



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14233/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 December 2017 and 22 June 2018

Decision & Reasons Promulgated
On 11 July 2017

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJEEVE NISHANTHAN NOMIS PERERA JOHN PIYATHASA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer (On 19 December 2017)
Mr D Clarke, Senior Home Office Presenting Officer (On 22 June 2018)
For the Respondent: Mr E Waheed, instructed by Ratna & Co (On 19 December 2017)
Mr A Malik, instructed by Ratna & Co (On 22 June 2018)

DECISION AND REASONS

1. The respondent, to whom I shall refer hereafter as the appellant, as he was before the First-tier Judge, appealed to the First-tier Tribunal against the decision of the now appellant (to whom I shall refer hereafter as the respondent as she was before the judge) of 9 December 2015 refusing his application for leave to remain in the United Kingdom on the basis of family and private life.

2. The decision maker had concluded that the appellant could not meet the requirements under the five year partner route because he had not met the eligibility requirements as to the English language. He could not meet the requirements of the ten year route because he could not satisfy EX.1 in respect of insurmountable obstacles in continuing his family life outside the United Kingdom. It was also concluded that he could not meet the requirements of paragraph 276ADE(1)(vi) in respect of private life because there would not be very significant obstacles to his integration into Sri Lanka on leaving the United Kingdom.
3. The appellant first arrived in the United Kingdom in January 2010 on a student visa valid until June 2012 which was subsequently extended to 30 October 2015. Before his leave expired he had met and married his wife who is a British citizen and who had arrived in the United Kingdom 23 years ago as the daughter of a successful asylum seeker. She had been back to Sri Lanka just once some three years previously when she had stayed for two weeks. She had a job with WH Smith and earned £16,500 a year. The appellant's evidence was that he earned £5,600 a year.
4. The appellant had failed to pass a module in his degree course at Glyndwr University and therefore was awarded not a BA Honours but a Certificate of Higher Education. After he had failed to meet this requirement and his application had been refused, he wrote to the Home Office seeking the return of his passport so he could enter the English examination at Trinity College London, but he received no response to that letter and his passport remained with the Home Office.
5. The judge allowed the appeal stating first of all that but for the English language requirement the appellant would have met the five year partner route Rules. He noted that the appellant had been prevented from completing his English language test. The judge was further satisfied in respect of the ten year partner route and EX.1 that there would be insurmountable obstacles and significant difficulties faced by the appellant and his wife in continuing their family life in Sri Lanka. The judge made the point that in particular the appellant's wife had been in the United Kingdom for 23 years, her parents and siblings were all in the United Kingdom and she had been educated and worked here for ten years. Her father was a refugee. The judge considered that there would be insurmountable obstacles in expecting the parties to return to Sri Lanka and live their life together there and also with regard to the paragraph 276ADE(1)(vi) requirement in respect of private life.
6. The judge made the further point that between the appellant and his spouse they could currently meet the financial requirements under Appendix FM, and if he were to return to Sri Lanka and make an application as the respondent suggested he would not have the income necessary and nor will his spouse on her own. Effectively therefore he would be compelled to stay in Sri Lanka and postpone making an application until his spouse had reached the financial threshold which would involve some delay. For all these reasons the judge considered that the appeal should be allowed.

7. The respondent sought and was granted permission to appeal against this decision on the basis that, bearing in mind that the financial requirement was not met and the English language requirement not met the judge had in effect allowed the appeal on the basis of insurmountable obstacles and significant difficulties for family life to continue in Sri Lanka. The point was made that no documentary evidence had been provided to the Secretary of State for the relevant period to show that jointly the couple could meet the £18,600 threshold and the judge appeared to have come to a conclusion on this purely on the basis of the appellant's re-examination at the hearing.
8. It was also argued that the judge had failed to give effect to the guidance in Agyarko [2017] UKSC 11, and making the further point that the appellant's wife was not a refugee and had not had problems when she returned to Sri Lanka for two weeks three years earlier. It was argued that the fact that she lived in the United Kingdom for 23 years and worked here for ten years could not come within the definition of insurmountable obstacles and significant difficulties.
9. In his submissions Mr Tarlow relied on and amplified the points made in the grounds. He referred to the quotation from the Court of Appeal in Agyarko, which had been approved in the Supreme Court, with regard to the case there of a British citizen who had lived all his life in the United Kingdom and had a job here and who then might find it difficult or be reluctant to relocate to Ghana to continue family life there could not amount to insurmountable obstacles to doing so.
10. In his submissions Mr Waheed relied on the points made in his skeleton argument. He made the point that the First-tier Judge was not bound by Appendix FM-SE with regard to whether the appellant met the financial requirements and the decision was open to the judge to make, the credibility of his evidence not being challenged by the Secretary of State. It had not been argued by the respondent that the appellant had not been prevented from completing his English language test. The reliance on Agyarko was said to be misconceived and that each case depended on its own facts and the judge's reasoning at paragraph 26 was clearly sound. The challenge to the decision amounted to disagreement only. The appeal had been allowed on several bases and all of those were sustainable.
11. Mr Tarlow had no points to make by way of reply.
12. It became necessary to reconvene the hearing on 22 June 2018 in light of a post-hearing submission by Mr Waheed, to which I directed a response. None being forthcoming, a further hearing date was fixed for 22 June 2018.
13. Mr Waheed's point, relied on by Mr Malik, was that the Secretary of State had not challenged the judge's finding under paragraph 276ADE. Mr Clarke's response was that, though the grounds were silent with respect to paragraph 276ADE it could be seen from paragraph 26 of the judge's decision that his decision on paragraph 276ADE was reached 'for the same reasons' as the decision in respect of EX.1. Mr Malik responded that there had been no challenge to the paragraph 276ADE conclusion.

14. I think Mr Malik must be right. The fact that the decision on paragraph 276ADE was reached for the same reason as the decision on EX.1 does not alter the fact that there are two separate decisions, and only one of them has been challenged. The reasoning in respect of EX.1 is far from satisfactory, but there is no challenge to the decision on paragraph 276ADE and therefore the judge's decision on that point has to be upheld, and the appeal, as a consequence, dismissed.
15. No anonymity direction is made.



Signed

Date 9 Jul. 18

Upper Tribunal Judge Allen



Signed

Date 9 Jul. 18

Upper Tribunal Judge Allen