Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05723/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2017	**On 5 January 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel instructed by D J Webb & Co Solicitors

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Sri Lanka aged 51. In a decision sent in 11 November 2016 Judge Hussain of the First-tier Tribunal allowed on human rights grounds his appeal against the decision made by the appellant (hereafter the Secretary of State or SSHD) refusing

to grant him leave to remain. The claimant came to the UK in 2001 as a theology student. He ceased to have leave to remain in November 2011. In September 2011 he married SI, a citizen of Malaysia, who had also come to the UK. She has a PhD and teaches English and Maths. She has indefinite leave to remain in the UK.

2. The SSHD refused the claimant's application because she was not satisfied that there would be any insurmountable obstacles in accordance with EX.2 of Appendix FM of the Immigration Rules preventing him from continuing his relationship with his wife in Sri Lanka or Malaysia. Nor did the SSHD consider there would be very significant obstacles to the couple's integration into either country. The SSHD also took into account that he had numerous applications refused.

3. The judge had the benefit of a large volume of documentation, including witness statements from the claimant, his wife and numerous supporters. He heard from a number of witnesses. He concluded that the couple were both devoted Christians who are "highly prized in their community" and "very much embedded into church life in this country". They are both pastors. He considered that their inability to continue their work in the UK would have an adverse impact on their lives. He also took into account their claimed difficulty in practising their faith in Sri Lanka or Malaysia, although he said he did not give that "much weight". He then considered the medical evidence relating to the couple's lengthy efforts to have a child, entailing extensive fertility treatment. Whilst finding that fertility treatment may be available both in Sri Lanka and Malaysia, the judge concluded that:

> "The difficulty of establishing a new regime of treatment in a foreign country under a different system cannot be underestimated. Given that time may be of the essence for the appellant's wife in this case, I find that any delay in the resumption of treatment could well be fateful for this couple".

The judge concluded that paragraph EX.1 was satisfied.

4. The SSHD's grounds of appeal are essentially twofold. First, it is submitted that the judge failed to engage with EX.2 and failed to appreciate that the insurmountable obstacles test imposes a high threshold. They point out that in **Agyarko [2015] EWCA Civ 440** the Court of Appeal had upheld a finding by UTJ Craig that the fact that the applicant in that case was undergoing fertility treatment in the UK was not an insurmountable obstacle. Second, it was submitted that given the judge's findings that the couple's claim that they would not be able to practise their faith in Sri Lanka or Malaysia did not bear "much weight" and that infertility treatment would be available in both countries, his finding that there would be insurmountable obstacles was unsustainable.

5. I am grateful to Mr Nath and Mr Richardson for their submissions. Both managed to pilot their submissions through a crowded sea of documentation with skill and clarity.

6. I am not persuaded that the SSHD's grounds are made out. It would be fair to describe the judge's decision as a generous one, but I cannot interfere with his decision unless satisfied that it is vitiated by legal error. The fatal difficulty with the SSHD's grounds is that they do not grapple with the fact that the judge's assessment that the couple would face insurmountable obstacles was not based on a single factor but on a cumulative consideration, relevant factors including the great strength of the couple's community ties in the UK, their charitable work, the couple's difficulties in conceiving a child and (although not attaching "much weight" to them) the problems they would face practising their faith in Sri Lanka or Malaysia. It is simply incorrect of the grounds to assert that the judge "failed to engage with EX.2". The judge did not consider that the difficulties they were experiencing in undergoing fertility treatment were sufficient on their own to amount to an insurmountable obstacle. It is true that the judge (to use the wording of the grounds) "gives little to the assertion that the appellant and his wife would not be able to practise their faith in Sri Lanka or Malaysia" but, once again, that only shows that that this factor in itself was not considered to constitute an insurmountable obstacle. As regards the infertility treatment issue, it is clear that for the judge it was not the difficulty of establishing a new regime of treatment in a foreign country that was decisive (although he considered it a difficulty that "cannot be underestimated"); it was rather that the couple's failure to conceive over a long time, especially in light of the wife's age, meant that "time may be of the essence" and "any delay in the resumption of treatment could well be fateful for this couple". The judge's findings as regards the fertility treatment were clearly made against the background of the evidence, medical and otherwise, indicating that the wife's failure to conceive had taken its toll physically and mentally on her. She suffered from clinical depression. The treatment had proved traumatic to her. None of this evidence was or has been challenged by the SSHD or Mr Nash. I do not find the SSHD's invocation of a passage from **Agyarko** in the Court of Appeal relating to the applicant's particular circumstances in that case to be helpful. The decision in **Agyarko** in both the Court of Appeal and the Supreme Court emphasise that Article 8 cases are highly fact-sensitive.

7. Accordingly, whilst accepting that the judge's decision was a generous one, it was within the range of reasonable responses on an issue that required broad evaluative judgment.

8. For the above reasons, I find that the SSHD's grounds are not made out and that accordingly the decision of the judge must stand.

9. I would point out that had I found a material error of law and continued to re-make the decision for myself, I would have given more weight than the

judge did to the likely problems the couple would face in practising their faith in Sri Lanka and Malaysia. The COI evidence before the judge at least, contained materials indicating that persons who actively proselytise a Christian evangelical faith in either of these countries face significant difficulties. In considering he could not attach "much weight" to these the judge may have had in mind that this COI fell short of establishing a real risk of persecution or ill-treatment. But the issue in this case was whether such difficulties would give rise to insurmountable obstacles which, even though still a stringent test, is clearly a lesser level of severity than persecution or ill-treatment. The very detailed evidence before the judge established beyond doubt that the couple were committed evangelical Christians for whom the active promotion of their faith is a matter fundamental to their identity.

10. There is another matter that in my view would have weighed heavily in the claimant's favour. It is not disputed that save for suitability criteria relating to the claimant's failure to leave the UK when his leave ran out, he meets all the substantive requirements of the Immigration Rules relating to spouses. His wife has a well-paid job. She has ILR. It is not disputed that they are in a genuine and subsisting relationship. They are of good character and have shown dedication and service to their local community and charitable causes. In my judgment, even though the couple do not have children, their case brings into play the principles set out by the House of Lords in **Chikwamba [2008] UKHL 40**; see also **Agyarko [2017] UKSC 11**. In my judgment, were the claimant to return to Sri Lanka, he would have strong prospects of being found to satisfy the requirements of the Rules for overseas spouses. Taken in conjunction with other factors in play in this case, this would strongly point to a conclusion that it would be disproportionate to require him to leave the UK

11. For the above reasons, I dismiss the SSHD's grounds of appeal and uphold the decision of the FtT Judge.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 4 January 2018

H H Storey

Dr H H Storey

Judge of the Upper Tribunal