Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA125372014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th June 2017	**On 3rd July 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YADDARTHAN CHANDRASEGARAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel (Direct Access)

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Sri Lanka born on 10th June 1989. His appeal against the decision to remove him was allowed by First-tier Tribunal Judge Dineen under the Immigration Rules and on Article 8 grounds on 14th April 2015.

2. The Secretary of State appealed on the grounds that the judge misdirected himself in law in failing to apply the correct test set out in paragraph EX.2

which states: “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.” It was submitted that the reasons given by the judge, that the Sponsor was British and had a family and a job in the UK, were insufficient to amount to insurmountable obstacles.

3. Permission was granted by Upper Tribunal Judge Macleman, on 25th April 2017, on the basis that it was arguable that paragraph EX.2 should have been applied and was not. UTJ Macleman stated: “The Secretary of State for the Home Department’s grounds contend failure to consider and apply paragraph EX.2 of Appendix FM of the Immigration Rules. (EX.2 came into force on 28/7/14 after the date of the Respondent’s decision, but before the date of the hearing in the FtT. It is not mentioned in the judge’s narration of the submissions. The suspicion arises that he did not have the assistance he should have had from representatives on both sides about its applicability.) It is highly unfortunate that the Appellant now finds the case re-opened after a long series of delays not of his making. However, in respect of the timeliness issue, I find it inescapable that the foregoing circumstances require this application to be admitted and on the merits, the Secretary of State states an arguable case that paragraph EX.2 (even if not drawn to attention) should have been applied, but was not.”

The Appellant’s immigration history

4. The Appellant entered the United Kingdom on 15th September 2009 as a Tier 4 (General) Student valid until 1st November 2012. He married a British citizen on 31st August 2011. He submitted a Tier 4 application for leave to remain on 27th November 2012 which was refused on 18th January 2013. A further Tier 4 application on 21st February 2013 was refused on 4th July 2013. He was served notice as an overstayer on 3rd June 2013.

5. On 3rd July 2013, the Appellant made an application as the spouse of a British citizen. This application was refused on 9th September 2013 and a One-Stop Notice was issued on 24th January 2014. The Appellant made representations on human rights grounds on 3rd February 2014. Those representations were rejected for the reasons given in the letter dated 19th February 2014 and a decision to remove the Appellant to Sri Lanka was made on the same date. The Appellant appealed on 10th March 2014 and the appeal was heard by First-tier Tribunal Judge Dineen on 17th October 2014

The judge's decision

6. The judge found that the Appellant and Sponsor were truthful witnesses and each of them had been consistent. The relationship was genuine and subsisting. The judge went on to consider paragraph EX.1 and made the following findings:

> "34. So far as this requirement is concerned, it is not necessary for the appellant to show that there are obstacles which literally cannot be surmounted. It is not necessary to show it is impossible to surmount any such obstacle. It is a question of whether there are particularly compelling reasons arising from the specific circumstances of the case why leave to remain should be granted.
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> 35. I bear in mind that, as noted by the respondent, the appellant has family in Sri Lanka to whom he could return. However, I also take into account that the sponsor is a British citizen with a British family in the UK, and has been born and brought up in the UK. For her, the prospect of relocating in Sri Lanka would be frightening, and, as she stated, she would not resettle with her husband there, despite the strength of their relationship.
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> 36. For the sponsor to relocate to Sri Lanka would entail serious interference with the ongoing close relationship she has by way of private life with her British citizen parents and sister in the UK. It would also, as I accept, mean that she could not pursue the career for which she has been trained in biomedical science.
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> 37. All of these matters, as I find amount to compelling circumstances which satisfy the requirement of EX.1.
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> 38. If, contrary to my above findings, EX.1 is not satisfied, I am satisfied that the removal of the appellant would constitute a serious interference with the family and private life of both himself and the sponsor. While such interference would be for a lawful purpose within Article 8(2), I am also satisfied, for the reasons given above, that there are very compelling reasons why that interference would be disproportionate.
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> 39. In reaching this conclusion, I take into account all the circumstances, including the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002. I take into account sub-Section (1) that the maintenance of effective immigration controls is in the public interest and I find that, in all the circumstances of the case including the existence of a genuine and subsisting marriage, the continued presence of the appellant in the UK would not be inconsistent with the maintenance of such controls.

40. The appellant is a fluent English speaker. He and the sponsor are financially independent and not a burden on taxpayers. They are both clearly integrated into UK society. Their relationship was not formed at a time when the immigration status of the appellant was unlawful or precarious. Sub-paragraphs (2) to (5) inclusive are therefore satisfied. Sub-paragraph (6) is inapplicable.

41. I find there is no public interest consideration adverse to the appellant."

Submissions

7. Mr Bramble submitted that the judge applied the test of compelling circumstances in his consideration of insurmountable obstacles. This was not the appropriate test. The test under the Immigration Rules was more stringent than the test outside the Rules. This was a material error because the judge's findings at paragraphs 34 to 36 were not sufficient to demonstrate insurmountable obstacles.

8. Mr Bramble submitted that paragraph EX.2 was not in existence at the date of decision, but it was applicable at the date of hearing and the judge should have applied it. If the judge had erred in his application of EX.1, this affected his assessment of Article 8 outside the Immigration Rules. Further, in considering when the relationship was formed, the judge failed to appreciate that the Appellant was a student and therefore his immigration status was precarious.

9. The judge's approach under the Immigration Rules amounted to a material error of law which undermined his further conclusions on Article 8. No weight should be attached to the Appellant's case and greater weight should be attached to the public interest in concluding that removal is proportionate.

10. Mr Slatter submitted that, whilst this was a generous decision, it was a decision that was open to the judge on the material before him. Mr Slatter relied on paragraph 27 of EJA v Secretary of State for the Home Department [2017] EWCA Civ 10 which states: "Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the FtT has failed to mention *dicta* from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, 'reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account'. He added that an 'appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself'. Moreover, some

principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof; or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding."

11. Mr Slatter relied on the following paragraphs of R (on the application of) Agyarko v Secretary of State for the Home Department [2017] UKSC 11:

> "16. At the time when the present cases were considered, the Rules did not define the expression 'insurmountable obstacles'. A definition was however introduced with effect from 28 July 2014, when paragraph EX.2 was inserted into Appendix FM by the Statement of Changes in Immigration Rules (HC 532, 2014):
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> > '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.'
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> Paragraph EX.2 applies only to applications decided on or after 28 July 2014."
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> "42. In *Jeunesse,* the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under Article 8 of the removal of non-settled migrants from the contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in a contracting state, whether there were 'insurmountable obstacles' in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control (for example a history of breach of immigration law) or considerations of public order weighing in favour of exclusion.
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> 43. It appears that the European Court intends 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. In some cases, the courts have used other expressions which make that clearer, for example referring to …. 'major impediments'… or asking itself whether the family could 'realistically' be expected to move… '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… "

44. Domestically the expression ‘insurmountable obstacles’ appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in paragraph 15 above that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression ‘insurmountable obstacles’ is now defined by paragraph 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.’ That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in paragraph 16 above paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition it would nevertheless be reasonable to infer consistently with the Secretary of State’s statutory duty to act compatibly with Convention rights that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I will therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.”

“57. That approach is also appropriate when a court or tribunal is considering whether refusal of leave to remain is compatible with Article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is 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 it should give appropriate weight to the Secretary of State’s policy expressed in the Rules and the 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. It must also consider all factors relevant to the specific case in question including, where relevant, the matters discussed at paragraphs 51 to 52 above. 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. Mr Slatter submitted that the First-tier Tribunal Judge had applied the correct test and had properly considered insurmountable obstacles. There

was no definition in the Rules at the time the Respondent made her decision. If it was the case that the judge should have applied paragraph EX.2, which was in force at the date of hearing, then the judge had done so. The judge had applied what was set out in Strasbourg case law and knew the test. It had the same meaning before the insertion of paragraph EX.2 as it did after paragraph EX.2 was brought in. The test applied by the judge was not inconsistent with the insurmountable obstacles test set out in paragraph EX 2. Therefore, the judge had not misdirected himself in law. The Respondent's challenge was a reasons challenge and the judge's finding that there were insurmountable obstacles was open to him on the facts set out at paragraphs 34 to 36 of the decision.

13. Mr Slatter submitted that the judge's findings at paragraph 34 were consistent with paragraphs 42, 43 and 57 of Agyarko. The Appellant's wife, the Sponsor, would not resettle in Sri Lanka and therefore there would be serious interference with family life, which would effectively be ruptured. There was also the fact that she had no ties to Sri Lanka, she would be in fear of relocating to Sri Lanka and she could not pursue her career there. All these matters would entail serious hardship for the Sponsor. The judge had properly directly himself and he had given adequate reasons. The Respondent's grounds amounted to disagreements with the judge's decision, but disclosed no material error of law.

14. In response Mr Bramble submitted that insurmountable obstacles had the same meaning as that set out in EX.2. He submitted that compelling reasons were not of the same level as very significant difficulties entailing serious hardship. The judge was not able to carry over his assessment of insurmountable obstacles into his assessment of Article 8. Compelling reasons was a less stringent test. Mr Bramble submitted that the judge's assessment of proportionality was flawed because he failed to attach sufficient weight to the public interest. The judge had made an error of law and the case should be remitted for rehearing.

Discussion and Conclusions

15. The implementation provisions in the Statement of Changes in Immigration Rules HC 532 state that paragraph 59 (the introduction of EX.2 into the Immigration Rules) is to "take effect on 28th July 2014 and applies to all applications, to which paragraphs 276ADE to 276DH and Appendix FM apply (or can be applied by virtue of the Immigration Rules), and to any other ECHR Article 8 claims (save for those from foreign criminals), and which are decided on or after that date."

16. In this case the definition of insurmountable obstacles set out in paragraph EX.2 was not part of the Immigration Rules at the time the Secretary of State made her decision to remove the Appellant from the UK. However, it was part of the Immigration Rules when the First-tier Tribunal came to consider it.

17. Mr Slatter was of the view that paragraph EX.2 did not apply in the Appellant's case because it was not in existence at the date of the Secretary of State's decision. Mr Bramble was of the view that it applied at the date of hearing and the judge should have considered it. I have no authority before me either way, but I find it is not necessary to resolve this issue because, in this particular case, the First-tier Tribunal judge was aware that the applicable test under the Immigration Rules was that of insurmountable obstacles and the definition in paragraph EX.2 was the same as that under Strasbourg case law, which the judge applied.

18. The judge did not apply a less stringent test of compelling circumstances. He was aware that it was not necessary for the Appellant to show obstacles which could not be surmounted, but that there must be "particularly compelling reasons arising from the specific circumstances of the case why leave to remain should be granted". The judge recognised the high threshold that must be met.

19. The judge found that the Sponsor was a British citizen with a British family in the UK and she had been born and brought up in the UK. The prospect of relocating to Sri Lanka would be frightening for her and she would not resettle there, with the Appellant, despite the strength of the relationship.

20. The judge took into account the factors referred to at paragraph 42 of Agyarko: the extent to which family life would effectively be ruptured; the extent of ties in the contracting state; whether there were insurmountable obstacles in the way of the family living in the country of origin of the non-national concerned; and whether there were factors of immigration control or considerations of public order weighing in favour of exclusion.

21. On the facts found by the judge, the Appellant's removal would cause serious hardship to the Sponsor. Family life would effectively be ruptured. The Sponsor would not relocate to Sri Lanka. She had no ties there and she would be unable to pursue her career in biomedical science. It would also disrupt her ties to the UK and the private life she had with her family and sisters. In considering immigration control, the Appellant had arrived in the UK legally as a student and married the Sponsor before his leave expired. His first application for further leave as a student was within the 28 day period. His second was out of time. His period of overstaying was limited to seven months during which time he made three applications for further leave to remain. He was not seeking to evade immigration control. The Appellant did not have a significant adverse immigration history or other considerations of public order weighing in favour of his exclusion.

22. The matters which were of concern to the judge were those which were relevant to the assessment of insurmountable obstacles and his reference to particularly compelling reasons did not demonstrate otherwise. The judge's conclusions were consistent with Strasbourg case law and

paragraphs 42 to 44 of Agyarko. The factors identified by the judge would entail very serious hardship for the Appellant and his partner. The failure to refer to EX.2 was therefore not material to the judge's decision to allow the appeal under the Immigration Rules. I find that the judge has applied the correct test and, whilst his decision might be considered to be a generous one, it was one which was open to him on the evidence before him.

23. The judge found that the Appellant's removal would constitute a serious interference with the family and private life of both the Appellant and the Sponsor. The factors identified by the judge amounted to compelling reasons why that interference would be disproportionate, namely the serious hardship caused to the Sponsor and the lack of weight to be attached to the public interest bearing in mind the Appellant had not formed his relationship at a time when his immigration status was unlawful. There was no material error in the judge's application of section 117B of the Nationality, Immigration and Asylum Act 2002. The Appellant's precarious status as a student was only relevant to the assessment of his private life.

24. Accordingly, I find that there was no error of law in the judge's decision of 14th April 2015 allowing the appeal under the Immigration Rules and on human rights grounds. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed Date: 30th June 2017

Upper Tribunal Judge Frances