Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04394/2015**

THE IMMIGRATION ACTS

Heard at Glasgow **Decision and Reasons Promulgated**

On 17 July 2017 **On 21 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

YASIR BUTT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Shafaatulla, solicitor, of Five Star (International) Ltd.
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

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2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge P A Grant-Hutchison promulgated on 13 December 2016, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 20 December 1984 and is a national of Pakistan. The Appellant applied for leave to remain in the UK as the spouse of a British Citizen. On 5 August 2015, the Secretary of State refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge P A Grant-Hutchison ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 31 May 2017, Judge Adio gave permission to appeal stating

> "1. The appellant seeks permission to appeal in time against a decision of the First-tier Tribunal (Judge PA Grant-Hutchison) who in a decision promulgated on 13 December 2016 dismissed the appellant's appeal against the respondent's decision to refuse to grant leave to remain on family and private life grounds. The grounds in the permission application argue that the appellant's partner was born in and has spent her life in the UK and she has never lived in Pakistan and not visited since childhood. The Judge failed to attach due weight to this. It was also argued that the sponsor's mother and sister are heavily reliant on her for day-to-day care and assistance both physical and emotional. It is argued that the Judge did not apply the correct standard of proof.
>
> 2. The Judge found that there are obstacles but these are not significant however the Judge did not seem to analyse that the sponsor is a British citizen who is pregnant and who is entitled to such medical care in the UK on the basis of her citizenship. The Judge seems to concentrate on the fact that the sponsor is from a Pakistani ethnic background and not mentioning that she is a British citizen. Bearing in mind the sponsor's ill-health the fact that she assists her sister and the emotional and physical care involved it is arguable cumulatively that there is an error of law in the Judge's decision evaluating whether he obstacles faced by the sponsor is significant. I find that there is an arguable error of law."

The Hearing

6.(a) For the appellant, Ms Shafaatulla moved the grounds of appeal. He told me that the focus is entirely on [18] of the decision. She told me that the Judge had made both an error of fact and an error of law there. At [18] the Judge records that the sponsor is pregnant. She told me that at the date of hearing the sponsor was not pregnant, and that no evidence was

led to suggest that she was. Ms Shafaatulla told me that the sponsor is now pregnant.

(b) Ms Shafaatulla told me that the Judge's conclusion at [18] is incorrect. She told me that the evidence indicated that the appellant provides significant day-to-day personal care, including toileting and bathing, to her sister. She told me that the appellant's mother is unable to provide that support and care because the appellant's mother suffers from depression and panic attacks. The appellant's sister suffers from fibromyalgia, depression, slipped discs and trapped nerves. She told me that the Judge had failed to give adequate consideration to the evidence of the amount of support that the sponsor gives her sister.

(c) Ms Shafaatulla emphasised that the sponsor and her family are all British citizens, and that the sponsor has not visited Pakistan since she was a child. She referred me to Agyarko [2017] UKSC 11**,** and told me that the Judge has applied too high a test. She told me that the circumstances in this case amount to insurmountable obstacles as defined in EX2 of the immigration rules. She urged me to allow the appeal and to substitute my own decision allowing the appellant's appeal against the respondent's decision.

7. For the respondent, Mr Matthews told me that the decision does not contain errors, material or otherwise. He told me that the Judge considered all relevant factors, then made a decision which applies the correct legal test, set out in Agyarko [2017] UKSC 11**.** He told me that there can be no criticism of the Judge's fact-finding process, that the Judge took correct guidance in law and that the Judge took account of all relevant factors in the appellant's case before reaching conclusions well within the range of conclusions reasonably available to the Judge to reach. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. This case turns entirely on consideration of the appellant sponsor's article 8 family life. The focus in this appeal is on paragraphs EX.1 and EX.2 of appendix FM to the immigration rules.

9. Paragraphs EX.1(b) & 2 say

> '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.
>
> 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.'

10. What is plead is that the sponsor's commitment to her mother and sister creates very significant difficulties for the appellant and sponsor to continue their family life outside the UK.

11. It was held in Agyarko [2017] UKSC 11 that the definition of "insurmountable obstacles" at EX.2 as meaning *"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"* was consistent with Strasbourg case law. The court referred to the case of Jeunesse v Netherlands. 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 "insurmountable obstacles" (as defined) in continuing their family life together outside the UK. Even in a case where such difficulties did not exist leave to remain could nevertheless be granted outside the rules (according to the IDIs) in "exceptional circumstances" i.e. *"circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate".* The rules and IDIs together were compatible with Article 8. This was not to say that decisions in individual cases would necessarily be compatible with Article 8. "Exceptional circumstances" did not mean that a unique or unusual feature was to be sought and in its absence the application rejected. A proportionality test had to be carried out. A court or tribunal considering whether a refusal of leave to remain was compatible with Article 8 in the context of precarious family life had to decide whether the refusal was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, whilst also considering all factors relevant to the specific case in question, it should give appropriate weight to the Secretary of State's policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. "*The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".*

12. The challenge to the Judge's decision focuses entirely on [18] of the decision. No criticism is made of any other part of the decision.

13. At [18] of the decision, the Judge records that he considers the health of the appellant and the sponsor, and the sponsor's commitments to his sister and her mother, as well as the sponsor's lack of familiarity with Pakistani culture and life. The Judge explains that he does not accept that only the sponsor can care for her ailing family members. The Judge accepts that there are obstacles, but finds that

> "They are not significant ones."

14. In R (on the application of Luma Sh Khairdin) v SSHD (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC) it was held where the Upper Tribunal is considering, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007, whether there is an error of law in the decision of the First-tier Tribunal involving Article 8 proportionality, the task of the Upper Tribunal is confined (at that point) to deciding if the First-tier Tribunal's assessment of where to strike the balance was unlawful, according to the error of law principles set out in R (Iran) [2005] EWCA Civ 982. In R (Iran) v SSHD (2005) EWCA civ 982 the Court of Appeal was took the firm view that a decision on proportionality of an Adjudicator or Immigration Judge who has properly directed himself can only be overturned on reconsideration on traditional public law grounds.

15. At [12] of the decision, the Judge correctly reminds himself of the standard & burden of proof. Between [13] and [17] of the decision, the Judge takes correct guidance in law, which is not the subject to challenge in this appeal.

16. The Judge's findings of fact and his proportionality balancing exercise is found in [18] of the decision. It is suggested for the appellant that the Judge applies too high a threshold, but the final two sentences of [18] are manifestly correct in law. What the Judge says in the final two sentences of [18] is entirely consistent with what is said in Agyarko

17. The facts argued for the appellant relate to the sponsor's circumstances - her British citizenship, her lack of familiarity with Pakistan, and her obligations to her mother and sister who both suffer from disabling conditions. Those are precisely the factors that were considered by the Judge in the analysis at [18] of the decision. In reality, what is now argued is a disagreement with the weight the Judge afforded each of the factors plead for the appellant and sponsor.

18. In Green (Article 8 – new rules) [2013] UKUT 254 (IAC) the Tribunal said that "*Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law".* In the decision promulgated on 13 December 2016, the Judge clearly took account of each strand of evidence and reached conclusions which were well within the range of conclusions available to him.

19. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

20. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

21. No errors of law have been established. The Judge's decision stands.

DECISION

22. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Paul Doyle Date 20 July 2017

Deputy Upper Tribunal Judge Doyle