Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/36920/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14 December 2015

Decision and Reasons Promulgated
On 5 January 2016

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMJAD HUSSAIN

Respondent

Representation:

For the Appellant: Mr S. Whitwell, Home Office Presenting Officer
For the Respondent: Ms H. Masoud, Counsel instructed by ZA Solicitors

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

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2. The appellant says that he entered the UK on 04 August 2005 with entry clearance as a visitor that was valid until 31 March 2006. He married on 04 February 2012. On 26 March 2012 he applied for leave to remain as the spouse of a British citizen. The application was refused in a decision dated 30 January 2013 without a right of appeal. The respondent issued an appealable immigration decision on 02 September 2014.

3. First-tier Tribunal Judge Stokes ("the judge") allowed the appeal in a decision promulgated on 23 June 2015. In light of the decision in *Singh & Khalid v SSHD* [2015] EWCA Civ 74 the judge found that the respondent was entitled to consider the application with reference to the new rules because the decision did not fall within the relatively small two month window identified by the Court of Appeal in that case. The judge went on to consider whether the appellant met the requirements of EX.1 and EX.2 of the immigration rules. In considering whether there were insurmountable obstacles to the couple continuing their family life outside the UK the judge considered principles outlined in *MF (Nigeria) v SSHD* [2014] 2 All ER 543, *Izuazu (Article 8 - new rules)* [2013] UKUT 00045 and *AB (Jamaica) v SSHD* [2007] EWCA Civ 1302.

4. The judge went on to consider the facts of the case. She considered the fact that the appellant's wife was a British citizen. Although she was born in India she had entered the UK in 1964 with her parents aged two years old. She was divorced from her first husband but has two children in the UK who are British citizens as well as grandchildren. Her mother is 75 years old and dependent on the appellant's wife to a certain extent. His wife is the sole director of her own company, which is an established business with sales totalling about £112,000 a year. The appellant helps his wife with the business, in particular, with physical tasks such as moving stock. His wife was on medication for a heart condition. The judge noted that she had never travelled to Pakistan. The judge took judicial notice of the fact that there are political tensions between India and Pakistan, which might make it difficult for an ethnic Indian to integrate into Pakistani society.

5. The judge also took note of the fact that the appellant's wife spoke one of the main languages of Pakistan. She was a Muslim so there would be few religious differences. The judge accepted that there was evidence to show that, as a woman, her life would be far more curtailed in Pakistan than it is in the UK where she is able to live independently and run her own business. The judge recognised that the appellant's wife would have his support to adapt to life in Pakistan but concluded that her relocation away from a culture where she had lived since she was two years old, and her separation from her immediate family, was likely to have an adverse affect on her health. The judge also took into account the fact that the appellant had been living outside Pakistan for the last 10 years albeit that he continued to have links there through his children from his previous marriage.

6. The First-tier Tribunal went on to mention the cases of *Zambrano* (Case C-34/09) and *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 00048 but did no more than cite the general principles outlined in those cases. The judge then

concluded that, in light of the evidence, the appellant, and particularly his wife, would face "very significant difficulties" in continuing their family life in Pakistan, which could not easily be overcome and would entail very serious hardship. As such the judge concluded that the appellant met the requirements of paragraph EX.1(b). The judge went on to consider whether removal in consequence of the decision would be unlawful under Article 8 with reference to the five stage test in *R v SSHD ex parte Razgar* [2004] 3 WLR 58 she concluded, largely in reliance on her earlier findings relating to EX.1(b), that removal would be disproportionate in all the circumstances of the case.

7. The respondent seeks to appeal the decision on the following grounds:

   (i) The First-tier Tribunal erred in relation to the proper assessment of the "insurmountable obstacles" test contained in paragraph EX.2 of Appendix FM. The test is more stringent than merely being unreasonable to expect their family life to continue outside the UK. The judge focussed too heavily on factors relating to their life in the UK rather than whether there were obstacles to their family life continuing in Pakistan.

   (ii) The First-tier Tribunal erred in reliance on *Zambrano* because the decision did not compel the appellant's spouse to relocate elsewhere. The case was not authority for the proposition the judge was trying to make.

   (iii) The First-tier Tribunal erred in relying on the appellant's earnings from unlawful employment when considering whether he would be financially independent for the purpose of section 117B(3) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002").

Decision and reasons

8. The central issue in this appeal is whether the judge was entitled to take into account the matters she did in coming to the conclusion that the appellant met the requirements of paragraph EX.1(b) of the immigration rules in light of the associated definition contained in EX.2.

9. Paragraph EX.1(b) was inserted into the immigration rules as part of the major changes introduced on 09 July 2012 (HC 194).

   "EX.1. This paragraph applies if

   ...

   (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."

10. Paragraph EX.2 was introduced by a Statement of Changes to the immigration rules (HC 532) and applies to all decisions made on or after 28 July 2014.

"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."

11. In the recent decision of the Court of Appeal in *R (Agyarko) v SSHD* [2015] EWCA Civ 440 Lord Justice Sales made the following statements about the "insurmountable obstacles" test contained in paragraph EX.1(b) of the immigration rules (prior to the introduction of paragraph EX.2):

"21. The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.

22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, para. [39] ("… whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them …"). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by *Jeunesse v Netherlands* (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).

23. For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in *Jeunesse v Netherlands* at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal in *Izuazu v Secretary of State for the Home Department* [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).

24. Secondly, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which

> has to be satisfied in every single case across the whole range of cases covered by Article 8: see paras. [29]-[30] below."

12. The definition now contained in paragraph EX.2 of the immigration rules has two main elements. The first element is that the applicant or their partner must show that they would face "very significant difficulties" in continuing their family life together outside the UK. The second element is divided into two alternatives (i) the difficulties could not be overcome <u>or</u> (ii) the difficulties would entail "very serious hardship" for the applicant or their partner.

13. The immigration rules are said to reflect the respondent's view of where a fair balance should be struck between the right to respect for private and family life and public interest considerations relating to the maintenance of an effective system of immigration control (paragraph GEN.1.1 Appendix FM). The rules should be read in a way that reflects a proper interpretation of Article 8 of the European Convention. However, there will be some cases where the rules do not address the relevant Article 8 issues. In such cases it may be necessary to consider whether there are compelling circumstances to justify granting leave to remain outside the immigration rules: *SSHD v SS (Congo)* [2015] EWCA Civ 387.

14. The respondent's first ground of appeal makes general statements about the stringent nature of the test of "insurmountable obstacles" within the meaning of EX.1(b) of the immigration rules but then goes on to list a series of issues where it is said that the judge failed to give adequate reasons for finding that there were insurmountable obstacles in this case. However, many of the points amount to little more than disagreements with the judge's findings.

15. Mr Whitwell argued that it is a "forward facing" test that should be assessed solely in relation to what obstacles the couple might face in the applicant's country of origin but *Agyarko* makes clear that the test of "insurmountable obstacles" is intended to have the same meaning as Strasbourg jurisprudence, which takes into account all relevant factors in the assessment. Mr Whitwell did not refer me to any case law that supported such a narrow reading of the test. It seems clear that an obstacle to relocation may include compelling circumstances surrounding an applicant or his partner's life in the UK that could properly be described as a very significant obstacle to them being able to continue their family life outside the UK. For example, if the couple were the main carers for a close family member in the UK. The wording of paragraph EX.1(b) and EX.2 states that there must be insurmountable obstacles to family life continuing "outside the UK" but does not specify that those obstacles need be in another country, although such obstacles if they did exist in the proposed country of relocation would also be relevant to the overall assessment.

16. The grounds complain that the judge's findings in relation to factors such as the sponsor's length of residence in the UK, her close family connections in the UK, the fact that she is an ethnic Indian who would relocate to Pakistan where political relations "remain troubled" and the sponsor's medical condition were inadequate. While some of the judge's findings in relation to those matters were more fully

reasoned than others, and it is the case that none of those factors, taken alone, would have been sufficient to meet the requirements of such a stringent test, it was open to the judge to take into account the cumulative effect of a range of factors in assessing whether there could properly be said to be insurmountable obstacles to the couple continuing their family life outside the UK.

17. Ms Masoud accepted that the judge was mistaken in thinking that the appellant's wife had not been to Pakistan because she had made a single visit there on a business trip about 10 years ago. Although this is an error of fact I find that the judge's finding on this issue did not form such a central part of her reasoning that it would be material to the outcome of the appeal. It is nevertheless the case that the sponsor has very little experience of life in Pakistan.

18. Similarly, the judge's reference to *Zambrano* was limited to a single reference in paragraph 18, which quoted an extract from the Tribunal's decision in *Sanade & Others*. It came at the end of her assessment of whether there were "insurmountable obstacles". The reference was rather opaque and the point was not developed in any way save for the bare reference to those cases. I accept that if the judge did purport to apply the *Zambrano* in this case it would amount to an error given the relatively narrow application of those principles. However, the judge's reference is so limited that it does not appear that she was seeking to do any more than emphasise that the rights of a British citizen, who is also a European citizen, should be taken into account. Given the very limited reference, which was not developed with any further reasoning, I conclude that even if the judge erred in referring to *Zambrano* it formed such a peripheral part of the overall reasoning that it was not material to her overall conclusion.

19. The judge conducted a detailed and careful assessment of all the relevant circumstances of the case and it is clear from her conclusion at paragraph 19 of the decision that she applied the correct test and was fully aware of the stringent nature of the test. She concluded that in light of the evidence before her the appellant, and in particular his wife, would face "very significant difficulties" in continuing their family life in Pakistan and found that these could not easily be overcome and would entail very serious hardship. Another judge may have come to a different conclusion on the same evidence but it was open to the judge to make the findings that she did. It could not be said that her conclusion is irrational on the facts of this case.

20. Even if I am wrong in relation to the judge's assessment of the test of "insurmountable obstacles" it is quite clear that she took into account all of the same factors in her assessment of Article 8 outside the immigration rules. This approach is consistent with the Court of Appeal decision in *Agyarko*, which recognised that there may be some cases that engage the operation of Article 8 even if insurmountable obstacles are not shown. The judge made reference to the five stage test outlined in *R v SSHD ex parte Razgar* [2004] 3 WLR 58 and gave proper weight to the public interest considerations outlined in section 117B of the Nationality, Immigration and Asylum Act 2002 that weighed against the appellant [23].

21. The judge took into account the fact that the appellant spoke English and was not a burden on the taxpayer (in light of the evidence that showed that he helped his wife with her business) as factors that "weighed in favour of the appellant". In light of the Tribunal's decision in *AM (s.117B)(Malawi)* [2015] UKUT 0260 it is likely that no positive weight should be placed on these neutral factors. If a person does not speak English and is therefore less likely to integrate and is likely to be a burden on taxpayers it would add weight to the public interest considerations. The fact that a person is able to integrate and is not a burden on taxpayers is a matter that goes to the weight to be given to the public interest but does not add to the claim.

22. Although the wording suggests that the judge may have taken an incorrect approach to that part of her assessment I find that there is nothing to suggest that she placed undue weight on those matters such that it would have made any material difference to the outcome of the appeal. She made quite clear in paragraph 25 that she placed particular reliance on the factors that underpinned her findings in relation to EX.1(b) [25]. The two factors relevant to an assessment under section 117B(2) and (3) were at best peripheral to the judge's overall proportionality assessment. It is clear that having considered the public interest considerations that weighed in favour of removal it was open to the judge to conclude that there were sufficiently compelling circumstances to render the appellant's removal in consequence of the decision disproportionate.

23. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

<u>DECISION</u>

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed Date 16 December 2014

Upper Tribunal Judge Canavan