



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

Appeal Number: IA335102015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 August 2017**

**Decision & Reasons Promulgated  
On 16 August 2017**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Secretary of State for the Home Department

Appellant

And

MA

Respondent

**(ANONYMITY ORDER MADE)**

**Anonymity**

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the MA's partner and her child/children. I therefore issue an anonymity order which extends to all the appellants. No report of these proceedings shall directly or indirectly identify them. This direction applies to both the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The parties at liberty to apply to discharge this order, with reasons.

**Representation:**

For the Appellant: Mr L Tarlow, Senior Presenting Officer.  
For the Respondent: Ms M Malhotra, of Counsel.

**DECISION AND Directions**

1. The Secretary of State has been granted permission to appeal against a decision of the Judge of the First-tier Tribunal Iqbal who, following a hearing on 2 November 2016, allowed the appeal of MA (hereafter the “claimant”) under the Immigration Rules against a decision of the Secretary of State 15 October 2015 to refuse his application of 25 March 2015 for leave to remain on the basis of his family and private life under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
2. The claimant is a national of Pakistan, born on 15 March 1989. He arrived in the United Kingdom with entry clearance as a student. His leave as a student was subsequently extended. He last had leave as a student until 20 October 2014.
3. On 20 October 2014, the claimant was served with an IS151A on the ground that he had used deception to gain leave to remain. His leave to remain was curtailed to expire on the same date.
4. The claimant's family life claim was based on his relationship with his partner, a Ms MT, a British citizen (hereafter the “sponsor”). On the evidence before the judge, the claimant and the sponsor did not have any children, although the sponsor had a child, JT, from a previous relationship. The child JT was living with her father. The claimant's private life claim was based on private life established since his arrival in the United Kingdom.

#### The Secretary of State's decision

5. The Secretary of State considered the claimant's family life claim under Appendix FM and EX.1 of Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter referred to individually as a “Rule” and collectively the “Rules”). In summary, she considered that he did not satisfy the relevant suitability requirements because he had practised deception in a previous application for leave to remain. He did not satisfy the relevant eligibility requirements which provided that applicants must not be in the United Kingdom in breach of immigration laws unless EX.1. applied. She considered that the claimant was an overstayer and that EX.1 did not apply.
6. In relation to para 276ADE(1) of the Rules, the Secretary of State considered that the claimant did not meet the suitability requirement in para 276ADE(1)(i). She further considered that the claimant could not qualify under para 276ADE(1)(iii) and 276ADE(1)(iv) and that there would not be very significant obstacles to his reintegration in Pakistan and therefore he did not satisfy para 276ADE(1)(vi).
7. The Secretary of State then considered the Article 8 claim outside the Rules. She considered the medical evidence in relation to the sponsor which showed that she had been diagnosed ten years previously with early onset of Parkinson's disease and suffers from disabling fluctuations in her mobility, with severe tremors and episodes when she is unable to walk. She concluded that there were no exceptional circumstances for the grant of leave on the basis of Article 8 outside the Rules.

#### Right of appeal

8. As the claimant's application was made on 25 March 2015 and the Secretary of State's decision on 15 October 2015, the claimant did not have a right of appeal under the Immigration Rules. He could only appeal on human rights grounds. This is because s.82 of the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”)

was amended by s.15 of the Immigration Act 2014 with effect from 20 October 2014 and because the transitional provisions do not apply.

### The judge's decision

9. Although the claimant did not have a right of appeal under the Rules, the judge considered Appendix FM and EX.1.
10. The judge found, in the claimant's favour, that he had not used deception in his previous application for leave. She therefore found that the claimant satisfied the suitability requirement under Appendix FM.
11. In relation to eligibility, it was necessary for the claimant not to be present in the United Kingdom in breach of the immigration laws. However, this would not apply if EX.1 applied. She therefore proceeded to consider whether EX.1(b) and EX.2. applied. EX.1 provides:

“EX.1. This paragraph applies if

(a)

(i) ...

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means 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.”

12. At para 37 of her decision, the judge stated that she found “*on balance that relocation to Pakistan for the couple would create insurmountable obstacles*”. She therefore allowed the appeal under the Rules (Appendix FM with reference to EX.1 (b)).
13. The judge's reasons for her conclusion are set out at para 29 onwards of her decision, which I will now quote.

“29. Mr Bellara on behalf of the [claimant] has highlighted that there is an up to date neurologist's letter in relation to the [claimant's] partner's condition. This letter was not before the Respondent and is dated the 14<sup>th</sup> October 2016. It highlights that the [claimant] is the principal carer and partner of [MT]. It further sets out the following in relation to [MT's] condition:

*[MT] was diagnosed with young onset Parkinson's disease more than ten years ago. This is a relentlessly progressive neuro-degenerative disorder resulting in tremors, muscle rigidity, loss of walk and inability to maintain independent living and manage aspects of self-care and normal range of activities of daily living. Patients with Parkinson's disease are exquisitely vulnerable to stress and have high incidents of anxiety and depression. Parkinson's Disease is treated with frequent administration of medication at progressive increasing doses over time with gradual loss of efficacy and onset of fluctuations in movement with episodic cramping and rigidity and complete loss of ability to move and walk for variable periods of times requiring supervision and assistance during the day and also in the night when it can be impossible to shift position in bed or go to the toilet without help.*

*[The claimant] is both [MT's] primary carer, administering support and assistance continuously, both day and night and has been her partner since June 2012. [The*

*claimant] assists [MT] with washing, dressing, toileting and administration of her medication. [MT] is entirely dependent upon his assistance for her day-to-day needs and furthermore considers him now to be her life partner.*

*It is essential for [MT's] physical and mental wellbeing that she should not be separated from [the claimant] as this would have profoundly deleterious consequences for her physical and psychological health.*

*[MT] tolerates only one form of medication for her Parkinson's disease and this needs to be administered several times daily at the correct times and the form of medication is not available in all countries outside the UK.*

30. I have also been referred to a letter from DWP in relation to [MT's] DLA. It is clear she is receiving the higher rate for her personal care which means that “*she is constantly supervised with or without short breaks right through the day so that she does not cause substantial danger to herself or others, and also needs attention with bodily functions more than once a night or once for a prolonged period*”. She has been in receipt of this allowance from the 11<sup>th</sup> of September 2006.
31. The evidence before me demonstrates the [claimant's] partner is suffering from a serious condition which I find on balance, would make it difficult for her to be required to relocate to another country. Her partner is her full time carer and they both highlight in recent times that [MT] has deteriorated due to age and the stresses including her recent divorce so that she has not been able to manage without the [claimant], especially at night. In particular, she has highlighted that on one occasion there was an incident where she accidentally soiled herself in bed. It was the [claimant] who had cleaned her up.
32. I consider the [MT's] condition will continue to deteriorate over the years and I find that there would be very serious hardships for her including the fact that if the [claimant] was required to financially support her if they relocated to Pakistan, then she would essentially be left without the care she currently receives from him.
33. Whilst, [MT] also has her family in the United Kingdom which includes her parents, who are elderly and a sister and a brother, both who have their own families, it has been difficult to get the level of assistance and care that the [claimant] provided. Further they did not really approve of the *[sic]* [MT's] relationship with the [claimant].
34. I have further considered the guidance of **Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes August 2015** guidance as follows:

*This means that an insurmountable obstacle can take two forms:*

*1. A very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant's partner to continue overseas. For example, because they would not be able to gain entry to the proposed country of return; or*

*2. A very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but would entail very serious hardship for one or both of them.*

*.....*

*The factors which might be relevant to the consideration of whether an insurmountable obstacle exists include but are not limited to: a. Ability to lawfully enter and stay in another country. The decision maker should consider the ability of the parties to lawfully enter and stay in another country. Decision makers should consider country policy and information where relevant. However, the onus is on the applicant to show that it is not possible for them and their family to enter and stay in another country for this to amount to an insurmountable obstacle. A mere wish, desire or preference to live in the UK would not amount to an insurmountable obstacle.*

*b. Cultural barriers. This might be relevant in situations where the partner would be so disadvantaged that they could not be expected to go and live in that country, for example a same sex couple where the UK partner would face substantial social discrimination, or where the rights and freedoms of the UK partner would be severely restricted. It must be a barrier which either cannot be overcome or would*

*present a very serious hardship to the partner such that it amounts to an insurmountable obstacle.*

*c. The impact of a mental or physical disability. Whether or not either party has a mental or physical disability, a move to another country may involve a period of hardship as the person adjusts to their new surroundings. But a physical or mental disability could be such that in some circumstances it could lead to very serious hardship, for example due to lack of health care that amounted to an insurmountable obstacle.*

*d. The security situation in the country of return. In some circumstances there may be particular risks to foreign nationals which extend to the whole of the country of return. [page 25-27]*

35. I find that the guidance further supports my conclusion in relation to [MT's] disability and in addition I consider she may also face cultural barriers in moving to Pakistan, which is not a tolerant society insofar as mixed religious relationships are concerned.
36. I also take judicial note of the current security situation in Pakistan, especially for those individuals from the west.
37. For all these reasons, I find on balance that relocation to Pakistan for the couple would create insurmountable obstacles and therefore the Application ought to be allowed with reference to EX.1 (b).
38. Given the [claimant] satisfies the Immigration Rules under Appendix FM, I do not go further to consider his private life or indeed any matters outside the Immigration Rules."

#### The Secretary of State's grounds

14. The Secretary of State sought permission on two grounds. The first ground challenged the judge's finding that the claimant had not practised deception in a previous application for leave. Judge of the First-tier Tribunal Brunnen refused permission on this ground. The Secretary of State did not renew her application for permission on this ground.
15. However, Judge Brunnen granted permission on the second ground (i.e. Issue A below). Judge Brunnen raised an issue of his own (issue B below). At the commencement of the hearing before me, I raised an issue of my own (Issue C).
16. There are therefore three issues before me, as follows:
  - (i) (Issue A) The Secretary of State's second ground contended that the judge had not given adequate reasons for concluding that there were insurmountable obstacles to family life continuing outside the United Kingdom, why the difficulties that the couple would face in Pakistan reach the relevant threshold and that the judge had failed to consider the availability of support from the claimant's family or state support. The judge made no reference to any background material in making her findings in relation to the security situation and that there would cultural barriers due to a mixed religious relationship.
  - (ii) (Issue B) The issue that Judge Brunnen raised was whether the judge erred in law in allowing the appeal under the Rules given that the claimant only had available to him a human rights ground of appeal.
  - (iii) (Issue C) The issue I raised was whether, in her consideration of the question whether there were insurmountable obstacles to family life continuing in Pakistan, the judge was obliged to take into account the weight to be given to the state's interests pursuant to s.117B of the 2002 Act, by analogy with the

reasoning of the Court of Appeal in MA (Pakistan) and others v SSHD [2016] EWCA Civ 705 in which the Court of Appeal held that wider public interest considerations are to be taken into account in deciding whether it is reasonable for a 'qualifying child' (a child who had lived in the United Kingdom continuously for at least 7 years) to leave the United Kingdom.

### Assessment

17. In relation to Issue B, Ms Malhotra and Mr Tarlow accepted that the judge had no jurisdiction to allow the appeal under the Rules. They also accepted that, if the judge did not err in law in reaching her finding that there were insurmountable obstacles to family life being enjoyed in Pakistan, then she should have allowed the appeal outside the Rules on the basis of Article 8. In that event, I would set aside her decision to allow the appeal under the Rules and substitute a decision to allow the appeal on human rights grounds (Article 8) outside the Rules.
18. In relation to Issue C, Ms Malhotra accepted that the judge did not state *explicitly* that she had taken into account the state's interests and the factors in s.117B of the 2002 Act. However, she submitted that it was implicit that the judge had considered the state's interests in reaching her decision that there were insurmountable obstacles to family life being enjoyed in Pakistan.
19. When a judge carries out the balancing exercise in relation to Article 8 outside the Rules, it may be implicit that he or she must have had in mind the state's interests, although consideration of the precise weight to be given to the states interests in each individual case will be case-specific and will require specific consideration. In the instant case, the judge considered whether there were insurmountable obstacles under the Rules. She gave no indication at all that she was aware that, by analogy with the Court of Appeal's judgment in MA (Pakistan), the state's interests must be considered and that it is necessary to carry out a balancing exercise. She made no mention of the state's interests at all at para 29 onwards of her decision. She made no mention of the weight she considered should be given to the state's interests in the instant case. She made no mention of any balancing exercise.
20. Ms Malhotra accepted that the judge did not take into account s.117B(4), which requires little weight to be given to family life established with a qualifying partner whilst an individual's immigration status is unlawful. The effect of s.117B(4) is to require the personal circumstances of the claimant and the sponsor to be more weighty for them to succeed in establishing that there would be insurmountable obstacles to family life being enjoyed in Pakistan. The judge was plainly unaware that this was the case because she made no mention of s.117B(4).
21. Ms Malhotra accepted that the judge did not consider whether the claimant was financially independent. If he was not financially independent, this increases the weight to be given to the state's interests in his removal, although financial independence is a neutral factor: AM (S 117B) Malawi [2015] UKUT 0260 (IAC).
22. Ms Malhotra referred me to the fact that the judge had resolved the deception issue in the claimant's favour. She submitted that this is relevant not only to the strength of the state's interests, but also the fact that he is someone who, on the judge's findings speaks English. Thus, she submitted, s.117B(2) applies. However, the fact is that it is not for me to carry out the balancing exercise. Further and in any event, a person's ability to speak English is a neutral factor, as the Upper Tribunal said in AM (Malawi).

23. For all of the above reasons, I am satisfied that the judge erred in law by failing to consider the weight to be given to the state's interests, failing to apply the s.117B factors and failing to take into account the state's interests in reaching her finding that there were insurmountable obstacles to family life being enjoyed in Pakistan, i.e. Issue C is established. I am further satisfied that this error is material.
24. Ms Malhotra accepted that there was no evidence before the judge that the medication that the sponsor tolerates is not available in Pakistan. She asked me to bear in mind the seriousness of the medical condition of the sponsor.
25. Although I acknowledge that the sponsor is suffering from Parkinson's disease, it is impossible to say that, on the evidence before the judge, her condition was such that no reasonable Judge of the First-tier Tribunal could reach a different decision on proportionality in relation to the Article 8 claim outside the Rules.
26. In relation to Issue A, on the discrete issue as to whether the judge's use of the word "*difficult*" in the first sentence of para 31 shows that she applied too low a threshold when reaching her decision on whether there were insurmountable obstacles to family life being enjoyed in Pakistan, I agree with Ms Malhotra that, when the judge's reasoning from para 29 onwards is read as a whole, her single use of the word "*difficult*" at para 31 is not determinative. She quoted from the Secretary of State's guidance at paragraph 34 of her decision at length and used the phrase "*insurmountable obstacles*" on a few occasions.
27. Nevertheless, the judge did err in failing to consider whether the claimant had established that the only medication that the sponsor tolerates is not available in Pakistan. Her finding at para 35, that the sponsor may face cultural barriers in moving to Pakistan, was not based on any evidence placed before her. She did not refer to specific background material in reaching her finding at para 36. When these errors are considered against the judge's reasoning as a whole, I am satisfied that they are material to the outcome.
28. In summary, therefore, the judge made the following errors of law:
  - i) (Issue C) The judge did not consider the weight to be given to the state's interests and failed to factor this in the balancing exercise in reaching her decision that there were insurmountable obstacles to family life being enjoyed in Pakistan.
  - ii) (Issue A) The judge failed to consider whether the claimant had established that the only medication that the sponsor tolerates is not available in Pakistan.
  - iii) (Issue A) The judge's finding at para 35, that the sponsor may face cultural barriers in moving to Pakistan, was not based on any evidence placed before her.
  - iv) (Issue A) The judge did not refer to specific background material in reaching her finding at para 36.

I am satisfied that i) is material on its own and that ii)-iv) taken together are material on their own and independently of i).

29. I therefore set aside the judge's assessment from and including para 29 up until and including para 38 of her decision. I set aside her purported decision to allow the appeal under the Rules. Her finding concerning the deception issue stands.
30. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
- “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
31. In the instant case, the decision is finely balanced. On the one hand, the judge's finding on the deception issue stands. This therefore reduces the fact-finding in the re-making of the decision. On the other hand, the claimant succeeded in his appeal previously. Given the sponsor's medical condition and the fact that the claimant succeeded in his appeal previously, this case falls within the guidance in JD (Congo) & Others [2012] EWCA Civ 327 concerning the cases in which the appropriate course is to remit the case to the First-tier Tribunal, in my judgement. I am therefore satisfied that this case falls within para 7.2.

### **Decision**

The decision of the First-tier Tribunal involved the making of errors on points of law such that the assessment from paras 29 to 38 is set aside. The judge's assessment in relation to the deception issue shall stand.

This case is remitted to the First-tier Tribunal for a judge other than Judge of the First-tier Tribunal Iqbal to re-make the decision on the claimant's Article 8 claim outside the Rules.



Signed  
Upper Tribunal Judge Gill

Date: 16 August 2017