Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10250/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 29th April 2019	**On the 13th May 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

IS
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Z. Rahman, instructed on behalf of the Appellant
For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity as the appeal concerns minor children No report of these proceedings shall directly or indirectly identify him or his

partner and children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant appeals with permission against the decision of First-tier Tribunal panel ("FtTJ panel"), promulgated on the 14th September 2018 dismissing his appeal against the decision to refuse his human rights claim based on his family life. Permission to appeal was granted by the Upper Tribunal (Judge Jackson) on the 3rd January 2019.

2. The appellant is a citizen of Pakistan. He entered the UK in May 2011 with entry clearance as a Tier 4 (General) student with a visa valid until June 2014. Whilst in United Kingdom he entered into a relationship with a British national in 2012 and they later married in a religious ceremony in 2014 and began to live together. She had previously been married and there were three children born of that relationship. The marriage between the parties ended and the children lived with their father. A Child Arrangements Order was made in April 2013 relating to contact with their mother.

3. The appellant applied for further leave to remain on the basis of his relationship with his partner, but that application was refused in a decision taken on 20 August 2014. He appealed that decision, but the appeal was dismissed on 7 July 2015 by the First-tier Tribunal.

4. A further human rights application was made in 2016 relying on his relationship and a change in circumstances since the previous appeal determination. The application was refused, and which resulted in the decision letter under challenge in these proceedings (the decision of the respondent made on 29 August 2017 to refuse granted leave to remain).

5. The appeal came before the First-tier Tribunal panel 22nd August 2018. The panel heard evidence from the appellant and his partner. In a decision promulgated on the 14th September 2018, the panel dismissed his appeal on all grounds. The FtT panel found that the appellant could not meet the requirements of Appendix FM as he could not meet the requirements for leave to remain as either a partner or a parent and found that EX1 was not met as there were no "insurmountable obstacles" to family life in Pakistan. As to paragraph 276ADE, the panel recorded that he did not appear to have sought to claim under that paragraph (see [23]).

6. When considering Article 8 outside of the Rules, the panel, when applying the section 117B public interest factors, took into account that the appellant's immigration status had always been "precarious" and thus little weight was attached to the private life that he had established in the United Kingdom and the family life established with his partner (at [25]). The panel rejected the assertion that the appellant's partner could not manage without the appellant (if he returned to Pakistan) and that there were no reasons why he could not return to Pakistan apply for entry clearance to return. They concluded that there were no compelling reasons why leave should be granted outside the rules and dismissed the appeal.

7. The appellant sought permission to appeal which was granted on the 3rd January 2019 by Upper Tribunal Judge Jackson.

8. Thus, the appeal came before the Upper Tribunal. Ms Rahman relied upon a comprehensive skeleton argument which set out all the matters she wished to rely upon, and I heard oral submissions in the light of that document. Mr Tufan, on behalf of the respondent provided oral submissions in the absence of a Rule 24 response.

9. I have had regard to the written grounds, the skeleton argument and the oral submissions when reaching a conclusion as to whether the deciosn of the panel involved the making of an error on a point of law. It is not necessary for me to set out all those submissions and I intend to make reference to the salient parts during my assessment and analysis of the issues raised.

Decision on the error of law:

10. I have carefully considered the competing submissions of the advocates, and having done so, I am satisfied that the decision demonstrates the making of an error on a point of law. I shall set out my reasons for reaching that view.

11. In summary, it is submitted that the decision of the panel is vitiated by material errors of law because, firstly, the panel took an erroneous approach to EX (1) (a) and EX2 and wrongly concluded that the appellant was unable to meet the requirements of the Immigration Rules. Secondly, in the alternative, the panel applied an erroneous approach to the proportionality assessment of article 8 outside of the rules, including consideration of the section 117B public interest factors.

12. Mr Tufan on behalf of the respondent submitted that in relation to EX1, whilst the panel accepted he had a genuine and subsisting relationship with his wife, there was a lack of evidence that related to his partner's relationship with the children. The outcome of the order made by the family Court in January 2018 had not been provided and whilst it was accepted that she had contact with the children, the panel could not conclude any further as to the level of that contact. He submitted that there had been inconsistent evidence given by the witnesses as to the level of contact. In relation to the appellants partner's medical condition, the panel were correct to identify that

there was a lack of up-to-date medical evidence. Consequently, the assessment under EX1 was therefore open to the panel to reach as it had not been shown that there were any "insurmountable obstacles" to family life being established in Pakistan, either under the Rules or outside of the Rules (applying the decision in Agyarko). As to the Chikwamba point raised in the grounds, it was open to the panel to reach the conclusion that he could apply for entry clearance from abroad given the previous decision of the FtT (Judge Obhi).

13. Dealing with the first ground, it is submitted that the panel applied an incorrect interpretation of EX1 in the context of the Rules. Appendix FM sets out the requirements of leave to remain as a partner, relying on either the five-year route or the 10-year route. There is no dispute that the basis upon which this application was made was under the 10-year partner route. At paragraph [8] the panel quoted from the decision letter that it been accepted by the respondent that the appellant met the suitability and eligibility requirements under the Rules and then purported to apply the decision in *Sabir (Appendix FM – EX 1 not freestanding)*[2014]UKUT 63 and concluded that the decision held that "the architecture of the Rules as regards partners is such that EX1 is parasitic on the relevant Rule within Appendix FM that otherwise grants leave to remain. Thus, we find the appellant cannot succeed under paragraph EX1".

14. The submission made by Ms Rahman is that this is an error because the appellant relied on EX1, not as a freestanding provision but as a component of the requirement for leave to remain as the appellant met the eligibility and suitability requirements and therefore the only remaining requirement was whether EX1 applied. She therefore submits the panel fell into error in its conclusion at paragraph 8.

15. In my judgment it is important to read the determination as a whole as at paragraph 8 the panel correctly stated that whilst the appellant

met the eligibility and suitability requirements "thus the question must be whether EX1 applies in the appellant's case." The reference to the decision in *Sabir* is in that context; therefore it is plain at the beginning of paragraph 8 that the panel correctly identified the issue, that is, whether EX1 applied. Where the panel stated "we find the appellant cannot succeed under EX1" at the end of paragraph 8, I consider that it should be read in the light of and the context of paragraphs 9 – 15 where the panel then went on to actively consider factual findings relevant to EX1.

16. Furthermore, even if it could be said that the decision of the panel is ambiguous in this respect, the panel nonetheless went on to state at [15] "if we were wrong in findings in relation to paragraph EX1 above we now consider that paragraph. For the reasons given above the appellant cannot meet the requirements of EX1 (a)". Therefore, any error asserted on behalf of the appellant that the panel failed to consider EX1 is not justified because the panel in the alternative went on to consider this issue.

17. In my judgement the better point raised in the grounds and as identified in the grant of permission, relates to whether the panel properly applied the test under EX1 in the light of the particular factual circumstances. I have therefore considered this in the light of the material that was before the panel and the findings of fact that they reached.

18. The approach taken in the decision letter was that EX1(a) did not apply because whilst the appellant's partner had children in the UK, she did not maintain a "parental relationship" as she did not see them or have contact to them. As regards EX1(b) it was said that there was no evidence of any "insurmountable obstacles". Against that background the panel reached the following findings:

- the appellant did not have a genuine and subsisting relationship with any children in the UK;
- the panel accepted that the appellant's partner had three children but that the appellant had only met one child in 2013 (see [9]);
- the panel accepted that the appellant's partner had some contact with the children but for the reasons set out at paragraph 10 – 14, whilst they accepted there was a level of contact, they could make no specific findings.
- Against that background and at [15] the panel reached the conclusion that the appellant could not meet the requirements of EX1(a).

19. As the panel correctly identified on the evidence before them the appellant could not meet the requirements of EX1(a) because he failed to establish the first limb-he did not have a genuine and subsisting parental relationship with his partner's children given that he had no contact since that date (see [9]). EX1(a) does not refer to whether the appellant's partner has a genuine and subsisting parental relationship. Therefore, the appellant fell at the first part of EX (1) (a) (i), and there is no error in the panels finding that it cannot meet that paragraph (see [15]). Although I would accept that the panel would have re-visited the issue outside of the Rules.

20. As to EX (1) (b) the panel set out their findings on the issue, having taken into account the earlier findings at paragraphs 9 to 14 and in addition made the following findings:
    - the appellant's partner was a British citizen although she had also retained Pakistani nationality,
    - the appellant had family members in Pakistan (see [17]);
    - the appellant's partner had some medical problems but there was no up-to-date evidence to demonstrate that her health would be compromised if she lived in Pakistan;

- the appellant had spent 25 years in Pakistan;
- the appellant's partner's wish not to accompany him was not sufficient to constitute an "insurmountable obstacle";
- consideration should be given to the best interests of the children, but the panel were not satisfied as to the actual level of contact between the appellant's partner and children because of the inconsistent evidence given and that they had not seen the CAFCASS report;
- any interruption in family life would be for a short period and at the appellant and his partner could live in Pakistan as a holiday and apply for entry clearance as a spouse.
- The panel therefore found that there were no insurmountable obstacles "to the appellant's return to Pakistan."

21. The panel therefore found that the appellant could not meet the threshold as to EX1(b) either.

22. The panel did not set out the case law relating to the issue of "insurmountable obstacles". However, it is not in dispute that the Supreme Court considered the issue of insurmountable obstacles and Article 8 in the decision of R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11.

23. At paragraph 43 the court considered the European jurisprudence and that the "words "insurmountable obstacles" 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".

24. However, the Court went on to state: "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable

obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119".

25. Thus, the Court found that the requirement of insurmountable obstacles is a stringent test to be met and this was not incompatible with Article 8.

26. In conclusion the Court held at [45] "By virtue of paragraph EX.1 (b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship".

27. When looking at the issue of Article 8 outside the Rules at paragraph [48] the Court stated:

> "[48]As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences,

> such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or Tribunal in the light of the particular circumstances of each case".

28. The question is whether the panel failed to consider the relationship between the appellant's partner and her children as part of the assessment under EX1(b). In this context Mr Tufan submits that the findings made as by the panel were open to them in the context of a lack of evidence.

29. It is plain from reading the judgment that they had made tentative findings of fact as to the nature of the relationship between the appellant's partner and her children (see paragraphs 9 – 15 of the decision). They accepted that she was the mother of three children residing in the United Kingdom. Whilst the panel did not say so, irrespective of whether the children resided with her, she retained parental responsibility for those children as their mother. In any event, whilst the level of contact was not clear, it was accepted by the panel that there was some contact taking place. As to the issue of their relationship with their mother and the level of contact, the panel was not assisted by the failure of the parties or earlier case management decisions being made to provide disclosure of the family court documentation.

30. Where there is an issue as to the best interests of relevant children in the context of a human rights claim and it is known that there are previous Family Court proceedings that would provide relevant evidence, there is a mechanism available to obtain an order for disclosure. That has recently been highlighted again in the decision of *The Secretary of State for the Home Department v AB(Jamaica) and AO(Nigeria)* [2019] EWCA Civ 66 by King LJ and that the Protocol and communication between the judges of the Family Court and the Immigration and Asylum Chamber of the FtT and Upper Tribunal [2013] Fam Law 1197 is designed to facilitate the process of disclosure of relevant material.

31. The panel observed that there had been no compliance with the protocol (see paragraph 10) and at 21 they made reference to having not seen the CAFCASS report.

32. There was important documentary evidence which was unavailable to the panel as to the factual circumstances of the appellant's partner and her relationship with the children. Whilst the panel had some documentary evidence, such as the order that was made in 2013 and 2018, this did not provide sufficient information for any assessment of the best interests of the relevant children.

33. Furthermore, it would have assisted in providing the panel with material so that the best interests of the children could be properly assessed. The panel at [21] made reference to "consideration must be given to the best interest of the children" but as they had not been satisfied as to the level of contact between the mother and children and had not seen any of the family documentation, they made no actual findings as to the best interests of those children concerned. In my judgement the panel were in error even on the basis of the material they had. Having found that the appellant's partner was maintaining contact with her children, it was incumbent

upon the panel to consider their best interests in their assessment of EX1.

34. I do not fully accept the submissions made by Ms Rahman that the panel failed to make findings about the level of contact. I prefer the submission made by Mr Tufan that the panel identified that the evidence before them as to the level of contact had not been consistent and gave sustainable reasons for reaching that view at paragraphs 10 – 14 due to the inconsistent evidence given in the letters from the children and from the evidence given by the appellant's partner. It was for the appellant and his partner to provide consistent evidence concerning the level of contact and there was a lacuna in the evidence in this respect. There was no further information in documentary form as to the re-establishment of contact post- dating the order in 2013 and much of the evidence was undated (including letters from the children and from the appellant's former partner). Therefore, it is not surprising that if the panel did misunderstand that evidence that there was ongoing unsupervised contact, it was because the evidence was either lacking in cogency or that it had not been properly explained.

35. Notwithstanding that I am satisfied that the panel fell into error because having accepted that there was ongoing contact, at whatever level, they were required to consider the best interests of the children and go on to make an assessment of them, and to consider what the consequences would be to the children of their mother relocating to Pakistan and consider whether this was an "insurmountable obstacle" to family life being established out of the United Kingdom. Those issues were not considered in the panel's assessment.

36. Furthermore, as set out above if relevant evidence was missing, as identified by the panel, an order could have been made under the

protocol. I recognise that it is for the appellant to prove his case but where the best interest's assessment is necessary and family documents are available, that could have been obtained either prior to the hearing or by adjourning part heard.

37. A further issue identified in the grounds is that when considering the issue of insurmountable obstacles, the panel failed to consider the medical circumstances of the appellant's partner. Again, I cannot accept the submission in its entirety. The medical circumstances of the appellant's partner were a relevant consideration under EX1(b) and also in any assessment outside of the Rules. However, there was a lack of up-to-date medical evidence before the panel. As Mr Tufan pointed out, the panel expressly referred to this at [18]. The evidence related to 2015 and 2016 and that the only other evidence consisted of assertions made by the appellant's partner. The decision in *SSHD v R (on the application of Kaur)* [2018] 15th May 2018, cites with approval the earlier decision of the Court of Appeal in *R (Mudibo) v SSHD* [2017] EWCA Civ 1949, where the court emphasised the distinction (in the context of insurmountable obstacles) between evidence and mere assertion and in the light of the high threshold set by EX1(b) (see paragraph 59 of that decision).

38. However, I accept that there was evidence available which gave a clear understanding of the appellants partner's difficulties which was not taken into account. The appellant's partner is in receipt of personal Independence Payments to assist in her daily living needs and she had been assessed as unfit to work (see 290AB). Whilst that evidence was dated 2016 and the panel were correct to say there was nothing more up to date, the oral evidence was that she continued to receive that benefit and other benefits as a result of her medical conditions. Whilst there was a lack of up-to-date evidence, it did not preclude the panel from taking into account and applying weight to the oral evidence of the appellant as to her present

circumstances in the context of the past documentary evidence. In this context there was no assessment either under EX1(b) or outside of the Rules as to the impact of relocation or the availability of care and treatment in Pakistan.

39. The panel also erred in considering that the interruption of family life could only be temporary and that in essence, the appellant and his partner could go and live in Pakistan on a temporary basis whilst he applied for entry clearance (see [22]). In this context no consideration was given to the separation between the appellant's partner and her children and their best interests.

40. In the light of those matters identified, I am satisfied that the decision is vitiated by errors of law and should be set aside. It is not necessary to set out any further issues identified in the grounds relying on the Article 8 assessment outside of the Rules and assessment of the S117B public interest considerations given the errors already identified which would have relevance for any assessment outside of the Rules. I therefore reached the conclusion that the decision should be set aside and that further findings of fact will need to be made and further evidence placed before the Tribunal on the relevant issues as identified including to determine the best interests of the children, and any updated medical evidence and compliance with the protocol (if so advised by the parties).

41. I have therefore reached the conclusion that the only finding that should be preserved is that at [9] relating to the appellant's relationship with the applicant's children. It does not, however, preclude the FtTJ hearing the appeal to depart from that finding if there is any new evidence.

42. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal 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."

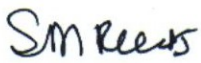
43. Having done so, I am satisfied that it is appropriate to remit the appeal to the FtT. It will be necessary to make findings on the issues identified above and in the light of the more recent case law and guidance.

Notice of Decision

44. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. It is to be remitted to the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him, his partner or children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed 

Date 10 /5/2019

Upper Tribunal Judge Reeds