Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32806/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 21st December 2015

Decision & Reasons Promulgated
On 15th January 2016

Before:

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

Between:

MR SHAH AZMAN ALI
(Anonymity Direction not made)

Claimant

and

THE SECRETARY STATE FOR THE HOME DEPARTMENT

Appellant

Representation:
For the Appellant (Secretary of State): Mr Kandola (Home Office Presenting Officer)
For the Claimant (Mr Ali): Mr Karim (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Ado promulgated on the 15th May 2015, in which he allowed the Claimant's appeal against the decision to issue removal directions in accordance with Section 10 of the Immigration Asylum Act 1999, consequent upon the Secretary of State's refusal of the Claimant's application for Leave to Remain in the UK as the spouse of a settled person under the Immigration Rules HC 395,

as amended. As this is the appeal of the Secretary of State, for the purposes of clarity throughout this decision, the Appellant will be referred to as "the Secretary of State" and the Claimant Mr Ali will be referred to as "the Claimant".

Background

2. On the 12th August 2014 the Claimant had applied for Leave to Remain in the United Kingdom as the spouse of a settled person. That application was refused in a decision dated the 16th October 2014. The Claimant sought to appeal that decision to the First-tier Tribunal, and that appeal was heard by First-tier Tribunal Judge Ado at Hatton Cross on the 23rd April 2015. Within that decision, First-tier Tribunal Judge Ado did not accept that the Claimant had utilised deception by having a Proxy Test Taker take his English language test for him and that this had not been proved by the Secretary of State to the requisite standard. He further went on to consider whether or not there would be significant difficulties in the Claimant and his wife continuing family life outside of the United Kingdom and he found that the Claimant did meet the requirements of paragraph EX1.1 (b) of the Immigration Rules, and that the Claimant's appeal should thereby be allowed under the Immigration Rules.

3. The Secretary of State has sought to appeal that decision to the Upper Tribunal, and permission to appeal has been granted by Upper Tribunal Judge McWilliam on the 22nd September 2015. She found that there was no merit in the first ground of appeal which sought to argue that the First-tier Tribunal Judge had failed to give adequate reasons for his findings that the Claimant had not utilised deception and that the Judge should have had due consideration to the witness statements which identified this Claimant as an individual who had exercised deception and had failed to give adequate reasons for holding that a person who speaks English would therefore have no reason to secure a test certificate by deception. Upper Tribunal Judge McWilliam found that this simply amounted to a disagreement with the findings of First-tier Tribunal Judge and that the First-Tier Tribunal Judge properly considered the evidence at [11] and [12] and that the weight to be attached to that evidence was a matter for the Judge, as was the weight to be attached to the Claimant's language ability and that the decision was adequately reasoned.

4. However, Judge McWilliam did grant permission to appeal to the Upper Tribunal on the second ground of appeal on the basis that it was arguable that the Judge did not apply the correct test in relation to EX.1 and that he arguably applied the test of reasonableness instead of that of insurmountable obstacles. She further found that as the appeal was allowed under Appendix FM, Section 117B was arguably not material. She granted permission in respect of ground two of the Grounds of Appeal.

5. Within ground two of the Grounds of Appeal, it is argued that allowing the appeal under paragraph 276 ADE of the Immigration Rules, the First-tier

Tribunal Judge failed to have account of Section 117B of the Nationality, Immigration and Asylum Act 2002, as the Claimant and sponsor began their relationship when the Claimant's immigration status in the UK was precarious. It is argued that this approach should not be rewarded. Secondly, it is argued the decision to formalise and develop this relationship was a matter of personal choice and not the responsibility of the Secretary of State for the Home Department and that the Secretary of State should not be penalised for the couple's actions. Thirdly, it was argued that the outcome of the First-tier Tribunal Judge's decision is an abuse of the Immigration Rules and that whilst these points may constitute exceptions, they do not mean that the Tribunal's decision reached requirements of EX.1, not least because it is argued that the child was not yet born and there was nothing to prevent a short-term separation whilst the Appellant seeks entry clearance, as would be the case in any other circumstance. It is argued that in allowing the appeal under the Immigration Rules the First-tier Tribunal Judge had materially erred in law such that the decision should be set aside.

Submissions

6. In his oral submissions on behalf of the Secretary of State, Mr Kandola recognised that permission to appeal had only been granted on ground 2 and that the findings of the First-tier Tribunal Judge in respect of deception stood. However, in respect of ground 2, he sought to argue that the First-tier Tribunal Judge had focused on reasonableness rather than insurmountable obstacles and sought to argue that within paragraph 13 the Judge had raised questions as to whether or not it was reasonable to expect the sponsor to relocate to Bangladesh in view of the number of years she has spent in the UK and in paragraph 14 had again mentioned that it was not reasonable to expect the Claimant to return to Bangladesh and leave his wife who was expecting a child in less than 5 months' time and that "it was not reasonable to expect the sponsor to accompany the Claimant to Bangladesh". He then argued that the First-tier Tribunal Judge found that "I therefore accept the submissions made by Mr Hasan and find that the Claimant satisfied the requirements of paragraph EX.1 (B) of the Immigration Rules." He argued that the Judge's concentration on reasonableness rather than the question as to whether or not there are insurmountable obstacles, rendered the decision unsafe and that the decision should be remade, dismissing the Claimant's appeal.

7. In his submissions on behalf of the Claimant, Mr Karim argued that permission to appeal had been limited to ground 2. He argued that there was no need to consider Section 117B, as the appeal was being allowed under the Immigration Rules by the First-tier Tribunal Judge. He argued that whether or not the decision to formalise and develop the relationship between the Claimant and his sponsor was a matter of personal choice, did not mean that the Secretary of State for the Home Department was being penalised by the couple's actions and that the outcome did not amount to an abuse of the Immigration Rules and that the argument as to whether or not there could be a short-term separation, was

irrelevant and that these arguments did not show a material error in law and simply amounted to disagreement with the outcome.

8. In respect of the issue raised by Upper Tribunal Judge McWilliam as to whether or not the wrong test had been applied, he argued that it was dangerous to look at words in isolation. He argued that in [4] of the decision, the Judge had set out that in the reasons for the refusal letter the Secretary of State had considered paragraph EX1 and that the Secretary of State had noted that the Claimant did not meet the requirements of paragraph EX.1 (B) on the ground that it was not accepted that there were any insurmountable obstacles to the Claimant's family life with his spouse continuing outside of the United Kingdom. He argued that the insurmountable obstacles test had been set out. He further argued that at [9] the Judge had considered whether or not it would be unduly harsh to remove the Appellant from the United Kingdom and that this, he argued, was a higher test than insurmountable obstacles. He argued that insurmountable obstacles do not in fact mean obstacles which were impossible to surmount and that the Secretary of State's appeal effectively was an appeal on semantics and that the Judge had properly considered all of the relevant issues and applied the correct test.

9. He further relied upon the House of Lords case of Secretary State for the Home Department v AH (Sudan) and Others [2007] UKHL 49 and the Lady Hale at [30] in which she stated "This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view which I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialist field the Tribunal will have got it right: See Cooke v Secretary of State for Social Security [2001] EWCA Civ 734, [2002] 3 ALL ER TR279, paragraph 16. They and they alone are the Judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decision should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirection's simply because they might have reached a different conclusion on the facts or expressed themselves differently".

10. Mr Karim further sought to argue that they had since the date of the decision been a change in circumstances in that the Appellant's wife had now given birth, such that if there was a material error of law, he left it in my hands as to whether or not the case remains in the Upper Tribunal or should be remitted back to the First-tier Tribunal. However, he argued that any error of law was not material, as the Judge would have come to the same conclusion outside of the Immigration Rules. He further sought to argue that within the Grounds of Appeal it was not specifically stated that the Judge had applied the wrong test.

My Findings on Error of Law and Materiality

11. Permission to appeal was not granted in respect of ground one of the Grounds of Appeal, and therefore I do not make any findings in respect thereof and the findings of First-tier Tribunal Judge Ado in respect of deception thereby stand.

12. In respect of ground 2 of the Grounds of Appeal, namely that the First-tier Tribunal Judge made a material misdirection of law in allowing the appeal under paragraph 276 ADE of the Immigration Rules. In respect of the argument that the First-tier Tribunal Judge failed to take account of the provisions of Section 117 A-D of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal in the Case of Bossade ADE (Sections 117 A-D-inter Relationship with Rules) [2015] UKUT 415 (IAC) set out specifically that ordinarily a Court or Tribunal will, as a first stage, consider an Appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations. Such considerations have no direct application to Rules of this kind. Part 5A considerations only have direct application at the second stage of the Article 8 analysis. It was found that this method of approach does not amount to according priority to the Rules over the Primary Legislation but rather of recognising their different functions. When the First-tier Tribunal is considering a Claimant's family life under paragraph 276 ADE, it is not carrying out the second stage Article 8 analysis outside the Rules, but is applying the substantive conditions as set out within the Rules without direct reference to Part 5A considerations. Indeed, the wording of Section 117A (2) makes it clear that it is when the Court or Tribunal is considering the public interest question that the Court or Tribunal must (in particular) have regard in all cases to the considerations listed at Section 117B. The public interest question is defined at Section 117 A (3) as meaning "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8 (2)". I therefore find that had the First-tier Tribunal Judge gone on to consider the Claimants appeal outside of the Immigration Rules in respect of Article 8, then clearly the considerations under Section 117 A-D of the Nationality, Immigration and Asylum Act 2002 would have been relevant. However, he did not need to take them into directly into account when considering the application under the Immigration Rules under Paragraph 276 ADE. There is no error of law in the decision on the First-tier Tribunal Judge on this basis.

13. In respect of the second argument that the decision to formulate and develop their relationship between the Claimant and his sponsor was a matter of personal choice and not the responsible of the Secretary of State for the Home Department and that the Secretary of State should not be penalised for the couple's actions, this amounts to simply a disagreement with the decision reached and does not reveal any error of law in the approach taken by the First-tier Tribunal Judge. Further, the third argument that the outcome of the First-tier Tribunal Judge's decision rewards abuse of the Immigration Rules, again does not reveal any material error of law, and is entirely misconceived, as there

were no findings that the Claimant had sought to abuse the Immigration Rules, and consideration of his family and private life under the Immigration Rules is exactly the consideration that the First-tier Tribunal Judge should have been applying, as he did, when considering the appeal. Further, in respect of the argument that the points taken by the Judge may constitute exceptions but they did not meet the requirements of paragraph EX1, not least because the child was not yet born, also simply amounts to a disagreement with the decision reached and does not reveal a material error of law. Furtherthe question as to whether or not there could be a short-term separation was not relevant when considering whether or not the provisions of paragraph EX.1 were met.

14. I further bear in mind that although within the Grounds of Appeal it is argued that the First-tier Tribunal Judge allowed the appeal under paragraph 276 ADE and misdirected himself in law in this regard, when one actually reads the decision of First-tier Tribunal Judge Ado and his findings of fact between [10] and [14], although he allowed the appeal under Appendix FM in respect of the Appellant's family life, he did not in fact decide the case on the basis of private life under paragraph 276 ADE, as asserted by the Secretary of State.

15. However, in respect of the basis upon which Upper Tribunal Judge McWilliam granted permission to appeal, namely that it is arguable that the Judge did not apply the correct test in relation to paragraph EX.1 and arguably applied the test of "reasonableness" instead of "insurmountable obstacles", although the Secretary of State in the Grounds of Appeal, does argue that there was a material misdirection in law, the specific argument raised by Upper Tribunal Judge McWilliam was not raised, but I do accept the submission of Mr Kandola that this was a Robinson obvious point which Upper Tribunal Judge McWilliam was correct to raise. It is therefore appropriate for me to consider that argument.

16. I find that although First-tier Tribunal Judge Ado at [4] when dealing with the Refusal Letter set out the Secretary of State's stance in respect of paragraph EX.1 and how the Secretary of State noted that the Claimant did not meet the requirements of paragraph EX.1 (B) on the grounds that it was not accepted that there were any insurmountable obstacles to his family life with his spouse continuing outside of the United Kingdom, when actually making his findings of fact, after finding at [12] that the suitability criteria under appendix FM S-LTR.1.1 to 1.3 of the Immigration Rules were met and that the Secretary of State had accepted that the Claimant and his wife were in a subsisting relationship and having accepted the documents submitted showing that their relationship was subsisting, First-tier Tribunal Judge Ado then states at [13] that "the issue I have to consider is whether there will be significant difficulties in the Claimant and his wife continuing family life outside of the United Kingdom." Nowhere within his findings between [10] and [14] does First-tier Tribunal Judge Ado specifically refer to the actual test that has to be applied under paragraph EX.1 as to whether or not there "are insurmountable obstacles to family life with that partner continuing outside of the UK." Although I do bear in mind that under

paragraph EX.2 it is stated that "for the purposes of paragraph EX.1 (B) 'insurmountable obstacles' means the very significant difficulties which would be faced by the Claimant or their partner continuing their family life together outside of the UK which could not be overcome or would entail serious hardship for the Claimant or their partner.'

17. I do bear in mind the judgement of Lady Hale in the case of the Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49 at paragraph 30 and her comments that the First-tier Tribunal is an expert Tribunal charged with administering a complex area of law in challenging circumstances and that the Courts should approach appeals from them with an appropriate degree of caution and it is probable that in understanding and applying the law in their specialist field the Tribunal will have got it right. I bear in mind that as Lady Hale stated specific at paragraph 30 that "appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently" and that "their decision should be respected unless it is quite clear that they have misdirected themselves in law".

18. I find that First-tier Tribunal Judge Ado was aware of and did have in mind the test under paragraph EX.1, although this was not set out later within his decision, he referred to the test that had to be applied when dealing with the reasons for the refusal letter at paragraph 4. First-tier Tribunal Judge Ado, although not having specifically stated that there needed to be insurmountable obstacles, has gone on to consider whether or not there were very significant difficulties which would be faced by the Claimant or his partner continuing their family life outside the United Kingdom which is what is required to prove that there are insurmountable obstacles for the purpose of paragraph EX.1 as a result of the definition for insurmountable obstacles in paragraph EX.2. Although First-tier Tribunal Judge Ado has referred in his findings that it was not reasonable to expect the sponsor to relocate to Bangladesh in view of the number of years she has spent in the UK, he also when considering whether or not there are significant difficulties to the Claimant and his wife continuing family life outside the UK, specifically found that the wife had been residing in the UK since the age of 6 or 7, that she was British citizen and had a stable job in the UK being employed by the University Hospital of Leicester NHS Trust on a wage of £16,210 per annum and that she was also expecting her first child and found specifically that this would bring significant difficulties in continuing family life outside the UK. He also found that she would lose her job if she had to relocate and would then be worse off by not having employment to provide for herself and her family as her husband is not able to work at present. He then states "the other significant difficulty for the families is that they are expecting their first child which is due in less than 5 months' time. This is an added factor which would make it difficult for them to live together as a family and continue their family life bearing in mind that they had been together since the start of their relationship". The Judge therefore clearly has directed his findings to the question of whether or not they are very significant difficulties in family life

continuing outside the UK such as to amount to insurmountable obstacles, although it is not specifically set out within his findings the words "insurmountable obstacles". However, the First-tier Tribunal Judge can be taken to know the law in this regard, and indeed had set it out previously at paragraph 4.

19. Although reference has been made by him to the reasonableness of the sponsor accompanying the Claimant to Bangladesh and that it would not be reasonable for the Appellant to return to Bangladesh leaving his wife expecting their child in less than 5 months' time as at the date of his decision, these were simply factors that he took account of in considering what the very significant difficulties would be that the couple faced. I do not accept that he has misapplied the law or applied the wrong test in this case. Although the Judge clearly could have expressed himself differently and better in this regard, I do find reading the decision as a whole, that he has clearly addressed his mind to the issues that needed to be considered and has applied the correct test. The decision of First-tier Tribunal Judge Ado therefore does not contain a material error of law, and his decision shall stand.

Notice of Decision

The decision of First-tier Tribunal Judge Ado does not contain a material error of law and shall stand;

I make no order in respect of anonymity, no order having been sought in respect thereof from the First-tier Tribunal, and no such order having been sought before me.

Signed Dated 23rd December 2015

RF McGinty

Deputy Upper Tribunal Judge McGinty