Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21892/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 10 November 2014

Decision and Reasons Promulgated
On 14 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

A H
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan who was born on the 9th September 1972. He appeals against the decision of Judge Dickson, promulgated on the 21st August 2014, to dismiss his appeal against the respondent's refusal of his application for leave to remain and her decision to remove him from the United Kingdom.

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2. Whilst the First-tier Tribunal did not make an anonymity direction, I consider it appropriate to do so in order to safeguard the best interests of the children to whom I shall make reference in this determination.

3. At the hearing of the appeal before the First-tier Tribunal, the appellant was represented by Ms S Khan of Counsel, who was instructed by 'Maz Shah Legal'. The grounds of appeal to the Upper Tribunal were also settled by Ms Khan. However, Maz Shah Legal subsequently wrote to the Tribunal, stating that they are without instructions and no longer represent the appellant. The appellant did not attend the hearing before me. I was nevertheless satisfied that he was served with notice, on the 16th October 2014, of the time, date and place of hearing at the address provided for service in the Notice of Appeal. In all the circumstances, I considered that the appeal could justly be determined in his absence.

Background

4. The background to the appeal may be summarised as follows.

5. The appellant arrived in the United Kingdom, as a family visitor, with six months' leave to remain until the 4th December 2007. Since that time, he has remained in the United Kingdom unlawfully. His wife and eldest three children remain in Pakistan, where they live with and are financially supported by the appellant's parents. The appellant does not have contact with them and has never provided them with financial support.

6. The appellant met his current partner, I S, in 2008. They were married, in accordance with the customs and practices of Islam, in 2010. They have three children. At the date of the First-tier Tribunal's decision, the children were respectively aged 5 years 3 months, 3 years 11 months, and 5 months.

7. In November 2010, the appellant's partner was granted humanitarian in the UK for a period of 5 years. This appears to have been granted on the basis that she was at risk of suffering serious harm on return to Pakistan due to her status as a single woman with a child. At that time, the appellant and his partner were separated and had lost contact with one another. However, they resumed contact a few months after the birth, in May 2009, of their eldest child. As a result, I S became pregnant with their second child. There then followed a series separations and reconciliations for various periods of time. The relationship was characterised by domestic violence between the appellant and I S., which was sufficient to cause the local social services department to intervene in order to protect the interests of the children. In March 2014, social workers decided that the children were not at risk of significant harm from their parents, but that it was nevertheless necessary to put a 'Child in Need Plan' in place for a period of three months.

The decision of the First-tier Tribunal

8. The reasons for Judge Dickson's decision to dismiss the appeal can be found at paragraphs 33 to 39 of his determination. The references to the

"sponsor" in the second sentence, and thereafter to the end of paragraph 33, were obviously intended to be references to the appellant. Subject to this amendment, his reasoning may be summarised as follows.

9. The judge found I S to be a credible witness, with the exception of her testimony relating to the issue of whether the appellant had been working whilst in the United Kingdom. He found the appellant to be an unsatisfactory witness who had shown a total disregard for UK immigration laws and for his responsibilities to his wife and children in Pakistan. The appellant had admitted working in Pakistan as a builder, and there was no reason to suppose he could not do so again. The appellant had given an unsatisfactory explanation for how he had financially supported himself and his claim that he had not been working whilst in the UK was not therefore credible.

10. The appellant and I S currently appeared to have a good relationship with each other, and their children were also happy living with them. The judge nevertheless took account of the "volatility of the situation" [paragraph 36].

11. The appellant did not meet the eligibility criteria of Appendix FM of the Immigration Rules because he was not lawfully married to I S and because he remained lawfully married to his wife in Pakistan. Although the appellant had a genuine and subsisting parental relationship with his children, he did not meet the criterion in Section EX(a) because all the children were under the age of 7 years. Whilst the appellant had a genuine and subsisting relationship with I S, he did not meet the criteria of Section EX(b) because there were no insurmountable obstacles to their relationship continuing outside the UK.

12. The judge accepted that I S and at least two of her children had leave to remain until November 2014. He nevertheless considered that it would be reasonable for them to follow the appellant to Pakistan in order to continue family life there. He noted that I S would not be returning as a single woman, and that they could relocate to a different area of Pakistan from that in which her family (whom she fears) reside. The Pakistani authorities would provide her with sufficient protection and the appellant would be able to support them from his work as a builder.

The grounds of appeal

13. There are two grounds of appeal. Firstly, the judge erred in applying the definition of "insurmountable obstacles" that is contained in Section Ex. 2 of Appendix FM of the Immigration Rules. This is because that provision was not in force at the date of the Immigration Decision. As a result, the judge had erred by "applying a more stringent test to the Appellant's article 8 claim" [paragraph 9]. Secondly, the judge erred in revisiting I S's asylum claim, and in doing so failed to take account of the fact the appellant and I S have a history of domestic violence and have only been able to "move on and re-establish their relationship" with the "supervision and support of social services" [paragraph 11].

Analysis

14. I do not accept either of the premises upon which the first ground of appeal is predicated. Firstly, the judge did not direct himself by reference to the definition of “insurmountable obstacles” that is now contained within Section Ex.2. Rather, he did so by reference to the *dicta* in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC) in which it said that “insurmountable obstacles” is not concerned with obstacles that are impossible to surmount, but is concerned with the practical possibilities of relocation [see paragraph 16 of the determination]. Secondly, and in any event, I do not accept that the ‘very significant obstacles’ test that is now contained within Section Ex.2 (and also in Section 117C of the Nationality, Immigration and Asylum Act 2002) is more “stringent” than that referred to in the jurisprudence, quoted at some length in the grounds of appeal. I am thus satisfied that the judge did not err in this regard.

15. Neither do I accept the argument that it was inappropriate to “re-visit” the question of whether I S would be at risk on return to Pakistan, in the very different circumstances to those that were contemplated when she was granted humanitarian protection. As Mrs Petterson rightly pointed out, I S was separated and had lost contact with the appellant at the time when she was granted humanitarian protection. However, that relationship is now fully restored. Indeed, it was the very existence of that relationship that in large measure formed the basis of the appellant’s Article 8 claim. The appellant would not therefore be returning to Pakistan as a single woman; rather, she would be returning with the full support of her partner and father of her children. The argument that the existence of that relationship was somehow dependent upon the continued support of social services is without any evidential basis and, thus, entirely speculative. Therefore, in deciding whether family life could reasonably be expected to be enjoyed outside the United Kingdom, the judge was entitled (and arguably obliged) to take account of I S’s current circumstances rather than those that appertained at the time when she was granted humanitarian protection [see section 85 of the 2002 Act].

Notice of Decision

16. The appeal is dismissed.

Notice: 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 or any member of their family. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

David Kelly
Deputy Judge of the Upper Tribunal **13 November 2014**