IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002387

First-tier Tribunal No:
HU/50879/2020
IA/02139/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24th of April 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

Ms Khudeja Begum
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P Jorro, instructed by Waterstone Legal
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer (15/10/2023)
Mr D Clarke, Senior Home Office Presenting Officer (05/04/2024)

Heard at Field House on 15 October 2023 and on 5 April 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Peer promulgated on 27 April 2022, dismissing her appeal against the decision of the Secretary of State made on 11 April and 18 November 2020 to refuse her leave to remain in the United Kingdom.

Background

2. The appellant entered the United Kingdom on 20 October 2013 as the spouse of a settled person, that leave being valid until 26 June 2016. An application made on 24 June 2016 for further leave to remain in that capacity was refused and certified on the basis that she had used a false English language certificate. A challenge to the certification decision was unsuccessful as was a further application for judicial review, but a further application for leave to remain on the basis of her family and private life, made on 20 December 2019, was rejected under paragraph 353 of the Immigration Rules but, after permission for judicial review was granted on 20 July 2020, the respondent agreed to reconsider the application, which was refused, albeit attracting a right of appeal, which led to the appeal to the First-tier Tribunal.

3. It is accepted that the appellant has a genuine and subsisting spousal relationship with her husband ("the sponsor"), a British citizen and that the application does not fall for refusal on suitability grounds. The appellant and her husband live together in the United Kingdom. They have adult children; they live with one and the other lives close by. The sponsor has numerous health problems including heart failure, a previous heart attack for which he had been fitted with a stent.

4. The respondent was not satisfied that there were insurmountable obstacles to private life between the appellant and her husband being enjoyed in Bangladesh and thus paragraph EX.1 of Appendix FM was not met. She was not satisfied either that the appellant fell within the terms of GEN.3.2 of Appendix FM as there were not exceptional circumstances in this case.

The Hearing Before the First-tier Tribunal

5. The judge heard evidence from the appellant and the sponsor. She also heard evidence from the appellant's son and daughter as well as her son-in-law. The appellant's granddaughter, Samila, also gave evidence.

6. The judge found:

   (i) there were no very significant obstacles to the appellant's integration into Bangladesh where she had lived most of her life, finding also that there would be accommodation and financial support available [54];

   (ii) there was no medical evidence supporting significant deterioration in the husband's condition, heart attack [57] although it was unlikely to improve as he ages [58]; these did not present as the most severe;

   (iii) it had not been shown that any required medical treatment or medication for the husband or the appellant would be unavailable or unaffordable in Bangladesh [59];

   (iv) the appellant primarily meets any care needs of the sponsor given the mobility issues he has and that the son, daughter and daughter-in-law provide care and support from time to time [63] and the appellant

could continue to meet such care needs as her husband has in Bangladesh, as much as she does in the UK;

(v) the couple potentially have access to property in Bangladesh [67] and any necessary financial support would be to meet the living expenses [68] and that the family would be able to provide this;

(vi) whilst there is hardship inherent in the proposal that the couple should continue their married life in Bangladesh given the practical and other problems that would exist, the husband losing treatment available to him in the UK replacing it with treatment which might not be equivalent and may be costly in Bangladesh and that the maintaining relationships with children and grandchildren would be different, this was insufficient to show there are insurmountable obstacles which could not be overcome or would entail very serious hardship [71];

(vii) since the appellant returned to Bangladesh alone it would not be unjustifiable harsh [74];

(viii) there was not in existence family life between the appellant and her adult children and grandchildren [75] and having had regard to Section 117B of the 2002 Act removal would be proportionate and it would be disproportionate [88] to require her to return to Bangladesh and make an application for leave to return.

7. The appellant sought permission to appeal on the grounds that the judge had erred:-

(i) in failing to take any or adequate account of their son's role in terms of providing practical care, rendering the conclusion a continuing family life together in Bangladesh would not entail very serious hardship was flawed; the care provided by the son;

(ii) in concluding irrationally that the loss of the husband's NHS ongoing support and medical treatment would constitute serious hardship for him amounting to an insurmountable obstacle in a practical and realistic sense, see GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630, the information showing that elderly people in Bangladesh do not receive help from the government or NGOs and that medication was not always available;

(iii) in concluding irrationally that appellant returning alone to Bangladesh leaving her husband here would not be unjustifiably harsh given their respective ages and the colossal interference that such separation would entail at this late stage of her life, with the prospect of separation being permanent given the sponsor's limited income;

(iv) in making findings as to proportionality which were irrational and inadequately reasoned in concluding that the appellant did not enjoy family life with her son, the evidence showing that the bonds between the appellant and her husband and their son exceeding original

emotional bonds; erred in the interpretation of being financially independent and erred in treating insurmountable obstacles as being determinative.

8. On 14 November 2022 Upper Tribunal Judge Lindsley granted permission stating the third ground was arguable although the other grounds appeared less so. Given the finding that the family could provide health services for the partner in Bangladesh, the son playing a lesser role in the parents' care than was advocated in the grounds.

The Hearing on 15 October 2023

9. Mr Jorro submitted that, contrary to the Rule 24 letter, the decision was irrational both in grounds 1 and 2 and in ground 3. He submitted that there is an air of unreality in that the judge appeared to consider that the appellant and the sponsor could live in a currently abandoned house.

10. With regards to grounds 2 and 3, Mr Jorro submitted that it had been shown that the appellant and the sponsor were financially dependent on the family; and, that if the appellant were to return on her own there would be a loss of the care she provides to the husband resulting in a colossal interference with their family life. The appellant would never be able to return under the Immigration Rules given the husband's income and the result would be a permanent separation. The family live together in the same household and, given that it was accepted by the Secretary of State that this is a case where the balance is finely balanced, the dependency was important to material issue.

11. Mr Melvin submitted that this was an attempt to reargue the case. The role of the son had been properly addressed, as was the role of the appellant as her husband's primary carer. The judge had been clearly aware of the sponsor's illnesses and reached a conclusion which was rational and open to her. It had been open to the judge to conclude that the sponsor would not return and that was sustainable, and the matter was finely balanced.

Discussion

12. I begin my assessment of the challenge to the decision by bearing in mind what was said by the Supreme Court in HA (Iraq) [2022] UKSC 22 at [72] and by the Court of Appeal in Riley v Sivier [2023] EWCA Civ 7 at [13]. This is a case in which the evidence and findings inter-relate.

13. In assessing the judge's approach to the evidence that the son provided, I bear in mind that she heard all the evidence. That said, she accepted the evidence that that husband's mobility is significantly impaired, and that the son provides care and support, as do other members of the family which includes cooking and cleaning. She also accepted that the house in which it was said they could live had been abandoned.

14. It is also evident from the medical evidence relating to the husband that he has difficulty rising from a chair, and that he is reliant on his son to take

him places. He has significant health needs, currently met by the NHS, and to which he is entitled. Again, this is evidence she accepted.

15. The judge in effect accepted that the sponsor would not go to Bangladesh, given the difficulties there would be not least as a result of not being able to get the current level of medical treatment (and his lack of mobility and ability to travel aided by his son).

16. I remind myself of what was said by Lord Justice Green in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630. I am satisfied that the judge did misdirect herself with regard to what is meant by financial dependence. It is unclear why the judge considered that the factor weighed against the appellant, as it was a neutral factor.

17. Stepping back and looking at the facts, as found by the judge, which are that in effect the husband would not go to live in Bangladesh, the effect of separation in this case would be significant given the ages of the appellant and her husband, the husband's ill-health, the length of time they have lived together now and the circumstances in which they live with their close family and are surrounded by them in the United Kingdom which are factors that go also to whether there would be insurmountable obstacles to family life being continued in the United Kingdom; these issues cannot easily be distinguished.

18. In the circumstances, the conclusion that would not be unjustifiably harsh consequences is vitiated by a culmination of a failure properly to follow the law with regard to Section 117B(3) of the 2002 Act and, given the statement that this case was finely balanced, this also indicates that the finding with respect to unjustifiably harsh, which is the ultimate conclusion, was also wrong. It is also difficult to conclude that a judge could rationally conclude that the appellant and her grandchildren could be maintained by "modern means of communication" and the lack of regular visits.

19. Accordingly, the decision of the First-tier Tribunal involved the making of an error of law. While I am not satisfied that the decision with respect to paragraph 276ADE of the Immigration Rules is unsafe, I considered the conclusion with respect to Appendix FM is not sustainable and must be set aside. It follows that the decision with respect ot to article 8 is also flawed and must be set aside. As there would not be any need for any substantial remaking, I consider this matter can be remade in the Upper Tribunal.

20. The matter was then relisted to be remade on 5 April 2024.

Remaking the Appeal - hearing on 5 April 2024

21. I heard submissions from both representatives. Mr Jorro relied on his skeleton argument, and by agreement, no additional oral evidence was called. In addition to the material provided to the First-tier Tribunal, I had a short additional bundle provided by the appellant's representatives.

22. Mr Jorro relied on his skeleton argument, submitting that there were insurmountable obstacles to family life between the appellant and the sponsor being conducted in Bangladesh given, as set out in the psychiatric report updated medical evidence, their physical difficulties. He submitted that both the appellant and the sponsor are now in their 70s, in reality cannot return to Bangladesh given that he has now been here for some 36 years, and the appellant has not lived in Bangladesh for eleven years.

23. There was no issue of there being financial dependence on the State given they were supported by their son and son-in-law and, although it was accepted that the appellant does not speak English, it was submitted that this was a matter of minor weight.

24. Mr Jorro submitted that there would in this case be a "colossal" interference with the right to family life, noting that the respondent had accepted at the error of law hearing that the matter was finely balance, as that being as at the date of the First-tier Tribunal's decision. The situation had now moved on and the appellant and the sponsor had aged in the two years since then.

25. Mr Clarke submitted that the insurmountable obstacle test, relying on Agyarko [2017] UKSC 11and Lal [2019] EWCA Civ 1925 was a stringent test which was not in its facts met. He submitted, on Lal at [35] to [38] that any difficulties could in this case be mitigated against. He did submit that the appellant and her husband could move to the house, which appeared now to be derelict, as it was rural, but that what they needed to consider was moving to an area where health facilities would be available. This was not a subjective test and what needed to be considered carefully was what measures could be taken to get round the obstacles on return and that it was clear evidence that the sponsor's health was relatively stable, there being no evidence of deterioration, or any significant deterioration in his health, despite his past history of a heart attack.

26. Mr Clarke submitted that the psychiatric report was unreliable given that it did not set out the test on which the diagnoses were reached; the interview had been conducted with the assistance of the son as an interpreter; there was no indication or explanation. There was no reference to the medical information which had been considered and it was odd that there was no comment on the absence of a presentation of mental health issues in the GP records. He submitted neither the insurmountable obstacles test nor the unduly harsh test was met although he did accept that if the Tribunal was not with him as to the availability or whether it was reasonable to move to an area where they could get proper treatment, there being no evidence that funding or availability of drugs was not an issue, that that would dispose of the appeal.

27. In reply, Mr Jorro submitted that it was important to look at the individual facts of cases. In Lal, the appellant was relatively young and the difficulty in the sponsor going to India was simply that he had said he thought it would be hot there. That was in direct contrast to the objective evidence of significant health problems in this case. He submitted further that the

family life in this case was not precarious given how long the relationship between the appellant and sponsor had lasted, they had married in the 1970s and had two adult children. This was in a very different scenario from that in Agyarko or Lal and that the balance now fell in favour of the appellant.

The Law

28. It is for an appellant to demonstrate that, on the balance of probabilities, requiring her to leave the United Kingdom would be in breach of the United Kingdoms obligations pursuant to, in this case, article 8 of Human Rights convention. The appropriate starting point in an appeal such as this is to consider first whether the appellant meets the requirements of the Immigration Rules as they set out the Secretary of State's view as to where the balance of the public interests lies.

29. The relevant rules are set out in Appendix FM at EX.1 and EX.2;

> EX.1. This paragraph applies if –
>
> (a) (…
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> 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."

30. The first issue to be addressed here is that of "insurmountable obstacles" about which the Supreme Court said in Agyarko as follows:

> 43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to "major impediments" (*Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a

degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "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." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". Is that situation compatible with article 8?

31. Subsequent to that, in Lal, the Court of Appeal held [36]-[37]:

36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).

37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the

> applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together.

32. I turn first to the issue of the appellant and the sponsor's health. Little regarding the physical ill-health is in dispute and I accept that the sponsor ha several problems in the past, not least of which was a heart attack. He has had blood pressure, type 2 diabetes and gout. He is on nine different medications and requires regular reviews and tests to monitor his various conditions. He has problems with mobility. Unlike in Lal, these are established facts.

33. The appellant has type 2 diabetes and is also on several different medications. She too has regular reviews and tests. Again this is confirmed by evidence.

34. I accept that neither the appellant nor her husband are in good health. I accept also that they require the support of family, in physical terms with mobility problems and day to day chores, and also in emotional terms such that there is now dependence on their adult son and his family.

35. It is difficult to attach much weight to the report from the clinical psychologist. There is inevitably a difficulty where the interview has been of relatively short duration and the interpretation services have been provided by the family. I agree also that there are concerns from the fact that there is limited information as to how the diagnoses of general anxiety disorder, major depressive disorder and somatisation disorder (psychosomatic/physical disorders) were reached. No details of any particular test results are set out

36. It is also of concern that despite it being written that the appellant was "severely distressed, anxious, depressed, and hopeless, and the consequent stresses overwhelmed her mental health. Besides, her day-to-day functionality and performance was affected immensely," this is not reflected anywhere in the GP's notes. It is also unclear on what basis it is said "Moreover, her husband is very unwell and needs *24 hour supervision* [emphasis added]as he is also diabetic and suffers from the above medical conditions."

37. That said, I accept that the appellant is anxious given the possibility that she faces of being separated from her husband and her adult children,

with whom it is accepted by the respondent that family life exists between her and her son and his son's family.

38. In assessing whether there are insurmountable obstacles, the starting point is that there is financial support available which may assist in relocation and in accessing medical treatment. There is no indication that that would not be able to be provided in Bangladesh where the cost of living may well be less than it is in the United Kingdom. As Mr Clarke submitted there is no evidence that the appellant and her husband would not be able to get the level of medication they currently get or undergo the tests which are required. I do, however, accept that, as Mr Clarke submitted, they would need to move to some area where they would have access to medical facilities.

39. While, realistically, the appellant's husband is unlikely to relocate to Bangladesh owing to his fears for his health, his wife does provide some support and assistance for him. But she is now age 70 and I accept, as the respondent accepted, that the level of dependence between her and her husband and their son and his family is such that this amounts to family life. That is an important consideration to be taken into account as an indicator of the level of necessary dependence.

40. I accept that the cost of medication could be met and would be available, but that is not the only circumstance to be assessed. The evidence shows that regular testing is necessary, and that requires attendance at hospitals or clinics. On the facts of this case, due to mobility issues, that would be difficult to achieve. I find that in reality and taking a realistic view, the lack of the day-to-day family support in everyday life, in both the physical sense and in the reassurance provided by emotional support, and the impaired mobility makes it difficult to access healthcare are significant factors which would greatly increase the difficulties in seeking to overcome the obstacles to family life in its proper sense being conducted in Bangladesh.

41. Taking all of these factors into account, which are particular to this case, bearing in mind the age of the appellant and her husband as well as the fact that their marriage has endured for well over the years, I am satisfied that in this case there are properly understood insurmountable obstacles to the family life being continued in Bangladesh given the need to relocate to be without other family support and inability to have actual access to the necessary medical support that the sponsor in particular currently enjoys. Accordingly, and given Mr Clarke's concession on this point, I am satisfied that the appeal ought to be allowed on the basis that the appellant meets the requirements of EX.1 and EX.2 of the Immigration Rules.

42. Further, and in any event, I am satisfied that it would also, on the facts of this case, be unjustifiably harsh to remove the appellant from the United Kingdom. In reaching that conclusion, I bear in mind the relevant case law referred to above and also Section 117A and B of the 2002 Act.

43. It is not in doubt that a family life exists between the appellant and her sponsor, a British citizen and that a family life exists between the appellant and her adult son and his family. They all live together as a family unit. Removing the appellant would clearly amount to interference with a right to family life would; the question then remains as to whether it is proportionate.

44. In assessing the factors in the appellant's favour, the factors set out in Section 117B, I consider that significant and considerable weight must be attached to the importance of maintaining immigration control. Further, in this case, other than suitability requirements were not invoked against the appellant, it nonetheless remains the case that she obtained in the past entry clearance by means of a false document demonstrating that she spoke English when she did not. Whilst there would be no burden on the State, that is a neutral matter and weight must be attached to the fact that she does not speak English.

45. I bear in mind that the family life that exists between the appellant and her husband predates her entry to the United Kingdom by a significant period and well before her status became precarious in the United Kingdom.

46. In assessing the factors in the appellant's favour, in addition to the findings, as set out above and preserved, I find that a family life exists between the appellant and her son and she has a close relationship with the grandchildren. Clearly that simply could not continue were she to be removed from the United Kingdom and thus the family life that exists would be severed. Additionally, on any view, she has significant health issues and she is age 70. She would be separated from her husband of some 36 years, which would be difficult and, I conclude, harsh in the circumstances. On any view, be a very difficult situation with which to cope. Even were he to go with her, she would be separated from the support of the family life she has had in the United Kingdom for the last eleven years and would have to live in a part of Bangladesh, for her and her husband to access medical care, with which they are not familiar.

47. There is merit in Mr Jorro's submission that the facts of this case are very different from that in Lal, and for that matter in Agyarko. It is also, in my experience, very much the case that it is younger couples who face separation, the appellant and her husband are now in their 70s. That factor is, however, reflected in the fact that weight can be attached to the family life given when it came into existence between the appellant and the sponsor.

48. Taking all of these factors into account and attaching very significant weight to the need to maintain immigration control, had I not already found that there were insurmountable obstacles in this case, I would have found that it would be unjustifiably harsh to remove the appellant. The important key difference here is that the insurmountable obstacles relates to the family life between the appellant and her husband; the assessment of whether a matter is unjustifiably harsh takes in the wider considerations

of the effects of separation and the diminution of the family life she has with her adult son and his family. Accordingly, I allow the appeal.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remake the appeal by allowing the appeal on human rights grounds.

Signed Date: 15 April 2024

Jeremy K H Rintoul
Upper Tribunal Judge
Immigration and Asylum Chamber