stating that her course began on 1 October 2019 and is expected to conclude on 24 July 2024. I cannot see that I have been provided with a copy of this letter; it is not in the composite bundle filed by the Appellant's solicitors. However, Mr Martin accepted this letter did not contain any explanation for the course end date being different from that shown in a previous letter from the University dated 24 August 2022 (of which I do have a copy) stating that the partner's course was expected to finish on 24 July 2023.

27. Overall, I do not find it proved that it was raised as an issue before the Judge that the partner's mental health or ability to perform on her course was being negatively impacted by the Appellant's status, or concern about the same.

28. As per the recent case of Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC):

> "A party that fails to identify an issue before the First-tier Tribunal is unlikely to have a good ground of appeal before the Upper Tribunal."

29. The same can be said of the point raised in the grounds about the length of the partner's course. I cannot see that it was raised before the Judge, that the amount of time left to run on the partner's course as at the date of application was a relevant or significant factor. As appears to be agreed by paragraph 7 of the grounds of appeal, the circumstances fell to be assessed as at the date of hearing. The Judge clearly does take into account the length of the partner's course left to run as at the date of the hearing, as she expressly addresses this in [24], finding that it is not a very significant difficulty that could not be overcome but is only a temporary obstacle.

30. Besides the question of the impact on the partner of separation from the Appellant (which I have found was not clearly put into issue before the Judge in the way the grounds allege), it is difficult to see what other obstacles are being said to have been sufficient to have entailed very serious hardship for the Appellant or his partner.

31. Overall, I consider that the Judge was aware of, and applied, the full definition as she cites it in [11] and refers back to it at the end of her fact finding and conclusions for EX.1 in [17].

32. I accept that there is no authority for saying that an obstacle has to be permanent in order to be “insurmountable” for the purposes of EX.1. The last sentence of [11] is therefore perhaps poorly phrased, but I do note the Judge says “likely to be” permanent rather than “must be” or similar.

33. As per the Supreme Court decision Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11, (paragraph 43):

> “the words "insurmountable obstacles" [are] to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned…. the court's application of it indicates that it is a stringent test”.

34. Whilst this does not touch upon the question of time, it is reasonable to conclude that something which is practically and realistically short lived may, by its nature (but very much depending on the thing itself) not be ‘insurmountable’ as it could be resolved within a short while.

35. I accept the rule 24 response in saying that the “concession” in the Refusal Letter has been taken too far. What the Refusal Letter says is that: the partner is in full-time education; whilst her studies are ongoing, the couple’s relationship can continue overseas via other methods of communication; and the Appellant returning to Bangladesh in the meantime would cause a degree of interference but does not amount to an insurmountable obstacle for EX.2.

36. I cannot see that the Refusal Letter states that while she is studying, it would be unreasonable for the partner to leave the UK. What it says is that her “education here… does not mean that you are unable to live together outside the United Kingdom when she has completed her studies” and “it is open to your partner to relocate when she has completed her studies in higher education”. This is not a concession that she is unable to leave the UK *at all* during her studies, but at best a concession that she is unable to relocate during her studies. I am not even necessarily persuaded that it says this much because this is to twist the meaning of the words somewhat. The natural reading is a mere statement that the partner can relocate once her studies have finished; that is all. I appreciate that my opinion differs somewhat from the opinion of Deputy Upper Tribunal Judge Chapman in this respect, but given that I am considering a fresh determination of the First-tier Tribunal, do not consider that I am bound by Judge Chapman’s determination.

37. I therefore find that the Judge does not go behind any concession in making her findings that the partner’s course is a temporary obstacle and one which is not insurmountable given she can visit the Appellant outside term time and could relocate to Bangladesh to be with him once her course is over [12] [31]. These are rational, reasoned findings that were open to the Judge on the evidence. The

fact that the partner's course was time-limited was something that the Judge was able to take into account. Indeed, I consider it would have been an error not to have taken it into account. As Mr Parvar submitted, there are many couples who live apart during periods of study and yet manage to maintain their relationships.

38. In addition to the temporary nature of their separation, the Judge gives a number of other reasons as to why she finds the couple would not face any very significant difficulties in continuing their relationship outside the UK, including the availability of accommodation and family support in Bangladesh [13], the partner having Bangladeshi heritage and familial ties there [15], and there being no health related concerns [16]. The partner's course was therefore one of several reasons given such that it was not determinative in itself. Even had there been a concession by the Respondent that the partner could not go to Bangladesh at all during her course (which, as above, there was not), I therefore cannot see this would likely have altered the Judge's overall conclusion.

39. Overall and to conclude, I find the decision is not infected by any material errors of law. The decision therefore stands.

Notice of Decision

40. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Anthony of 14 September 2023 is maintained.

41. No anonymity order is made.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
15 January 2024