Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07551/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 May 2019	**On 24 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

ZAHEER [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kumar, Legal Advisor, Ghafoors Immigration Service
For the Respondent: Mr Lindsay, Home Office Presenting Officer

DECISION AND REASONS

Introduction and background

1. The appellant is a citizen of Pakistan born on 15 April 1986. He appeals against the decision of First-tier Tribunal Judge Kimnell to dismiss his appeal on human rights grounds.

2. The appellant first came to the UK in February 2008 as the spouse of a British citizen claiming that the relationship began on 13 May 2008, i.e.

three months after he arrived here. The appellant's leave was curtailed with an in-country right of appeal which he subsequently availed himself of. That appeal was dismissed on 23 July 2009 and his appeal rights became exhausted in August 2009, but he remained in the UK anyway. He married another British citizen, [SA], but their relationship ended after three years. The appellant then met his current partner, whom he subsequently married, [KW], with whom he has recently had a child, [FA], who was born on [~] 2018.

The grounds of appeal to the Upper Tribunal

3. In extensive grounds of appeal, the appellant appealed Judge Kimnell's decision to dismiss his appeal to the First-tier Tribunal, which was promulgated on 25 October 2018. The grounds of appeal run to four grounds. The first ground states that the Immigration Judge was wrong to decide that there were no "insurmountable obstacles" to the family, that is the appellant and his current wife and child, going to live in Pakistan. The appellant relies on the recent Supreme Court case of **Regina v Agyarko v the Secretary of State for the Home Department [2017] UKSC 11** (**Agyarko**) in support of this ground. **Agyarko** approved the definition of "insurmountable obstacles" in EX.2 of the Immigration Rules as "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 to the applicant or their (sic) partner". I have underlined the words "could not" to emphasise that the test is not intended to be one of hardship or serious inconvenience but is intended to be a barrier which it is very difficult to overcome.

4. The appellant was given permission to appeal Judge Kimnell's decision by Upper Tribunal Judge Hanson, who, in a particularly fulsome and helpful grant of permission, gave the appellant permission to appeal to the Upper Tribunal on 21 February 2019. Judge Hanson identified the question of "insurmountable obstacles" and whether the judge had fully considered that matter as of particular importance. He said that the current appeal was under Article 8 of the ECHR and there was a legally arguable error in that it may have been material to the decision that Judge Kimnell had dismissed the appeal in circumstances where there would be great difficulty in the family returning to Pakistan. Arguably, Judge Kimnell had failed to provide adequate reasons for deciding that it was proportionate to require the appellant to go back to Pakistan and make a fresh application for entry clearance to re-join his British spouse. It was not disputed by the respondent that the appellant was entitled to apply for re-admission to the UK. There appeared to Judge Hanson to be at least be arguable grounds for saying that the obstacles to the appellant and his spouse returning to Pakistan to continue their family life there were "insurmountable" and that exceptional circumstances had to be shown why it would be appropriate in this case to require the appellant to go back to Pakistan.

The hearing before the Upper Tribunal

5. Before the Upper Tribunal, Mr Kumar, who represented the appellant, pointed out that the appellant's relationship with Ms [W] was the third such relationship since the appellant had arrived in the UK. He had had children by all three relationships, and he had not given up the hope of establishing contact with the children by the earlier relationships. This matter had not been given any weight by the First-tier Tribunal because there was no current evidence of contact being in place. Nevertheless, Mr Kumar suggested that such contact could be established. He then outlined ground 1, pointing out that he accepted that the appellant had family members in Pakistan and that it is possible that the appellant may be able to gain employment, but it was unlikely that his wife would be able to do so. His wife was above the income threshold and there was little point in the appellant returning to Pakistan because he was likely to be granted entry clearance to return for family settlement in any event. The appellant was likely to suffer significant hardship and, more importantly, the fact the whole family would be forced to suffer significant hardship, for the reasons given in the grounds of appeal, so no useful purpose. The appellant's sponsor is a white British female who has never visited Pakistan, was not familiar with the language or culture. In the circumstances, Mr Kumar submitted, she would be expected to experience "very significant difficulties" in settling in a country which was known for discrimination of women at societal level, cultural barriers to integration and other difficulties. Pakistan is ranked as a dangerous place for many women and the sponsor, whilst she was in a long-term relationship, could therefore considered to be at risk if she went to live there. Therefore, even though the appellant was married (to the sponsor) she might be at risk of sexual or gender-based violence. In any event, would face very significant hardship in retuning to Pakistan. The appellant and the sponsor might face difficulties in finding employment.

6. Mr Kumar also relied on **EB (Kosovo) [2008] UKHL 41** to support the submission that the material question was whether the removal of the appellant was proportionate. Given that the appellant's removal would inevitably have a very significant impact on the family, Mr Kumar submitted, that family life would be disrupted. Therefore, having regard to its effect on the family unit, his removal would be disproportionate. Nor was it right for the respondent to assume that, because the appellant might qualify under the Immigration Rules to return to the UK as the spouse of a British Citizen (it was accepted that the eligibility requirements were met in this case), it was necessary and proportionate to require the appellant to return to Pakistan and make a fresh such an application. Thus, would be disproportionately disruptive to family life in the UK. The case of **Chikwamba [2008] UKHL 40** was relied on to support the proposition that it would only be in comparatively rare cases that it would be

appropriate, necessary and proportionate to require a foreign national to return to their country of nationality to make a fresh application where the appellant had a family in the UK, including a child. Even if the appellant has been residing in the UK unlawfully, in cases where it would otherwise it would be certain he would be granted leave to enter the UK if returned to his own country, there may be no public interest in his removal.

7. On the other hand, Mr Lindsay said that although there was no Rule 24 response, it would need to be established under EX.1 of the Rules that the obstacles to family life continuing outside the UK were "insurmountable". He said that there was a wider range of considerations under Article 8 than merely to look at the well-being of the family. The starting position was the Immigration Rules. There was no good reason why the appellant should not return to Pakistan and apply for entry clearance to re-join his spouse. He referred me to paragraph 15 of the decision where Judge Kimnell pointed out that the submission had been made that Ms [W] could not live in Pakistan because her husband's family had no home and, "in parts of Pakistan", it would be difficult to live as a white woman. It was also recorded by Judge Kimnell that the submission had been made that the appellant's uncle was "a bit funny". Ms [W] would be worried about paying for healthcare as well. These were not, in Mr Lindsay's submission, strong grounds for opposing going to live as a family in Pakistan, although he accepted some hardship would be suffered.

8. There would be some discrimination at societal level, but this was dealt with at paragraph 23 of the decision, where the judge pointed out that although violence was commonplace, including domestic violence and honour killings, this was not a case where these things were particularly likely to occur. The status of women differs in accordance with their social position. The appellant had a supportive family and would be able to return to live with or close to that family. Given wider family support, and a functioning healthcare system, no reason was established as to why the obstacles to the appellant's return to Pakistan were insurmountable. There was no doubt that Ms [W] would find it difficult to settle in a strange country with a different language and culture, but it was not be right to say that these difficulties could not be overcome. **Chikwamba** was also referred to by Mr Lindsay. However, he submitted that Judge Kimnell was entitled to find that appropriate, necessary and proportionate to require a foreign national to return to their country of nationality to make a fresh application where the appellant had a family in the UK including a child._Mr Lindsay referred to the public interest considerations in Section 117B(4)(a) and (b) of the Nationality, Immigration and Asylum Act 2002 and pointed out that "Little weight should be given to a private life or a relationship with a qualifying partner …that is established by a person at a time when that person is in the UK unlawfully." It was submitted that this was the position here. Therefore, Judge Kimnell was entitled to decide that the need to enforce proper immigration controls was an overriding factor. His decision was in accordance with recent case law, including Agyarko.

9. At the end of the hearing I reserved my decision.

Conclusion

10. I have considered carefully the submissions by both sides but concluded that Judge Kimnell gave a clear, well-structured and properly reasoned decision. He had proper regard to the background material in relation to Pakistan in concluding that the risk that Ms [W] would face significant difficulties in settling into a country with such a different culture, language and history, did not cross the threshold required to show that there were "insurmountable obstacles" for the purposes of EX.1 of the Immigration Rules. Judge Kimnell referred to **Agyarko** and also to a number of other pertinent cases to this area. I am satisfied that he fully understood the definition of "insurmountable obstacles" in EX.2 of the Immigration Rules and apply that test to the fact this case. He also considered the appeal outside those rules but concluded that although the threshold was low for an article 8 claim, the couple would be able to establish family life there or the appellant could apply for settlement in accordance with the Immigration Rules. Judge Kimnell was entitled to attach weight to the section 117B factors in the public interest in the enforcement of immigration control. I am not persuaded that there is anything in Judge Kimnell's decision which amounts to an error of law.

11. The First-tier Tribunal weighed all the factors in the balance and reached a conclusion it was entitled to reach on the evidence it heard.

Notice of Decision

12. The decision of the First-tier Tribunal did not contain a material error of law. Accordingly, the appeal to the Upper Tribunal dismissed and the decision of the First-tier Tribunal stands.

13. No anonymity direction is made.

Signed Date 21 May 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 21 May 2019

Deputy Upper Tribunal Judge Hanbury