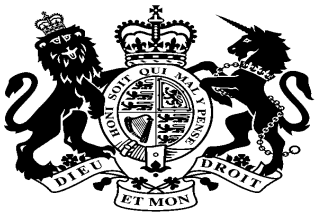


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05382/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th September 2018	**On 17th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

MUNTASIR AL MUSTAKIM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr P Turner (counsel)
For the Respondent: Mr S Walker (Home Office Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Muntasir Al Mustakim, a citizen of Bangladesh born 25 October 1985, against the decision of the First-tier Tribunal of 6 June 2018 to dismiss his appeal, itself brought against the refusal of his human rights claim on 11 February 2017.

Introduction

2. The Appellant entered the UK on 26 August 2003, with leave as a student extended until 30 November 2009. During that leave he applied for a residence card as the spouse of a Czech national, Katerina Tkadleckova, which was issued to him on 17 February 2015. On 30 May 2013 he applied for a permanent residence card, that application being refused on 4 March 2014 and the residence card being revoked, with a right of appeal.

3. Although he brought an appeal against the residence card decision, the Appellant subsequently withdrew it, preferring to pursue an application for indefinite leave to remain under the Immigration Rules on long residence grounds. Given that he had lacked leave under the Rules for a significant period, that application's viability depended on his contention that a significant period of his residence in the UK was nevertheless lawful as a matter of EEA law, as the partner of an EEA national exercising Treaty Rights here. That application was made on 17 February 2015 and upon its determination, the refusal was treated as a human rights claim, and hence a right of appeal arose. Within that application the Appellant also raised his relationship with Eva Rezankova, a British citizen of Czech origin.

The refusal and grounds of appeal to the First-tier Tribunal

4. Refusing the application, the Secretary of State did not accept that the Appellant had ever been in a genuine relationship with Ms Tkadleckova. A home visit by the immigration service of 5 November 2013 in relation to his outstanding marriage application with Ms Tkadleckova had resulted in an encounter with Ms Rezankova at the same address. The answers regarding his wife's absence given by both her and the Appellant were thought inconsistent and implausible; the decision maker concluded that the relationship with Ms Tkadleckova had been a marriage of convenience all along. Accordingly the Appellant had not shown he had been living in the UK consistently with the EEA Regulations over the relevant period. Additionally, he had been convicted of driving with excess alcohol on 5 November 2013, which merited refusal of a settlement application under the relevant suitability criteria. As to his present circumstances, it was not accepted that his relationship with Ms Rezankova was genuine, and even it was, it was not accepted that there were insurmountable obstacles to life together abroad.

5. The Appellant appealed against that refusal. His case on appeal was essentially that there were insurmountable obstacles to his relocation with Ms Rezankova to Bangladesh and/or that he would face very significant obstacles to integration there, that they had a viable claim under the Immigration Rules (immigration status apart) such that the *Chikwamba* principle should be applied in his favour, and that the immigration decision was generally disproportionate to the public interest it sought to uphold. In its impressively detailed decision, the First-tier Tribunal noted that it was not suggested that the Appellant had any right to

remain in the UK under the Citizens Directive, nor that the long residence application under the Rules was viable.

The decision of the First-tier Tribunal

6. The First-tier Tribunal accepted the evidence of Ms Rezankova, which it considered impressive in its spontaneity, and not reasonably capable of having been concocted. Accordingly the Judge accepted both that the Appellant had been in a genuine relationship with Ms Tkadleckova in the past, and that he was now in a genuine and subsisting relationship with Ms Rezankova now. It accepted that he had met Ms Tkadleckova in 2005, and began to live with her in June 2006; they married on 22 March 2007, and ran a business together in the ATM market for some time. They visited Ms Tkadleckova's family in the Czech Republic more than once. Their relationship was in difficulties by summer 2010 and Ms Tkadleckova moved out of their home to reside with friends in London; he learned that she was pregnant with another man's child in December 2010. She had left the UK in April 2011, and returned to the Czech Republic to have her baby there; subsequently she had only returned to the UK for the purpose of visits.

7. Accordingly the First-tier Tribunal accepted that the history provided of the two relationships was a credible one. The Appellant had nevertheless been less than forthcoming in his dealings with the Secretary of State. In particular he had not disclosed his claimed Sponsor's departure from the UK for a significant period, a failure which had led to the Respondent's suspicions as to the possibility of his marriage being one of convenience. The Judge noted that the Suitability criteria that had been invoked regarding the Appellant's conviction did not bite on a non-settlement case.

8. The Tribunal then applied its mind to the question of whether the Appellant and his partner faced insurmountable obstacles and/or very significant obstacles to integration were they to relocate to Bangladesh. The Judge noted that Mr Turner had dealt with this subject relatively briefly, notwithstanding that to make such a case required a party to surmount a high threshold, as shown by the authorities such as *Agyarko*. Of course, Ms Rezankova had no ties with the country whatsoever and was not familiar with its language or culture. However, that factor aside, they were a healthy young couple with only limited ties to the UK, and their circumstances did not begin to cross that threshold.

9. As to their case outside the Immigration Rules, the Appellant had been present on a precarious basis, given that he was in domestic law an overstayer. His assertion of historic lawful residence here was predicated on a marriage that had broken down some years ago and where his EEA Sponsor had subsequently left the country. He had clearly had no EEA residence rights from that time onwards; his residence card may have indicated the contrary, but he was clearly aware of the true circumstances, and had chosen not to advance his relationship with Ms

Rezankova as a basis for seeking recognition of residence rights as an extended family member.

10. Mr Turner focussed his arguments below on the proposition that the Appellant had been poorly advised as to his options vis-á-vis regularising his immigration status. Thus he had lost out on the opportunity to make a viable application. The First-tier Tribunal was unimpressed by this submission. The instructions he had provided to his former lawyers, Blavo and Co, in June 2013, were predicated on his remaining married to Ms Tkadleckova (and on good terms with her). The Judge noted that the advice the firm then gave was wholly appropriate based on the information received: he had given an account that suggested he remained the family member of a qualified person, and was thus entitled to a permanent residence card given the length of time over which this situation had endured.

11. As the First-tier Tribunal observed, the Appellant had not informed Blavo and Co that Ms Tkadleckova had in fact departed the UK in April 2011 and only returned for visits thereafter. Had they been aware of this fact, they might well have considered any application as her family member rather differently: since they had married in 2007, less than five years previously, he would not at that time have acquired *permanent* residence in his own right, and her loss of "qualified person" status following her departure from the UK prevented him enjoying any *enduring* right of residence as her spouse. Had the true circumstances been explained, they might have gone on to investigate whether there was any other relevant consideration in play, such as his relationship with Ms Rezankova. But this did not happen. Accordingly it was understandable that Blavo and Co had made a permanent residence application on his behalf, based on the information provided to them, and it was understandable that they had not advised him to make an application on domestic law long residence grounds. Such an application would not have been viable on the true underlying facts (as he had insufficient residence under the Immigration Rules and any rights of EEA residence that might potentially have plugged the gap would have lapsed for the reasons just explained).

12. Accordingly the First-tier Tribunal rejected the submission that the Appellant had been materially disadvantaged by the advice of previous lawyers. This left the question of whether the Appellant should join the queue to seek entry clearance as envisaged by the Rules. As shown by the line of authority in *Chikwamba*, *Hayat* and *Tikka*, where a relationship, if reiterated via a future entry clearance application, would foreseeably satisfy the criteria of the Immigration Rules as a partner, it might be disproportionate to enforce an essentially procedural requirement. However, as those authorities also demonstrate, this was subject to the question of whether there was any "sensible reason" to expect the Appellant to return abroad to meet the formal requirement of obtaining entry clearance. The Judge noted he had been economical with the truth as to how he had presented his case to the Respondent in the past (having failed to disclose Ms Tkadleckova's return abroad to Blavo and Co, and failed to reveal the breakdown of his relationship with her to

the immigration officers who conducted the home visit). Accordingly there was a sensible reason, having regard to the important consideration of maintaining immigration control, for requiring the entry clearance route to be enforced.

Onwards appeal

13. Grounds of appeal contended that the First-tier Tribunal had erred in law by

    (a) Failing to take account of all relevant considerations in assessing the question of insurmountable obstacles, particularly those relevant to the difficulties that the Appellant and Sponsor would face in making a life for themselves in Bangladesh given they were a mixed race couple facing relocation to a strict Islamic country in which Ms Rezankova had never lived;

    (b) Making a perverse decision as to the potential applicability of the *Chikwamba* principle given that the Tribunal had differed from the Secretary of State in its assessment of the asserted relationship between the Appellant and Ms Rezankova;

    (c) Failing to take account of all relevant considerations in determining the appeal outside the Immigration Rules.

14. Permission to appeal was granted without restriction, though express attention was given to the arguability of the ground challenging the consideration of insurmountable obstacles as unduly brief, bearing in mind the favourable finding on the evidence of Ms Rezankova generally.

15. Before me Mr Turner emphasised those factors of the case which in his submission amounted to insurmountable obstacles to return abroad. The relationship of Appellant and Sponsor would not be accepted in a strict Muslim country such as Bangladesh: they would be unable to proclaim their relationship as a couple there. The Home Office Guidance on *Minority Religious Groups* recorded evidence that Christians were at the bottom of the social hierarchy; and the CPIN on *Women fearing gender based violence* set out problems such as those heralded in its title. If inter-faith marriages provoked violence then surely inter-faith cohabitation would surely foreseeably provoke adverse attention too. That Guidance had escaped the attention of the First-tier Tribunal, Mr Turner not having produced it, but it was his case that it had been the duty of the Secretary of State to put forward such material if wishing to advance a case that was inconsistent with it.

16. Mr Turner contended that there was simply insufficient acknowledgment of the positive factors that had been found in the Appellant's favour in the First-tier Tribunal's decision. This was a case where the First-tier Tribunal had accepted a significant change of background from that upon which the Home Office had determined the appeal. It had accepted that each of the Appellant's asserted relationships had been genuine at relevant times; the Judge should have factored

that conclusion into the proportionality equation. The "insurmountable obstacles" aspect of the case had received minimal attention compared to the detail afforded to other issues. Furthermore, the Appellant had changed his name by deed poll to Joshua Maal, which was itself a strong indication of his degree of integration in the UK.

17. Mr Walker submitted that the First-tier Tribunal had carried out an impeccable consideration of all relevant issues by reference to the appropriate legal principles.

Findings and reasons

18. As can be seen from my summary of the reasoning below, the First-tier Tribunal decision is detailed and impressively reasoned. Nevertheless, this does not immunise it from the possibility of being flawed by legal error, and Mr Turner has permission to so argue.

19. As noted by the First-tier Tribunal, Mr Turner primarily argued below on the basis that a failure in the legal advice previously given to his client amounted to the kind of exceptional circumstances that could show that his departure from the UK would be disproportionate. Indeed, the lack of objective evidence before the Judge below as to the insurmountable obstacles said to be faced by the couple abroad is now highlighted by the indirect route by which supporting material has now been sought to be adduced.

20. It seems to me that the treatment of the argument of inadequate legal advice was impeccably dealt with by the First-tier Tribunal; indeed before me Mr Turner did not seriously suggest otherwise. The Appellant had indeed been less than forthcoming as to his true circumstances, both with his former legal advisors and with the Secretary of State. As noted by Judge Blundell, the departure from the UK of Ms Tkadleckova removed any lawful basis from his own stay. Any residence card represents only the official understanding of the underlying legal reality.

21. In her witness statement for the appeal hearing below Ms Rezankova stated, of the Appellant, that "His proposed removal from the UK would be not just a personal disaster for Joshua and myself but also a huge loss for the many people who befriended him over the years." It is difficult to find very much else by way of *evidence* rather than assertion. Undoubtedly the grounds of appeal to the First-tier Tribunal raise numerous issues that might, if addressed by appropriately detailed independent evidence, together amount to a viable case of insurmountable obstacles. But the material emanating from the Appellant and Sponsor themselves was slight in the extreme.

22. The first ground of appeal to the Upper Tribunal attacks the First-tier Tribunal's approach to the assessment of insurmountable obstacles based on the cultural differences between life in the UK, as opposed to life in Bangladesh, for a couple of different ethnicities, where one is of Czech origin. This ground was not

advanced in the conventional manner, by reference to objective evidence that was before the Judge below. Thus the Home Office Guidance first entered the proceedings before me when Mr Turner referred to a witness statement of 4 September 2018 from Ms Rezankova. No Rule 15 application was made to adduce that evidence, and besides, as I pointed out at the time, it fell foul of the self-evident necessity that an error of law be established via material that was in evidence before the First-tier Tribunal.

23. Mr Turner sought to bypass this objection to the way his case was put on the basis that the Secretary of State had been under a duty, as identified by *UB (Sri Lanka*) [2017] EWCA Civ 85, to put it forward this material of his own motion.

24. However, I do not think that this approach to litigation is acceptable. It was readily apparent that the Appellant below would need to demonstrate insurmountable obstacles to relocation abroad if his fall-back argument, as to the alleged failings of past legal advisors, was to fail. The insurmountable obstacles argument is in principle the primary point, given it is the focus of the Rules. Issues such as inadequate legal advice and the *Chikwamba* principle are logically secondary in nature, arising only if the case under the Rules is not made out.

25. The various pieces of Guidance referenced by Mr Turner are to my mind not sufficiently clear cut as to have raised an obligation on the Presenting Officer to draw them to the Judge's attention. For example, the Guidance on *Minority Religious Groups* speaks of Christians being at the bottom of Bangladesh's social hierarchy, suffering significant discrimination and extortion, for example damaging their access to a livelihood by way of rickshaw-driving or their access to public wells. However it is very difficult to imagine that this state of affairs applies to a returning national whose family have been able to finance his UK studies and who must be presumed to have always had his return to Bangladesh in contemplation. He and his Sponsor would present to the outside world as a relatively sophisticated couple and must be presumed to have something by way of social capital by way of his extended family and friends to draw upon. There are reports of occasional violent incidents against Christians in particular parts of the country, but I have seen no overt evidence that any such risks would extend to someone like Ms Rezankova, ie a person of European origin who would presumably be living in an urban environment.

26. One organisation is recorded as stating this:

> "… disadvantaged groups of women and girls, including Dalit women, women with disabilities, elderly women, Rohingya refugee women and women of ethnic minorities face multiple intersecting forms of discrimination due to their gender, health, indigenous identity, caste and socio-economic status"

27. Ms Rezankova clearly does not fall into any of those groups. So once again, I do not think that one can fairly conclude that this published Guidance, which of course is articulated in the context of *asylum* rather than *private and family life* claims, was material that was so incompatible with the Home Office's stated case that it demanded disclosure to the First-tier Tribunal. I accept that had it been available to the Judge below, it might have given rise to a more detailed examination of the question of insurmountable obstacles. But it is simply not the kind of material to which there is only a single response in the Appellant's favour, such that it should be allowed to undermine the otherwise lawful approach of a Judge whose attention was not directed towards it.

28. Mr Turner also argued that the First-tier Tribunal had failed to give sufficient weight to those factors of the couple's circumstances where it had made favourable findings. As noted in *R (Iran)* [2005] EWCA Civ 982 §20, within the appellate system allegations of errors in assessing proportionality must be identified via the traditional public law errors (contrary to the approach taken when reviewing the proportionality of government decision making directly, as on judicial review). So strictly speaking, criticisms based on "weight" alone have no purchase in a statutory appeal.

29. In any event, the positive features of the case were essentially that the relationship was a genuine and subsisting one. However, the Judge considered that the Appellant's residence in the UK was precarious, unsurprisingly given his failure to seek to regularise his application via an application on "durable relationship" grounds once Ms Tkadleckova had stopped exercising Treaty Rights in the UK. So the positive findings on the genuineness of the relationship essentially amounted to the entry point to qualify for consideration of whether the couple faced insurmountable obstacles, which is the test both under the Rules and outside them too for a couple without children, see *Agyarko* [2017] UKSC 11.

30. The Judge was clearly aware that the Appellant would have a strong case under the Immigration Rules to return to the UK – that was the premise which activated his consideration of the *Chikwamba* line of authority. However, as recognised in one of the case he cited, *Hayat* [2012] EWCA Civ 1054 §[30](b): "Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so." Given the findings of the Tribunal below as to the Appellant's disingenuous stance vis-á-vis his residence rights under European Union law, it seems to me that the conclusion that there was indeed such a "*sensible reason*" present here was one to which the Judge was perfectly entitled to come.

31. Mr Turner did not direct my attention to any evidence that was before the First-tier Tribunal that would have shown the Appellant to face problems in Bangladesh because he had changed his name by deed poll. Once again, this is essentially unevidenced speculation based on an invitation to assume that life in

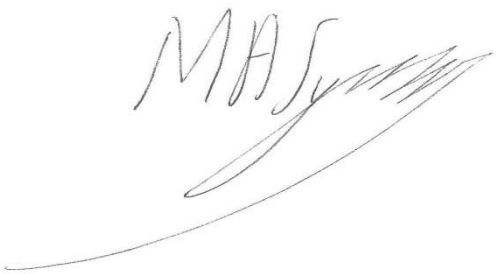
Bangladesh would be very harsh when contrasted with that in the UK. Doubtless there would be differences, leading to inconvenience and perhaps some degree of hardship. But I can see nothing that should have driven the Judge below to conclude that any such difficulties would reach the "insurmountable obstacles" threshold. One might equally well speculate that mixed race couples often relocate successfully to one of their respective homelands notwithstanding the potential difficulties they face. But the burden of proof is on the Appellant to make his case.

32. In conclusion, I do not consider that the grounds of appeal are made out. The First-tier Tribunal decision is not flawed by any material of law, and accordingly stands.

Decision:

The appeal is dismissed.

Signed: Date: 8 October 2018



Deputy Upper Tribunal Judge Symes