



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

Appeal Number: IA/01092/2015

THE IMMIGRATION ACTS

Heard at Manchester

On 12th January 2016

**Decision & Reasons
Promulgated**

On 20th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SYED UZMA ANJUM HASHMI
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer

For the Respondent: Mr C Timson of Counsel instructed by Maya Solicitors

DECISION AND REASONS

1. The Secretary of State appealed against the decision of Judge McGinty of the First-tier Tribunal (the FtT) promulgated on 7th April 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the Claimant.
3. The Claimant is a female citizen of Pakistan born 28th August 1983 who appealed against the decision to refuse her application for further leave to remain in the United Kingdom, the decision being made by the Secretary of State on 17th December 2014. The application for leave to remain was based upon the Claimant's marriage to Shoaib Akhtar.

4. The appeal was heard on 26th March 2015. The FtT decided that the Claimant and her spouse, who is settled in the United Kingdom, are in a genuine and subsisting relationship, and had entered into a valid marriage. The Claimant's appeal was therefore allowed under Appendix FM of the Immigration Rules.
5. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had made a material misdirection in law, and had failed to resolve conflicts on material issues. The FtT had accepted that the Claimant was in a subsisting relationship with her settled spouse and on that basis had allowed the appeal. It was contended that this was a material error of law because the FtT had failed to consider section EX.1 of Appendix FM, and whether there were insurmountable obstacles to family life continuing outside the UK. This was an issue that had been raised in the Secretary of State's reasons for refusal letter dated 17th December 2014.
6. Permission to appeal was granted and directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.
7. The appeal came before me on 2nd November 2015 and the Claimant attended the hearing together with her spouse. There was no difficulty in communication between the Claimant and interpreter, and the language used was Urdu.
8. The Claimant confirmed that she was not legally represented and was content to proceed without legal representation. I explained to the Claimant the purpose of the hearing, which was to decide whether the FtT had made an error of law in allowing the Claimant's appeal.
9. The Claimant confirmed that she had seen the application made by the Secretary of State, seeking permission to appeal, and she had seen the grant of permission to appeal, and she had with her copies of the FtT decision, the application for permission to appeal, and the grant of permission.
10. I heard oral submissions from Mr McVeety who relied upon the grounds contained within the application for permission to appeal. There was no challenge to the FtT finding that the Claimant and her spouse are in a genuine relationship, but it was submitted that the FtT had erred by failing to consider section EX.1(b) and whether there were any insurmountable obstacles to family life between the Claimant and her spouse continuing outside the UK.
11. The Claimant stated that the FtT had considered all the evidence, and was correct to conclude that she could not return to Pakistan, and therefore there was no error of law disclosed in the FtT decision, which should stand.
12. I explained my reasons at the hearing, and indicated I would confirm these in a written decision, and I issued a written decision dated 3rd November 2015 setting out my conclusions and reasons for setting aside the decision

of the FtT. For ease of reference I set out below paragraphs 14-17 of my error of law decision and directions dated 3rd November 2015;

14. Having reflected upon the oral submissions made, I found that the FtT had materially erred in law. Having decided that the Claimant and her spouse are in a genuine relationship, the FtT should have gone on to consider EX.1(b) which for ease of reference I set out below;
 - (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.
 15. The findings of the FtT commence at paragraph 21 and conclude at paragraph 26. There are no findings in relation to EX.1(b) and no consideration of whether there are insurmountable obstacles to family life continuing outside the UK. This was an issue specifically raised in the Secretary of State's reasons for refusal letter, and was referred to in the submissions made to the FtT by the Secretary of State's representative (see paragraph 19 of the decision).
 16. The FtT erred in paragraph 26 in finding that the only effective ground for refusal of the Claimant's application was whether the parties were in a genuine and subsisting relationship. The FtT erred in finding that the Claimant met all of the requirements of Appendix FM, as the FtT had neglected to consider EX.1(b). The FtT therefore failed to make findings on a material matter.
 17. As there was no challenge to the FtT findings that the Claimant and her husband are in a genuine and subsisting relationship, that finding is preserved.
13. After I had announced that the decision of the FtT was set aside, the Claimant asked that the hearing be adjourned to another date to enable her to prepare her case, and to give further evidence on the issue of insurmountable obstacles. Mr McVeety agreed that an adjournment would be appropriate.
 14. I indicated that I did not propose to remit the appeal back to the FtT to be reheard, and decided that it would be in the interests of justice to adjourn the hearing as requested by the Claimant.
 15. The appeal came before me again on 12th January 2016. The Claimant was legally represented and her solicitors had submitted a bundle of documents comprising 71 pages, which included a witness statement signed by the Claimant and dated 7th January 2016.
 16. Mr Timson indicated the main issue to be considered in relation to whether or not there were insurmountable obstacles to family life continuing outside the UK, was the contention that the Claimant is a Shia Muslim, and her spouse is a Sunni Muslim, and their respective families do not accept their marriage, and they fear being killed if they return to Pakistan. The Claimant had elaborated upon this in some detail in her witness

statement, and stated in paragraph 16 that she understood that the Secretary of State accepted that she is a Shia Muslim and her husband is a Sunni Muslim.

17. Mr Timson indicated that he required an adjournment so that a witness statement could be prepared on behalf of the Claimant's spouse, to support and confirm the account given by the Claimant in her witness statement. I was asked to take into account that the Claimant had not been legally represented before the FtT nor at the earlier error of law hearing, and her solicitors were only instructed on 23rd December 2015, and their offices were closed between 24th December 2015 and 4th January 2016. Mr Timson also requested an adjournment to obtain further objective evidence, to prove the difficulties that the Claimant and her spouse would face as Shia and Sunni Muslims who had married, if they had to return to Pakistan.
18. I was asked to accept that this was not a new issue, as although the Claimant had not previously been legally represented, this had been raised before the FtT, and was referred to in paragraph 12 of the FtT decision, in which there is reference to the Claimant advising the FtT that she feared being killed if returned to Pakistan because of her marriage, and that if her appeal failed, she intended to put in a further asylum claim. The Claimant had previously made an asylum claim but had withdrawn this on legal advice.
19. Mr McVeety stated that he did not oppose the application for an adjournment, and clarified that it was not accepted that the Claimant was a Shia and her husband a Sunni Muslim and that this would cause them difficulties if returned to Pakistan, and so far as Mr McVeety was aware, this issue had not previously been put to the Secretary of State. Mr McVeety indicated that there would be extensive cross-examination on this point, and commented that the Claimant was in fact making a de facto asylum claim and the Upper Tribunal would be acting as the primary fact-finder on this issue.
20. Mr Timson submitted that it would in fact be appropriate, for the appeal to be remitted to the FtT, so that the FtT could be the primary fact-finder on this issue rather than the Upper Tribunal, and Mr McVeety agreed with this suggestion.
21. I decided that there had been a change of circumstances since the error of law hearing, and in view of the contents of the Claimant's witness statement, it would not be appropriate to proceed to remake the decision. I decided that it would be appropriate for the Claimant's spouse to be given the opportunity to prepare a witness statement, and I took into account the fact that the Claimant had previously been unrepresented, and her solicitors had only recently been instructed.
22. As both representatives now agreed that it would be appropriate to remit this appeal back to the FtT, I took into account paragraph 7 of the Senior President's Practice Statements which provides as follows;

- 7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with the relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
- 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision and the appeal to be re-made is that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
- 7.3 Re-making rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact-finding is necessary.
23. In my view the requirements of paragraph 7.2(b) are met, in that substantial judicial fact-finding is required. No findings of fact were made by the FtT on the issue, in relation to the risk the Claimant and her spouse claim exists because of their marriage, if they returned to Pakistan. Therefore, with the consent of both parties, the appeal is remitted to the FtT so that it may be decided afresh. The only finding of fact that is preserved is that the Claimant and her spouse are in a genuine and subsisting relationship.
24. The appeal will be heard by the FtT at the Manchester Hearing Centre and the parties will be advised of the time and date in due course. The time estimate is two hours. An Urdu interpreter is required. The appeal will be heard by an FtT Judge other than Judge McGinty.
25. If the Claimant's spouse makes a witness statement that is to be relied upon, the witness statement must be submitted to the FtT and to the Secretary of State no later than 15th February 2016.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

There was no order for anonymity made in the First-tier Tribunal. There has been no request for anonymity, and the Upper Tribunal makes no anonymity order.

Signed

Date: 12th January 2016

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. The fee award will need to be considered again when the First-tier Tribunal has heard this appeal.

Signed

Date: 12th January 2016

Deputy Upper Tribunal Judge M A Hall