



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

Appeal Number: IA/36642/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 5 August 2015

Promulgated

On 14 August 2015

Before

**UPPER TRIBUNAL JUDGE PITT
UPPER TRIBUNAL JUDGE MARKUS QC**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD SHAFIQ AKBAR BUTT
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss E Savage, Home Office Presenting Officer

For the Respondent: Mr C Yeo, Counsel, instructed by Legal Rights Partnership

DECISION AND REASONS

- 1.** This is an appeal against a determination promulgated on 21 April 2015 of First-tier Tribunal Judge Adio.
- 2.** The appeal is brought by the Secretary of State for the Home Department. Although she is formally the appellant before us we refer to her in this

decision as the respondent, and to Mr Butt as the appellant, reflecting their positions before the First-tier Tribunal.

- 3.** Mr Butt wishes to remain in the UK with his partner who is a British citizen. The decision of First-tier Tribunal Judge Adio allowed his appeal under the partner provisions of Appendix FM of the Immigration Rules.
- 4.** In particular, Judge Adio found that the provisions of EX.1. were met, having concluded that there were insurmountable obstacles to the appellant and his partner exercising their family life outside the UK.
- 5.** The respondent's challenge to that finding is twofold.
- 6.** Firstly, the respondent maintains that it was not open to the judge to apply paragraph EX.1. This was because the appellant did not meet the suitability requirements of Appendix FM and where that was so the Immigration Rules did not allow for a freestanding application of paragraph EX.1; see Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 63 (IAC).
- 7.** The respondent's position was that the appellant did not meet the suitability requirement in paragraph S-LTR.2.2 which states:

“Whether or not to the applicant's knowledge -

 - (a)** false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application)”
- 8.** As set out at [9] in the refusal letter dated 5 September 2014, the respondent submitted that the appellant fell foul of paragraph S-LTR.2.2 by practising deception by getting a proxy to sit an ETS English language test.
- 9.** The respondent's second line of challenge was that the First-tier Tribunal erred in finding insurmountable obstacles where the evidence before him could not support such a finding.
- 10.** We can give our view relatively succinctly. As indicated by Mr Yeo at the hearing, it would have been preferable for Judge Adio to make a clear finding on the matter of a proxy ETS test. It remained the case, as conceded by Ms Savage, that there was nothing at all before the First-tier Tribunal other than the assertion at [9] of the refusal letter to support the respondent's case. There was not even anything showing that the respondent had ever been in contact with ETS concerning this appellant.
- 11.** It is well rehearsed case law, for example, RP (Proof of forgery) Nigeria [2006] UKAIT 00086, that the burden where an allegation of forgery is made is on the respondent and that the allegation needs to be proved by evidence. The head note of RP states:

“A bare allegation of forgery, or an assertion by an Entry Clearance officer that he believed the document to be forged can in these circumstances carry no weight. The Tribunal treats a document as forged only on the basis of clear evidence before it.”

12. Those matters being so, it did not appear to us that there could have been any outcome before the First-tier Tribunal other than that the allegation of deception was not made out. There was no evidence at all to support it. That meant that Judge Adio would have had to proceed to consider paragraph EX.1., however regrettable his failure to address the respondent’s allegation of deception.

13. The test in EX.1 is one of “insurmountable obstacles”. Paragraph EX.2 elaborates the test, stating that “insurmountable obstacles” means:

“The very significant difficulties to be faced by the applicant and 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 and/or their partner”

14. We noted also the guidance of the Court of Appeal in Agyarko v SSHD [2015] EWCA Civ 440 at [21] that the test of insurmountable obstacles is “a high hurdle”, “significantly more demanding than a mere test of whether it would be reasonable” and, at [23], “stringent”.

15. The First-tier Tribunal here had before it evidence of the very difficult family circumstances of the applicant’s partner prior to their meeting. He also had before him evidence of further difficulties arising from a miscarriage and serious and ongoing deterioration in her mental health such that she had required significant psychiatric intervention, the appellant being a very important support for her.

16. The First-tier Tribunal considered that evidence [11] and [12] of the determination. We saw nothing there that suggests he took the wrong approach to the evidence or misunderstood it in any way. In our view, it was open to the First-tier Tribunal judge to reach the conclusion that he did on “insurmountable obstacles” to family life continuing in Pakistan given the seriousness of the appellant’s partner’s condition, her need for stability in order to recover and her lack of familiarity with Pakistan even if her time there was limited to the appellant seeking entry clearance. It was not arguable, in our judgement, that it could not have been open to Judge Adio, to find for the appellant on the evidence before him.

17. Therefore we find, in essence, that the Secretary of State’s second challenge is one of disagreement rather than legal error and we uphold the findings of the First-tier Tribunal on paragraph EX.1.

18. For all those reasons we do not find the determination of Judge Adio disclose legal error.

Decision

19. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed

Date

Upper Tribunal Judge Pitt