IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006366

First-tier Tribunal No: HU/04747/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 1 September 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

Amreen Kousar
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms P. Yong, Counsel instructed by ABN Solicitors
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 26 April 2023
Directions issued on 22 June 2023
Further submissions received from the appellant on 20 July 2023

DECISION AND REASONS

1. At the heart of these proceedings lies a genuine and subsisting marriage between a Pakistani woman of the Islamic faith (the appellant) and a British man of the Sikh faith (the sponsor). The Secretary of State has conceded that under Islamic law, as practiced and applied in Pakistan, a marriage between a Muslim and non-Muslim is prohibited. The Secretary of State further accepts that the sponsor would have to convert to Islam in order to reside with the appellant in Pakistan. The central issue before is whether such a requirement amounts to an "insurmountable obstacle" to family life between the sponsor and appellant continuing in Pakistan for the purposes of paragraph EX.1(b) of Appendix FM of

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the Immigration Rules**.** A judge of the First-tier Tribunal concluded that it would not be. The first question for our consideration is whether that was an error.

2. By a decision sent to the parties on 22 June 2023("the Error of Law decision"), we concluded that the First-tier Tribunal did err in that respect. We set its decision aside with certain findings of fact preserved. We also set out our preliminary views concerning where, and how, the decision of the First-tier Tribunal should be remade. We set out our preliminary view that, exceptionally and in light of the Secretary of State's concessions, the appeal should be remade in the Upper Tribunal and allowed on the papers, subject to the submissions of the parties within 14 days concerning whether an oral continuance hearing should be convened. There was no response from the Secretary of State. The appellant encouraged us to remake the decision by allowing the appeal on the papers.

3. This decision incorporates the reasoning of our Error of Law decision and remakes the decision in accordance with our preliminary views.

Factual background

4. The appellant is a citizen of Pakistan whose date of birth is recorded as 1 January 1975. She entered the United Kingdom on a visitor's visa on 28 June 2015 valid until 11 November 2015, and has remained here ever since, unlawfully. On 12 April 2018, she married Ranjit Singh, a naturalised British citizen of Indian origin, whom we shall refer to as "the sponsor". Mr Singh is a Sikh. The appellant is a Muslim.

5. On 9 May 2018, the appellant made a human rights claim based on her family life with the sponsor. It was refused by the Secretary of State on 2 January 2019, and the appellant's appeal against the refusal was dismissed by First-tier Tribunal Judge E. M. M. Smith in a decision and reasons promulgated on 21 March 2019 ("the 2019 decision"). It was, and remains, common ground that the appellant and sponsor are in a genuine and subsisting relationship. The issue before the First-tier Tribunal in 2019 was whether the interfaith marriage between the appellant and the sponsor would present insurmountable obstacles to their family life continuing in Pakistan. That was dealt with in the following terms in the 2019 decision, at para. 22:

> "The respondent accepts that Muslim women cannot marry non-Muslim men and the non-Muslim man would need to convert to Islam. The sponsor does not wish to do that. However, whilst there are potential difficulties it does not in view [*sic*] represent a significant obstacle. The sponsor would have known of the difficulties of an interfaith marriage and would at some stage have been aware the appellant was in the UK illegally and would be in danger of being returned to her home country yet married."

6. On 18 December 2020, the appellant made a further human rights claim to the Secretary of State in the form of another application for leave to remain based on her private and family life with the sponsor. On the application form, in answer to the question "please explain why you and your partner cannot live together outside the UK", the appellant said:

> "My marriage is inter-religion marriage. If I return to Pakistan I will be killed."

7. The application was refused by a decision dated 29 September 2021 ("the refusal letter"). Since the appellant could not meet the immigration status

requirement under para. R–LTRP.1.1(d)(ii) of Appendix FM, her application could only succeed if she met paragraph EX.1(b). The main criterion imposed by that paragraph is that:

> "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen… **and there are insurmountable obstacles to family life with that partner continuing outside the UK**." (Emphasis added)

8. In her analysis of this issue in the decision under challenge, the Secretary of State said:

> "Although it has been accepted that under Islamic law Muslim women cannot marry non-Muslim men therefore a non-Muslim man would have to convert to Islam in order to marry a Muslim woman. **The onus would be on your partner to convert to Islam if you were to relocate to Pakistan and continue your relationship there.** Exercising discretion would mean treating you in a more favourable manner than those in your home country whom have had to convert and change their religious beliefs in order to marry." (Emphasis added)

9. The appellant appealed to the First-tier Tribunal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). By a decision dated 10 July 2022, First-tier Tribunal Judge O'Brien ("the judge") dismissed the appeal.

The decision of the First-tier Tribunal

10. In his decision, the judge said that his "starting point" was the 2019 decision's conclusion that the appellant and the sponsor faced no insurmountable obstacles to their relationship continuing in Pakistan (para. 29). The judge found that the appellant's father's attitude towards her had "softened", and rejected the appellant's evidence that her family would target her and the sponsor if they were to return to Pakistan (para. 30).

11. At para 31, the judge reached the following operative findings:

> "As for wider societal issues, the hearing proceeded on the basis that the appellant is Muslim and Mr Singh a Sikh, and so I will not go behind those bare facts. Neither will I go behind the respondent's concession that, under Islamic law, a Muslim woman cannot marry a non-Muslim man and so that it would be necessary for a non-Muslim man to convert to Islam to marry the woman. However, it is striking that Mr Singh does not mention that he is a Sikh once in his witness statement, let how important his religion is to him. He does not wear a turban and does not say that he ever attends the Temple. While Judge Smith [in the 2019 decision] accepted that Mr Singh 'does not wish to' convert to Islam, Mr Singh has not said why that is so. Certainly, he has not said that it is some matter of conscience or high principle. Therefore, I see no reason to go behind Judge Smith's finding that the provisions of Islamic law pose no significant obstacle to the couple. Indeed, I agree that requiring Mr Singh to convert to Islam would not be an insurmountable obstacle to their family life continuing in Pakistan."

12. The judge also adopted the 2019 decision's conclusion that the appellant and sponsor would not face insurmountable obstacles on other grounds, and that the

appellant personally would not face very significant obstacles to her own integration in Pakistan: paras 32 and 33.

13. The judge dismissed the appeal. The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Gumsley.

Issues on appeal to the Upper Tribunal

14. The ground of appeal to the Upper Tribunal is that the judge's conclusion that a requirement for the sponsor to change religion would not be an "insurmountable obstacle" was a misdirection in law. Such a requirement would be in contravention of the sponsor's right to freedom of religion. By definition, it amounts to an insurmountable obstacle, and the judge was wrong to conclude otherwise.

15. Ms Yong submitted on behalf of the appellant that the Secretary of State's *Country Policy and Information Note, Pakistan: Background information, including internal relocation*, version 3.0, June 2020, confirmed at paragraph 17.1.1 that under Islamic law, Muslim women cannot marry non-Muslim men. It states:

> "As marriages between Muslim women are considered illegal, a non-Muslim man would have to convert to Islam to marry a Muslim woman."

16. Ms Yong also relied on the Secretary of State's guidance on para. EX.1(b) of Appendix FM, which was quoted at para. 11 of the appellant's skeleton argument before the First-tier Tribunal (settled by Mr Dhanji of Counsel). Version 16.0 of *Family life (as a partner or parent), private life and exceptional circumstances* dated 7 December 2021 was in force at the time of the appeal before the judge. Under the heading "serious cultural barriers to relocation overseas", the guidance stated:

> "This might be relevant in situations where the partner would be so disadvantaged by the social, religious or cultural situation in a particular country that they could not be expected to live there.
>
> For example, a same-sex couple or an inter-faith couple were the UK partner would face a real risk of prosecution, persecution or serious harm in the country of proposed relocation, as a result of their relationship or faith. Such a barrier must be one which affects their fundamental rights, cannot reasonably be overcome and would present a very significant obstacle to family life being pursued in that country."

17. We observe that the current version, version 18.0, appears to replicate the approach adopted by the policy in force at the time of the appeal before the judge.

18. Ms Yong's submission was that, in addition to the societal discrimination that the appellant and the sponsor would face, there is a fundamental issue of principle at stake. The sponsor should not be required to convert to a religion that he has not chosen to follow of his own volition simply in order to facilitate family life with the appellant in Pakistan.

19. Ms Yong also highlighted the *Country Policy and Information Note, Pakistan: Women fearing gender-based violence*, version 4.0, February 2020, at paragraph 2.4.28, concerning the risk of honour crimes faced by women who are perceived to have brought dishonour to a family, and other similar background materials.

As a party to an interfaith marriage, the appellant would be at risk as described in those documents.

20. For the Secretary of State, Ms Nolan relied on the Secretary of State's rule 24 response, which contended that the appeal before the First-tier Tribunal was an attempt to relitigate the conclusion of the 2019 decision. There was minimal evidence concerning the importance of the sponsor's adherence to the Sikh faith, as found by the judge. The sponsor's attitude to his own religion entitled the judge to conclude that conversion to Islam would not be an insurmountable obstacle. Ms Nolan also relied on *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925, in which Court of Appeal held that the "insurmountable obstacles" test is an objective, rather than subjective, test: see para. 37. That is the position here. The sponsor's subjective reluctance to convert to Islam cannot merit the conclusion that he would objectively be unable to do so. It was in the gift of the sponsor to remove any obstacles he and the appellant would otherwise face on account of his religion simply by converting to Islam.

Relevant legal principles

21. The sole ground of appeal before the judge was that it would be unlawful under section 6 of the Human Rights Act 1998 to remove the appellant or require her to leave the United Kingdom. The relevant articles are:

> ARTICLE 8
>
> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. ART
>
> ARTICLE 9
>
> Freedom of thought, conscience and religion
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

22. In relation to Article 8, the Immigration Rules codify the Secretary of State's view as to what amounts to a fair balance for the purposes of Article 8(2). Where Article 8 is engaged and where an appellant meets the requirements of the rules, that will be determinative of a human rights appeal in her favour: see *TZ*

(Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109 at para. 34.

23. In addition, there are a range of statutory public interest considerations in Part 5A of the 2002 Act which are relevant to any assessment of proportionality under Article 8(2).

24. We have already quoted the essential criterion that lies at the heart of para. EX.1(b) of Appendix FM at para. 7, above. Para. EX.2 amplifies the term:

> "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."

Requirement to change religion may, in principle, be an insurmountable obstacle

25. To address the parties' respective submissions, we consider that it necessary to approach the central question we outlined in para. 1 from first principles.

26. First, we note that the Secretary of State's *Family life* guidance (see para. 16, above) recognises that inter-faith marriages can result in persecution.

27. Secondly, as also recognised by the *Family life* guidance, persecution flowing from an inter-faith marriage may, in principle, amount to an "insurmountable obstacle" for the purposes of para. EX.1.(b). Choosing which religion to adhere to, or deciding to follow no religion at all, in principle affects an individual's fundamental rights, as recognised by the guidance. *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 concerned the Refugee Convention implications of a requirement to feign political support for the ruling Zanu (PF) party. At para. 28, Lord Dyson cited with approval the following extract from guidance issued by the United Nations High Commissioner for Refugees on this point:

> "…religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution…"

28. Thirdly, a legal requirement imposed on an individual to suppress expression or manifestation of their faith, or feign or force conversion to another faith, can, in principle, amount to persecution. This applies to marginal believers. See para. 45 of *RT (Zimbabwe)*:

> "There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to human rights protection and to protection against persecution under the Convention. None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution."

29. Fourthly, it is necessary to look to the prospective conduct of the person concerned (in these proceedings, the sponsor) in the country in question. The

cases concerning sexual orientation (*HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31) and religious expression (*WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 302) require analysis of whether the individual will live openly as, for example, a gay man, or as a member of the Ahmadi faith. In the case of asylum claims based on sexual orientation and religious expression, where as a matter of fact the individual's conduct will be discreet, it is necessary to ask the "why?" question and determine the reasons for such conduct.

30. Where (as here) the Secretary of State's case is that any interfaith barriers that would otherwise be faced by a couple in the destination country could be overcome by one party converting to Islam, we consider that the practical application of the *HJ (Iran)* principles must be adapted to reflect the interfaith marriage paradigm, whereby one party to the interfaith marriage would be subject to a legal requirement to convert to Islam. It is conceded by the Secretary of State – contended, even – that the sponsor must convert to Islam in order to continue family life with the appellant in Pakistan. The Secretary of State accepts that there is no possibility of the sponsor continuing to live as a Sikh in the event that he was to accompany the appellant to Pakistan. He must "convert" to Islam. The question is whether that is a barrier that cannot be overcome, or whether it is otherwise appropriate to expect him to convert to Islam.

31. The verb "convert" is open to a different constructions. It could entail the sponsor genuinely embracing the Islamic faith as a matter of personal choice. If the sponsor would genuinely and willingly embrace Islam, albeit having been catalysed to do so by the requirements of Islamic law as they apply to his wife, it would be difficult to see how that would amount to persecution, or an insurmountable obstacle for the purposes of EX.1.

32. By contrast, "conversion" could entail the sponsor feigning conversion to the Islamic faith, through ostensible confession of faith and outward adherence to its requirements, while inwardly disbelieving the faith, and maintaining his personal convictions as a Sikh (or, as the case may be, a nominal Sikh or as a functional atheist). No doubt there are other possibilities, perhaps falling somewhere between the two. We do not rule out the possibility that there may be a prospective convert who is ambivalent about all things religious and would be willing to adopt a pragmatic approach to conversion in order to facilitate family life.

33. At its highest, it seems to us that the feigned manifestation of a false Islamic faith, coupled with the suppression of genuine and internal convictions as a Sikh, may well amount to persecution on grounds of religion. It would amount to a hybrid of the persecution in *WA (Pakistan)* and *RT (Zimbabwe)* concerning suppressed religion and feigned political support respectively. Such "conversion" would, in our judgment, be an insurmountable obstacle to the relationship continuing in Pakistan because it would contravene the sponsor's freedom of religion.

34. Drawing this analysis together, the principles underpinning *HJ (Iran)* should be applied to an assessment of "insurmountable obstacles" in prospective conversion cases such as the present in the following manner.

    a. The first question is whether the sponsor would convert to Islam in order to continue family life with the appellant in Pakistan?

b. Whether the answer to the above question is yes or no, the crucial factor is why?

35. The answer to the "why" question is essential to understanding whether the requirement to convert is a barrier that cannot be overcome, in light of the discussion above. Given the inherently personal nature of religious faith and the corresponding fundamental nature of the right to religious freedom, we consider that much will turn on the personal religious preferences of the individual concerned. An individual need not have pre-determined views of conscience or principle. In many cases, it will be difficult to go behind an individual's preferences or religious convictions. A simple reluctance to convert to Islam for personal reasons may well be sufficient.

36. As we conclude on this point, we must address Ms Nolan's reliance on *Lal.* The issue in *Lal* was the British sponsor's subjective dislike of the heat in India. It did not concern the fundamental right to freedom of religion, or the inherently personal and subjective nature of faith-based convictions. A reluctance to change to or adopt another religion is not coterminous with a preference for a particular type of weather. *Lal* is of little assistance to the Secretary of State.

The judge impermissibly expected the sponsor to raise an objection of conscience or principle

37. Quite understandably, since the 2019 decision had not been set aside, the judge adopted that decision as his starting point when concluding that the requirement to convert to Islam would not present an insurmountable obstacle to family life continuing in Pakistan. The difficulty is that there was no mention in the 2019 decision of the Secretary of State's *Family life* guidance, referred to above, which either did not exist in the present form, or was not referred to Judge E. M. M. Smith at the time. That guidance was before the judge below in these proceedings (see para. 11 of the appellant's skeleton argument) and so fell to be addressed as part of this analysis. Further, in his four page decision, Judge E. M. M. Smith did not consider any of the matters we have discussed above.

38. We accept that the judge sought to address the reasons why the sponsor was unwilling to convert to Islam as part of his analysis, at para 31. The sponsor's evidence before Judge E. M. M. Smith in 2019 that he did not want to do so was accepted in the 2019 decision, and he adopted the same approach before the judge below in these proceedings. So much is clear from paras 16 and 17 of his witness statement dated 7 June 2022, in which he refers to the prospective difficulties flowing from being in an interfaith marriage in Pakistan. There would have been no such difficulties if he would have been willing to convert to Islam.

39. At para. 31, the judge said that the sponsor had not explained why he did not want to convert to Islam. Although the judge did not say so in terms, it appears that the judge concluded that the sponsor's Sikhism was, at best, nominal (for want of a better term) and that it meant little to him. He observed that the sponsor did not wear a turban and did not make any references to attending the temple or otherwise refer to the importance of his faith in his evidence. Those were findings the judge was entitled to reach. However, in our judgment the judge impermissibly extrapolated the appellant's apparent nominal Sikhism into an expectation that he should be willing and able to convert to Islam. The two should not be conflated. Just as an atheistic or ambivalent non-believer cannot be expected to convert to Islam against their will, neither can a nominal Sikh (or nominal adherent of any other religion) be expected to convert to Islam, or any other religion.

40. In asking the "*why?*" question we identified above, the judge impermissibly looked for more than a personal conviction and reluctance to convert to Islam. The freedom to choose one's religion is inherently personal. It is a fundamental right. In this case, the appellant's evidence was that he did not want to convert to Islam. As the judge noted, that aspect of his evidence had been accepted by Judge E. M. M. Smith in 2019. Although the judge made some adverse credibility findings against the appellant and the sponsor, nothing in his decision sought to depart from that earlier finding. There was no reason to go behind that finding. Rather, the judge ascribed minimal significance to it because he found that the sponsor's Sikhism was nominal, and that his reluctance was not driven by "some matter of conscience or high principle". In our judgment, it was an error to look for evidence of conscience or high principle from the sponsor to underpin his desire not to convert to Islam. The 2019 decision found that he did not want to covert to Islam, and there was nothing before the judge to suggest that he had changed his mind (or convictions) since then.

41. In summary, the judge was wrong to conclude that "the provisions of Islamic law pose no significant obstacle to the couple." They did: the sponsor did not want to covert to Islam, and he should not have been expected to do so. That was an error of law.

42. Before we conclude on this point, we address Ms Yong's submissions that the judge erred in relation to the remaining background materials concerning the prospective in-country risk of honour killing from the appellant's family that would be faced by the appellant and the sponsor. This is a different facet of the appellant's case to that discussed above. In our judgment, there is no merit to these submissions. The judge reached unchallenged findings of fact that the appellant's family's attitude towards the appellant had softened (to adopt what the judge described as the appellant's words) in recent years. There had been a degree of inconsistency between the evidence of the appellant and the sponsor on this issue, and the judge found that the appellant and her family enjoyed cordial telephone contact with each other. There is no merit to the remaining submissions advanced by Ms Yong.

43. We therefore set the decision of the judge aside. We preserve his findings of fact reached at paragraphs 25 to 30 and 32 and 33, which have not been challenged successfully.

Remaking the decision

44. In light of the Secretary of State's concession, and the unchallenged finding that the sponsor would not convert to Islam, in our view this is not a case where the case should be remitted to the First-tier Tribunal to be reheard. There was no procedural unfairness before the First-tier Tribunal and there are no further facts to be found.

45. By our decision promulgated on 22 June 2023, we indicated to the parties that we were minded to remake the decision on the papers by allowing the appeal, subject to any submissions to the contrary. The Secretary of State did not request an oral continuance hearing, nor submit that there were any additional considerations to which we should have had regard when remaking the decision. In the exercise of our case management discretion, bearing in mind the overriding objective to decide cases fairly and justly, we conclude that we may remake the decision fairly by doing so on the papers. Convening a further hearing would, in the unique circumstances of this appeal, be unlikely materially to add further to

our consideration of the issues, which were fully ventilated in our Error of Law decision.

46. Applying the Secretary of State's *Family life* guidance in light of our analysis, above, we find that the appellant has demonstrated that there would be insurmountable obstacles to her relationship with the sponsor continuing in Pakistan. That is because it is accepted by the Secretary of State that, in order for the relationship to continue in Pakistan, it would be necessary for the sponsor to convert to Islam. He does not want to do so, and, as a matter of freedom of religion and conscience, that is an approach open to him. The sponsor's legitimate unwillingness to convert to Islam therefore is an "insurmountable obstacle" to the relationship between the sponsor and the appellant continuing in Pakistan. On the facts of this case, we find that EX.1(b) applies. We remake the appeal by allowing the appeal on the basis that the appellant meets the requirements of the Immigration Rules, and that is positively determinative of this human rights appeal, pursuant to *TZ (Pakistan)*.

Notice of Decision

The decision of Judge O'Brien involved the making of an error of law and is set aside, subject to the findings of fact referred to at para. 43, above, being preserved.

We remake the decision, allowing the appeal.

The appellant's appeal against the decision of the Secretary of State to refuse her human rights claim dated 29 September 2021 is allowed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 August 2023

TO THE RESPONDENT

FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. Had the Secretary of State not unlawfully concluded that "onus would be on your partner to convert to Islam if you were to relocate to Pakistan and continue your relationship there" in the impugned decision, these proceedings could have been avoided.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 August 2023