



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2023-001060
First-tier Tribunal No:
HU/53673/2022
LH/00608/2022**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 25 June 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

**MOHAMMED ALI
(NO ANONYMITY ORDER)**

Respondent

Representation:

For the Appellant: Mr J Martin of Counsel, Zyba Law

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

Heard at Field House on 30 May 2023

DECISION AND REASONS

1. The Claimant is a national of Bangladesh born on 25 January 1997. He arrived in the UK on 14 August 2016 with leave, which was subsequently extended until 30 October 2020. He applied in time on 21 October 2020 for leave to remain as the partner of his UK Sponsor. This application was refused in a decision dated 17 December 2021 and certified. Following reconsideration by the SSHD a further refusal was issued on 9 June 2022 with the right of appeal which the Appellant exercised. His appeal came before First-tier Tribunal Judge Borsada for hearing on 16 January 2023.

2. In the decision promulgated on 24 January 2023 the Claimant's appeal was allowed.
3. The Secretary of State made an in-time application for permission to appeal to the Upper Tribunal asserting that the judge had erred materially in law in the following material respects:
 - (i) At [8] the judge stated that he noted the concession made by the Respondent that the '*Sponsor was not in a position to leave the UK given her current studies*'. There was no Home Office Presenting Officer present at the hearing to make such a concession, neither does the refusal decision make such a concession, rather it refers to the Appellant's claim to that effect. It is therefore submitted that the judge erred in stating a concession had been made.
 - (ii) The Sponsor's course is said to finish on 24 July 2023, therefore any interference with family life will be temporary and proportionate.
 - (iii) The First-tier Tribunal Judge had failed to point to any evidence that the Appellant's return to Bangladesh would result in '*unjustifiably harsh consequences*' or '*insurmountable obstacles*' as there would be no very serious hardship in the Sponsor joining the Claimant in Bangladesh after the completion of her course. Any interference with Article 8 family life would be of a temporarily nature and in the meantime contact may be maintained through modern means of communication.
 - (iv) There is no evidence of exceptional circumstances: the '*practical and emotional support*' referred to at [7] fails to meet such a threshold. It is submitted that the First-tier Tribunal Judge has failed to remind themselves that family life has been acquired while the Claimant has had precarious immigration status and therefore less weight should be afforded to it.
4. Permission was granted by Upper Tribunal Judge Macleman on 25 April 2023 on the basis that the grounds show arguably that the First-tier Tribunal erred by interpreting the Respondent's position as a concession that there were insurmountable obstacles to family life being carried on in Bangladesh and did not identify anything which met the legal tests.

Hearing

5. At the hearing before the Upper Tribunal, Ms Isherwood submitted that there was no concession made with regard to the Claimant remaining in the UK whilst the Sponsor continued her studies. Whilst the judge made findings, there was no consideration of the

Claimant's position and no proper assessment of the circumstances as a whole. For example, there was no assessment as to whether or not the Claimant could go back to Bangladesh. Ms Isherwood submitted it was open to the British partner to relocate to Bangladesh once she finished her studies. There were no insurmountable obstacles for her doing so and that the judge had failed to assess the case properly or at all. For example, there was no assessment of the fact that the Sponsor is from Bangladesh. She submitted that there are material errors of law and the decision should be set aside.

6. In his submissions Mr Martin drew my attention to the Respondent's refusal decision of 9 June 2022 which reads *inter alia* as follows:

"You have provided evidence which proves your partner is currently studying Accounting and Finance at the University of Bedfordshire and therefore, your partner is not in a position to move to Bangladesh. However, the documents provided indicate that your partner is in full time education until 24 July 2023. During your partner's studies, your relationship can continue overseas via other methods of communication to ensure there is no interference with your partners higher education. Continuing her studies in the United Kingdom on your return to Bangladesh will cause some degree of interference in your relationship, this would not amount to an insurmountable obstacle in accordance with paragraph EX.1. of Appendix FM."

7. Mr Martin submitted that this did amount to a concession in relation to the Claimant's partner and that she was not expected to leave the UK whilst completing her university degree. He also sought to rely on the Respondent's review, which provides at (iv):

"Whilst it is acknowledged that the Appellant's partner remains in full-time education until 24 July 2023, the Respondent submits that communication can be maintained during this time period via modern technology."

8. Mr Martin submitted the judge was clearly entitled to treat the Respondent's position as set out in the refusal and the review as a concession. These clearly contemplated that the couple would keep in touch remotely whilst the Appellant's partner was studying in the UK.

9. Mr Martin reminded the Upper Tribunal that the test was under EX.2 insurmountable obstacles and whether there will be very significant difficulties that would be faced by the Claimant or his partner. He submitted the judge was fully entitled to deal with the matter quite shortly given it was accepted that one half of the partnership could not go to Bangladesh until after July 2023.

10. I sought Mr Martin's views on the other grounds of appeal i.e. those set out at [3] and [4] and he submitted that the consequence of separation would amount to unjustifiably harsh consequences and there was no material error of law. In terms of temporary separation, he also drew attention to the fact that the SSHD's position was that the relationship could be maintained via modern means of communication rather than focused on a separation of a temporary nature but that had not been the SSHD's case before the judge. Mr Martin accepted that the judge had not gone on to consider exceptional circumstances and that if the Upper Tribunal was not with him there would need to be an assessment of both aspects.
11. In reply, Ms Isherwood submitted that there was a precarious element to this case and that there was no clear or proper assessment by the judge which made it possible for a reader to understand why it had been allowed. In particular there was no consideration of whether or not the Claimant could return to Bangladesh.
12. I reserved my decision which I now give with my reasons.

Decision and Reasons

13. I first set out the material findings by First tier Tribunal Judge Borsada in his decision and reasons dated 23 January 2023:

"5. I am determining this appeal as at the date of hearing.

*...
7. I noted all the evidence provided to me for this hearing. I was satisfied that the circumstances of the appellant and the sponsor were as claimed in their witness statements on the basis of all the oral and documentary evidence available. In particular that the sponsor was in the middle of her studies in the UK and as such depended on the appellant's practical and emotional support to get her through this in the absence of any other family to help.*

8. I noted the concession made by the respondent that the sponsor was not in a position to leave the UK given her current studies. It followed from this that there was no current prospect of the sponsor being able to leave the UK. Were the appellant forced to return to Bangladesh at the current time, this would mean that he would be separated from his partner. I agree with the appellant's representative that modern means of communication between the couple separated in this way, was no substitute for the family life they currently enjoyed in the UK taking account of my findings in the previous paragraph. I was of the view that the

insurmountable obstacles test was therefore met. In those circumstances the requirements of the Immigration Rules were also met and that therefore the appeal is allowed on human rights grounds and in particular article 8 of the ECHR. I agree with all that the appellant's representatives have set out in the skeleton argument and also with all of the points made in the summary I have provided at paragraph 4 above. I do agree with the respondent that had this application been purely concerning the appellant's private life in the UK, then he would not have succeeded, and it is only on the basis of family life and the disproportionate nature of the interference, even given the legitimate reason for that interference, that I have allowed the appeal."

14. I find that the Respondent did in terms in both the refusal decision of 9 June 2022 [6] above refers and her review at (iv) (7) above refers, accept that it would not be reasonable to expect the Claimant's partner to leave the UK whilst she remains in full time education. I further find that the First tier Tribunal Judge was entitled to rely on this concession.
15. However, this is not an end to the matter, given that the SSHD further impugned the decision of the Judge on the basis that he failed to point to any evidence that the Claimant's return to Bangladesh would result in '*unjustifiably harsh consequences*' or '*insurmountable obstacles*' as there would be no very serious hardship in the Sponsor joining the Claimant in Bangladesh after the completion of her course. I consider that the Judge did fall into error in finding that removal of the Claimant would be disproportionate because, as is asserted in ground 3 of the grounds of appeal, the Judge failed to engage with the caselaw setting out the test for "insurmountable obstacles" or identify any such obstacles. EX.2. of Appendix FM of the Immigration Rules provides:

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

16. Whilst the Judge was entitled to find as he did at [8] that: "*modern means of communication between the couple separated in this way, was no substitute for the family life they currently enjoyed in the UK*" this is not the test for insurmountable obstacles, rather he needed to have considered whether, once the Sponsor's studies had been completed, in July 2023, there would be very significant difficulties in the couple residing together in Bangladesh and whether this would cause very serious hardship for the Claimant or his wife, the Sponsor.

17. Further, the Judge did not conduct a balance sheet or any meaningful proportionality assessment taking account of the fact that the separation between the couple would only be temporary, until July 2023, nor did he, as he must, factor in the public interest considerations set out in section 117A-D of the NIAA 2002.

Decision

18. For the reasons set out above, I set aside the decision of the First tier Tribunal Judge and remit the appeal for a hearing *de novo* before a differently constituted Tribunal.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date 14 June 2023