



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/09657/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11<sup>th</sup> June 2019**

**Decision & Reasons Promulgated  
On 24<sup>th</sup> June 2019**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL  
G A BLACK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR JANAKAN [S]  
NO ANONYMITY ORDER MADE**

Claimant

**Representation:**

For the Appellant: MS J. ISHERWOOD (Home Office Presenting Officer)

For the Respondent: MS A. PATYNA (Counsel)

**ERROR OF LAW DECISION AND REASONS**

1. This is an error of law hearing. The Appellant in this matter is the Secretary of State who appeals against the decision of the First-tier Tribunal (Judge Saunders) ("FtT") promulgated on 23.7.2018 in which the appellant's human rights claims was allowed on the basis of his family and private life.

## **Background**

2. The Claimant is a citizen of Sri Lanka who entered the UK as a student. He married his wife, a British citizen on 16<sup>th</sup> September 2015. His application for leave to remain as a spouse was refused on the grounds that he failed the Suitability requirements because on 4.4.2013 he submitted and relied on a false language test certificate. The Appellant also concluded in the reasons for refusal that the Claimant failed to meet EX 1 as to insurmountable obstacles to family life outside of the UK which had been argued on medical evidence. There was a previous appeal promulgated on 27.9.2016 in which the appeal was dismissed and in which it was found that the Claimant had worked without permission. On the morning of the hearing the Appellant sought to serve on the Tribunal and the Claimant the bundle of evidence in support of the deception claim. The Claimant's representative opposed the application to submit the documents late. The FtT considered Rule 2, the overriding objective and decided not to admit the bundle in evidence [9] and thus did not determine the issue of deception. The precise reasons given by the FtT are set out below in the Rule 24 response summary. It was further argued that there was new medical evidence to enable the FtT to depart from the previous determination (**Devaleesan**).

## **Grounds of appeal**

3. In grounds of appeal the Appellant argued that the FtT erred by acting unfairly in not admitting evidence (generic and specific) from ETS of the alleged deception because it had been served late. The Appellant's representative at the FtT hearing had been unable to produce evidence that the bundle had been filed and served in time in compliance with directions. The FtT failed to make material findings of fact and reached an erroneous decision on insurmountable obstacles. The Claimant's wife suffered from endometriosis and was at the time of the hearing trying to conceive a child. The FtT erred by failing to take into account her evidence that she was able to work full time in the assessment of insurmountable obstacles.

## **Permission to appeal**

4. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Povey who accepted that the Appellant unbeknown to the FtT had in fact served the further evidence in time, 5 days prior to the hearing and in accordance with Tribunal directions. Further in refusing permission to admit the bundle, the FtT had taken into account that a previous 2016 determination had not determined the ETS matter [8]. That aspect of the Appellant's decision was not before the FtT and which was relevant to subsequent the Article 8 assessment. The FtT made no finding as to whether or not the Claimant had acted deceptively in the language test.

## **Rule 24 response**

5. The FtT properly considered the application to admit the evidence of the ETS evidence bundle and gave sustainable reasons for refusing as follows:

- (i) the bundle had not been served at the hearing in 2016;
  - (ii) the evidence had not been included in the main bundle and no proper notice given that the issue was being pursued;
  - (iii) there was no evidence that the bundle had been served at all or properly;
  - (iv) if admitted the FtT would have had to grant an adjournment for the Claimant to deal with the issue;
  - (v) the delay would be significantly prejudicial given the Claimant's wife's medical condition.
- Even if the bundle was served it was too late for the material to be admitted without prejudice to the Claimant.

## **Submissions**

6. At the hearing before me Ms Isherwood representing the Appellant argued that it had now been accepted that the ETS evidence had in fact been served on the Tribunal in time (by 21<sup>st</sup> June). Ms Isherwood submitted (incorrectly) that the bundle had not been produced at the hearing for the FtJ. It had been produced at the hearing [5]. There was no issue that the Appellant failed to comply with directions therefore. The FtJ had acted unfairly by allowing the Claimant to rely on evidence that was served late on the morning of the hearing. It was clear from the refusal letter that the ETS matter was relied on. The FtJ had ignored the material fact that the Claimant was working full time in assessing the impact of her condition. The circumstances were the same as in R (on the application of **Agyarko v SSHD [2017] UKSC 11** and the appeal ought therefore to have been dismissed.
7. In response Ms Patyna for the Claimant contended that even if the ETS evidence had been served in compliance with the Tribunal directions, it was nevertheless served too late. The error was not material even if procedurally wrong because the FtT's findings and conclusions under EX 1 were sustainable. The FtT reasonably proceeded with the hearing having decided that although the ETS was a material issue, the FtT concluded that the evidence was served late and taking into account also that the previous Tribunal in 2016 had not been provided with the evidence of the ETS. The Appellant failed to explain why the bundle had been served using an incorrect email for the Claimant's solicitors. The fact that the FtT allowed the Claimant to rely on evidence that was served late was not relevant to the ETS issue. There had been no objection by the Appellant's representative. The FtT had considered the evidence in respect of Suitability having regard to the work without permission but found that it was not serious enough to support the Appellant's challenge. The FtT set out detailed considerations and concluded that the evidence was compelling and reliable, and the medical evidence was not challenged. The issue was not whether or not medical treatment was available in Sri Lanka, rather the impact on the treatment and the ability to conceive would be adversely effected if the wife, who is a British citizen, had to leave [29]. There was evidence from an occupational therapist to show

that the wife's employment was flexible in light of that fact that her condition impacted on her day to day functioning. The facts in this appeal were different from Agyarko. This Claimant could arguably succeed under Chikwamba principles (Chikwamba v SSHD [2008] UKHL 40) as referred to in Agyarko at [51].

## **Discussion and conclusion**

8. I have considered the issue of insurmountable obstacles first and I conclude that the issue raised by the Appellant does not amount to a material error of law. The FtT fully considered all of the evidence of the Claimant's wife's serious and debilitating medical condition and its impact on her fertility treatment which the Tribunal found to amount to compelling circumstances. The evidence that the Claimant's wife worked full time was supported by the letter from an Occupational therapist which established that whilst working full time she was able to work flexibly depending on her condition and treatment, which clearly had an impact on her ability to work day to day. Accordingly I am not satisfied that the FtT erred in failing to place weight on the evidence of full time employment which was considered together with the letter from the Occupational therapist.
9. The issue that I now go on to consider is whether or not there was a material error in the FtT's decision not to admit the ETS evidence and if so whether that failure had a material impact on the decision as to insurmountable obstacles and or proportionality. Regardless of whether or not the Appellant failed to comply with the directions as to service of documents, I take a pragmatic approach to the extent that the real position was that the evidence was served in time and it was produced before the Tribunal on the morning of the hearing. It was clearly a matter that was raised in the refusal letter and therefore the Claimant had notice that it was being pursued and relied on by the Appellant. The fact that the bundle had not been produced at the previous hearing in 2016 was not in my view relevant or material as the Appellant had raised it in the current refusal letter. The FtT in 2016 had not determined the deception issue as there was no evidence produced in support and no findings of fact were made, but it was a "live" issue that the Appellant relied on at that time as well. It was entirely clear that the Appellant relied on the issue of deception in the present refusal letter and it was the main issue raised in terms of Suitability; it was a matter that ought to have been determined and thereafter the finding made ought to have been considered alongside the evidence as to compelling circumstances. I consider the reasoning of the FtT at [9] (and as set out in paragraph 5 above) and conclude that it is not sustainable on the evidence. The Claimant was fully aware that the issue was raised in the refusal letter and ought therefore to have prepared for the evidence to be served at the hearing. There was no evidence to support the Claimant's belief that the matter was no longer being pursued.

There was no specific reason given for why an adjournment would have been necessary to enable the Claimant to respond to the issues raised. The evidence relied on in such cases is generic and any specific evidence would have referred to the date in March 2013 when it was shown that the test was taken. The issue of any delay associated with the Claimant's wife's medical condition was not in my view entirely relevant to the question of fairness.

10. There is a material error of law disclosed in the decision. Whilst I accept that the FtT considered illegal working was relevant but not of significance so as to outweigh the interest of the Claimant and his wife [32], it cannot be said that had the FtT also considered the main issue of deception that the outcome would not be different. The findings at [24-33] made as to insurmountable obstacles shall be preserved. The matter is to be remitted for limited hearing on the issue of deception and thereafter the findings assessed in light of the preserved findings as to insurmountable obstacles [29].

**Decision**

11. The Secretary of State's appeal is allowed. There is a material error of law. The appeal is to be remitted for rehearing at Taylor House (excluding FTJ Saunders) on the limited issue of deception in respect of the ELTS and thereafter further consideration given to insurmountable obstacles and proportionality under Article 8.

Signed

Date 17.6.2019

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 17.6.2019

GA Black

Deputy Judge of the Upper Tribunal

