



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/01149/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 9th April 2018

Promulgated

On 3rd May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR JASIM UDDIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hasan, Solicitor

For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Zahed dismissing his appeal against the Secretary of State's decision to refuse the Appellant's application for leave to remain as the spouse of a British national. The decision of Judge Zahed was promulgated on 24th July 2017. The Appellant was granted permission to appeal by First-tier Tribunal Judge Hollingworth. The grounds upon which permission was granted may be summarised as follows:

"1. It is arguable that the Judge has set out an insufficiently extensive analysis in relation to the question of whether there would be a breach of Article 8 in respect of family life. The Judge

has embarked upon a proportionality exercise having taken into account Section 117.

2. It is arguable that the Judge should have made specific findings of fact on the basis of the ambit of the available evidence given at the hearing in assessing the degree of weight to be given to the factors present. It is arguable that the Judge was able to proceed to consider whether there would be a breach of Article 8 given the findings made by the Judge in relation to the issues raised by the Respondent. At paragraph 16 the Judge refers to the human rights appeal having considered the suitability requirements under the Rules. At paragraph 18 the Judge referred to Agyarko.
 3. It is arguable that having embarked upon the proportionality exercise the Judge attached undue initial weight to the precariousness of family life in the context of the importance of maintaining effective immigration controls. It is arguable that the Judge attached undue weight to criteria in the Immigration Rules in relation to insurmountable obstacles in contra distinction to factors in favour of the Appellant. It is arguable the Judge has not made sufficient findings in relation to the evidence given at the hearing in the context of factors in favour of the Appellant and the circumstances appertaining to the Appellant's wife".
2. I was not provided with a Rule 24 response from the Respondent as one was not produced for the purposes of this appeal. The Respondent indicated however that the appeal was still resisted.

Error of Law

3. At the close of submissions I indicated I found an error of law such that the decision should be set aside, but that my reasons would follow. My reasons for so finding are as follows.
4. There were several issues live in the appeal before the First-tier Tribunal Judge, the first being the Appellant's suitability under S-LTR.1.6. concerning his taking an ETS (Educational Testing Service) exam and obtaining a TOEIC certificate. That matter was considered by the First-tier Judge at paragraph 9 through to 15 of the judge's decision and has not been challenged by either party in the present appeal. Thereafter, in the few remaining short paragraphs at paragraph 16 to 17 of the judge's decision the judge sets out the facts in relation to the marriage between the Appellant and his spouse, Mrs Farzana Amin. However, in paragraphs 18 and 19 there are no findings in relation to whether the marriage is genuine and subsisting which is the second issue which was live before the First-tier Tribunal. Although it seems implicit from the judge's going on to conclude in paragraph 20 that the Appellant's spouse is perfectly entitled to apply for the Appellant to join her in the UK from Bangladesh, there is no specific finding and no specific reasons as to why the marriage would

be genuine and subsisting - although I note that the Respondent has not taken issue with the unreasoned and implicit fact that the marriage has been accepted by the First-tier Tribunal. That is not a material error.

5. However, the judge reached an unannounced conclusion in paragraph 19 of the decision in simply stating (in the fourth sentence) that there are no insurmountable obstacles or any exceptional circumstances as to why the Appellant and his spouse cannot continue their family life in Bangladesh. In so finding, the judge did not give any reasons as to why that finding followed. There is only one relevant sentence in paragraph 19 which precedes the above finding which states that the Appellant's immigration status was always precarious as he had not sought entry for settlement. However, pursuant to the decision of *Agyarko* in the Court of Appeal and before the Supreme Court, precariousness will diminish over time and it does not follow that the lack of insurmountable obstacles in and of itself would never lead to a decision being disproportionate. On the face of this decision, equally, there is no ostensible evidence of a proportionality assessment other than the conclusion that "exceptional circumstances" have not been shown, notwithstanding that there is no reasoning which underlies that conclusion.
6. Mr Avery accepted in light of my observations, as recited above, that the appeal did contain a material error of law in the respect summarised.
7. I indicated therefore at the conclusion of the appeal that as no party had challenged paragraphs 1 through to 17 of the decision, those paragraphs would remain intact; however I would set aside paragraphs 18 to 20 of the decision, those paragraphs being infected by legal error.
8. The consequence of my findings is that the First-tier Tribunal's decision regarding suitability, concerning paragraph S-LTR.1.6., remain intact, but the remainder of the decision in respect of the issues concerning the genuineness of the appellant and his spouse's relationship, insurmountable obstacles and exceptional circumstances (the jurisprudential vernacular for a proportionality assessment in light of *Agyarko*) are hereby set aside and these issues will require re-making by the First-tier Tribunal *de novo* upon remittal.

Notice of Decision

9. The appeal to the Upper Tribunal is allowed.
10. The making of the previous decision involved the making of errors on points of law and is set aside to the limited extent indicated above in respect of paragraphs 18 to 20 alone of the decision.
11. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench in relation to the remaining issues of (a) the genuineness of the relationship between the appellant and his spouse, the existence or not of insurmountable obstacles (under paragraph EX.1) and, if insurmountable obstacles are not shown under the rules, an assessment

of 'exceptional circumstances' in the form of a proportionality assessment and fair balance of the competing interests.

12. No anonymity direction is made.

Signed

Date 02 May 2018

Deputy Upper Tribunal Judge Saini