Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06462/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2019	**On 15 November 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MALIK [K]
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Claimant: Mr J Trussler, instructed by Kinas Solicitors

DECISION AND REASONS

This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Herbert promulgated on 28 August 2019, dismissing the protection claim but allowing on immigration and on Article 8 grounds the claimant's appeal against the decision of the Secretary of State, dated 26 June 2019, to refuse the claimant's protection and human rights claims, which were based on his claimed fear of persecution the grounds of political opinion arising from his alleged involvement with the Turkish Gulen movement.

First-tier Tribunal Judge Chohan granted permission to appeal on 29 September 2019.

In the first instance, I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside. For the reasons I have set out below, I find there were errors of law of sufficient materiality to require the decision to be set aside and remade by dismissing the appeal.

I first note that there has been no cross-appeal against the First-tier Tribunal's decision dismissing the protection claim and that part of the decision must stand unchallenged. The only issue therefore is that of insurmountable obstacles to family life with the claimant's partner continuing outside the UK, either within the Rules or outside the Rules.

The relevant background can be summarised as follows. The claimant first came to the UK in 2007 with leave as a student, which is not a route to settlement. He was refused further leave beyond April 2009 and thereafter became an illegal overstayer. It was only after being served as an overstayer in March of 2019 that in April 2019 he claimed asylum. The claimant asserts a relationship with a British citizen partner, a Miss [S]. However, the respondent did not accept that they had been living together in a relationship akin to marriage or civil partnership for at least two years prior to the date of application. That remained an issue at the First-tier Tribunal appeal hearing.

From paragraph 36 onwards of the decision the First-tier Tribunal Judge considered the nature of the relationship and accepted that they had been living together in a relationship akin to marriage for more than two years prior to the application made in 2019 and in a subsequent paragraph, paragraph 37, the judge accepted they had lived together as husband and wife for several years prior to the date of application. From paragraph 38 of the decision the judge considered, both within and without the Rules, the question of insurmountable obstacles to continuing the relationship with the partner in Turkey. Applying EX.1 and EX.2, the judge found that there was a genuine and subsisting relationship with the British citizen partner and concluded that they would face very significant difficulties in continuing their family life together which could not be overcome or which would entail very serious hardship for either or both of them. At paragraph 43 the judge was satisfied that relocating to Turkey would involve a "degree of hardship which could not reasonably be expected to be overcome".

The judge went on at paragraph 45 to take account of Section 117B of the 2002 Act and that the relationship was formed at a time when the claimant's immigration status was precarious. At paragraph 47 the judge considered the case of Agyarko and finally, from paragraph 50 the judge applied the stepped approach in Razgar to conclude that the decision was disproportionate.

In granting permission to appeal Judge Chohan considered it arguable that the judge may have erred in finding insurmountable obstacles. The grounds first assert that the judge erred in failing to apply the correct threshold or test of insurmountable obstacles. It is argued that the reasons adopted by the judge are insufficient to amount to insurmountable obstacles and that at paragraph 43 the judge's finding of a "degree of hardship which could not reasonably be

expected to be overcome" did not apply the right test or threshold of EX.1 or EX.2.

It is also argued that although referencing the decision of the Supreme Court in Agyarko, the judge failed to apply it properly. If the insurmountable obstacles test was not met, then leave can only be granted outside the Rules on the basis of exceptional circumstances which would cause a refusal of leave to result in unjustifiably harsh consequences.

I find that in allowing the appeal outside the Rules at paragraph 43 of the decision, the judge failed to identify anything which could properly or reasonably be regarded as insurmountable obstacles or exceptional circumstances, rather than mere difficulties or challenges. It is far from clear why these difficulties or challenges could not be overcome. I accept the argument that at paragraph 42 the judge wrongly focussed on the partner's links and ties to the United Kingdom, rather than the difficulty of establishing family life with the appellant in Turkey or outside the UK. None of the factors set out relate to the difficulties of going to live in Turkey. None of the factors can sensibly be said to be ones which are so very significant that they cannot be overcome. I am satisfied that the judge has applied the wrong test of insurmountable obstacles and even if what he stated about a significant degree of hardship can be set aside the whole exercise of considering the circumstances fell, in my view, to establish insurmountable obstacles to family life continuing in Turkey.

Further, although the judge referenced Section 117B of the 2002 Act it is difficult to see any actual finding as to the statutory public interest considerations. Most importantly, given the appellant's immigration status was not only precarious but unlawful, little weight is to be accorded against the public interest to a relationship developed with a partner.

Of concern is paragraph 49 of the decision where the judge asserts that there is "an entitlement on a UK citizen to be able to marry a person of their choosing and to have their rights considered to be able to reside in the United Kingdom with a partner". This is a misstatement of the law, as conceded by Mr Trussler. SS (Congo) [2015] EWCA Civ 387 held that Article 8 confers neither an automatic right of entry nor a general obligation on a state to facilitate the choice made by a married couple to reside in it.

At paragraphs 48 and 52 of the decision the judge also appears to have concluded that if forced to return the claimant would succeed in an application for entry clearance from Turkey but made no assessment as to whether the Rules would be met for entry clearance in such circumstances. For example, there was no reference at all as to the maintenance requirements.

I am satisfied that these are material errors of law; the unsupported and unsustainable findings undoubtedly influenced the judge's assessment of the proportionality balancing exercise between the public interest on the one hand and the rights of the claimant and his partner on the other.

I also find that the judge has provided inadequate reasons for allowing the appeal at all. In particular, whilst at paragraph 36 the judge accepted that the relationship was one akin to marriage and was satisfied that it had lasted for a period of more than two years predating the application, no adequate reasoning is provided for the duration of the relationship, which is particularly important when it was clear that this aspect of the length of the relationship had been rejected in the respondent's refusal decision. The only reasons that are set out in paragraphs 36 and 37 relate to the relationship being genuine and subsisting, not its length. As I pointed out to Mr Trussler, it was not possible for the respondent to see from the decision on what basis the judge disagreed with the respondent and found that the relationship had endured more than two years prior to the date of the application.

It follows that the judge's conclusion that this was an application that met the requirements of the Rules was materially flawed and cannot stand.

In the circumstances, the decision cannot stand and must be set aside. Having found the decision was in error of law, I suggested to Mr Trussler that I saw no reason why I could not immediately remake the decision. Given my findings, it is clear that the appeal could not succeed and was bound to fail. He agreed with the proposed course of action, did not seek an adjournment, and did not seek to call any evidence in relation to the relationship. His only concern expressed to me was as to a right of appeal to the Court of Appeal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such as to require the decision to be set aside.

I set aside the decision.

I remake the decision in the appeal by dismissing it.

No anonymity direction is made.

Signed

Upper Tribunal Judge Pickup

Dated 12 November 2019

To the Respondent
Fee Award

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

Signed

Upper Tribunal Judge Pickup

Dated 12 November 2019