IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32411/2014

THE IMMIGRATION ACTS

Heard in Glasgow	**Decision & Reasons Promulgated**
On 23 July 2015	**On 20 August 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

JADWINDER SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Byrne, Counsel, instructed by Drummond Miller
For the Respondent: Mr M Matthews, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This appeal concerns a challenge to a decision of Designated First-tier Tribunal Judge Murray dated 17 November 2014. The judge had dismissed the appeal by the appellant, a citizen of India born 15 October 1972 against a decision to remove him from the United Kingdom dated 31 July 2014.

2. The appellant had entered this country unlawfully in 2005. On 3 May 2011 he married Margaret Hoare with Home Office permission. The parties' previous marriages had ended in divorce. The appellant made application in July 2011 to remain as a spouse which was refused without right of appeal. A further application dated 25 October 2013 met the same fate.

3. According to the Secretary of State, the appellant was encountered on 3 May 2014 at restaurant premises in Kilmarnock. When he was apprehended, he attempted to abscond. He initially gave a false identity. On 5 August 2014 he was served with the decision to remove him dated 31 July 2014 which gave rise to the right of appeal the appellant exercised before the First-tier Tribunal.

4. DFtTJ Murray heard evidence from the appellant and his wife Ms Singh. She found the latter to be credible but not the appellant. She accepted the parties had a subsisting relationship but had reservations about the appellant's intentions when the couple married, observing that he had two young children in India from his previous wife from whom he had divorced in 2009. The judge did not believe the appellant's claim that he had not been working in the Kilmarnock restaurant or that he had not given a false name and date of birth. She took the view that the appellant on being served with notice of liability to removal should have returned to India and made application for entry clearance.

5. The judge was invited to consider the case under Appendix FM Section EX1(B) of the Rules on the basis that there are insurmountable obstacles to the appellant and his wife going to live in India. She found there were none, noting the presence there of the appellant's two children and his parents. As to the appellant's wife, the judge noted the factors relied on to demonstrate insurmountable obstacles in these terms:

> "40. With regard to the appellant's wife, she is working in the United Kingdom but is hoping to cut back on her hours. She has a problem with her neck but seems to be receiving very little treatment for this. Her mother and father are getting old and her father is not well but she is not his principal carer and although she would like to be there for her parents, which is only natural, she has to make the choice of whether to remain or go to India with her husband. She has two sons in the United Kingdom but they are adults and I have heard nothing to indicate that there is more than a normal emotional relationship between them and their mother.
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> 41. I have also noted there would be medical treatment available for the appellant's wife in India.
>
> 42. With regard to Margaret's father requiring care it is clear that as Margaret works the care she gives him is limited. If her mother is unable to look after him there is care available through the local authorities and the social worker department in Kilmarnock.
>
> 43. I find that the terms of Appendix FM of the Rules cannot be satisfied and that EX.1 does not apply."

6. The evidence before the judge was that the appellant's wife has muscle spasms in her neck as a consequence of a lifting injury whilst an auxiliary nurse in Cross House Hospital fourteen years previously. She had not received compensation for this injury and is now employed by British Telecom. Her father is elderly. She is an only child and was concerned that her father would worry about what will happen to his wife when he dies.

7. An additional witness, an uncle of Ms Singh, gave evidence and he described her father as being very ill. A letter from Dr Tommy Miller of Frew Terrace Surgery in Irvine dated 8 February 2013 explains that Ms Singh's father who was born in July 1930, has a significant history of ill health with end stage heart failure, ischemic heart disease and five previous myocardial infarctions. In addition he has atrial fibrillation postural hypotension as well as osteoarthritis and osteoporosis. He described Mr Birkley as having a poor prognosis although he was unable to quantity the timescale. He concluded “He obviously requires some care at home which results in increased pressure on his wife and family”.

8. Having disposed the appeal under the Rules, the judge turned to Article 8 beginning with her consideration under paragraph 276ADE noting the ties that the appellant still had in India. She directed herself as to part 5A of the Nationality, Immigration and Asylum Act 2002 and reached this conclusion on proportionality,

> “45. ... When proportionality is assessed nothing has been put before me to make me believe that this appellant should be allowed to circumvent the Rules. Although the appellant has been in the United Kingdom for some time he has never had leave to remain. Public interest is now all important and public interest includes the maintenance of effective immigration control. The appellant speaks English but he is not financially independent, he is dependent on his wife. Section 117B states that a relationship formed with a qualifying partner, which is established by a person at a time when the person is in the United Kingdom unlawfully, should be given little weight. That is the case here. The appellant is seeking to stay in the United Kingdom but does not meet the requirements of immigration control as set out in the Rules. The usual policy considerations apply in this case.
>
> 46. I have noted the delay on the part of the Home Office but the appellant has known since he arrived in the United Kingdom that he had no right to stay. He made applications after he married Margaret which were refused but he made no attempt to return. I do not find that the delay merits greater weight being awarded to the appellant in the proportionality assessment.
>
> 47. I have considered the appellant's wife's human rights and the human rights of her family. It is clear that his wife did what she was told to do by the immigration advisor but she knew the appellant was in the United Kingdom illegally. In spite of this she married him. I believe she thought she was doing the right thing but she now has to make a choice. Whether to go to India with the appellant either to live there or to support him in his application to return to the United Kingdom or to

remain in UK without the appellant and await the outcome of any application he may make to return.

48. I find that there is nothing exceptional in this case. There is no good reason for considering the appeal outside the Immigration Rules."

9. First-tier Tribunal Judge Pirotta refused permission to appeal. Upper Tribunal Judge Perkins granted permission however on a renewed application in these terms:

"1. The appellant's ball point appears to be that his wife cannot join him in India because she would not then be able to care for her parents in the United Kingdom and that therefore he should be allowed to remain.

2. I have little confidence in the appeal being allowed to remain for that reason but I am persuaded that it is reasonably arguable that the determination does not show a proper application of the Rules or proper application of the point indicated above.

3. I give permission to appeal on all grounds relied on."

10. Five grounds of challenge are relied on as follows:

Ground 1

Ms Singh's father's illness presented an insurmountable obstacle because of the humanitarian consequences for her and her parents rather than that it presented a care deficit for which there would be no provision. The judge's decision failed to identify the nature of this obstacle and take it into account as a material factor.

Ground 2

The judge had not addressed EX.2 in substance or form at any point; the test that had been applied was EX.1 rather than as explained by EX.2.

Ground 3

The statement by the judge that 'public interest is now all important' shows an error of law indicating the judge did not envisage any scope for the nature and significance of an interference to outweigh the public interest.

Ground 4

The consideration by the judge when applying EX.1 did not address whether Ms Singh enjoyed family life with her parents, particularly her father. The care she provided prima facie constituted more than emotional ties between adult children and their parents.

Ground 5

The decision of the judge insofar as she relied upon 'insurmountable obstacles' to family life being enjoyed abroad as a relevant test in determining the proportionality of spouses from British nationals is wrong in law. The correct test is whether it would be reasonable for the couple to be expected to travel to the third country national's country of origin.

ANALYSIS

11. Although he did not retreat from any of his grounds, the focus of Mr Byrne's submissions was on ground 5. He placed reliance on the opinion of

the Inner House of the Court of Session in *Mirza v SSHD* [2015] CSIH 28 regarding the impact of Ms Singh's British citizenship in the proportionality exercise and the weight that was to be given to it. Both representatives accepted that Lord Eassie had not referred to part 5A of the 2002 Act. It also appears that his attention was not drawn to the decision of Aikens LJ in *MN & Ors, R (on the application of) v SSHD* [2014] EWCA Civ 985, in particular the dicta at [138] in which Aikens LJ concluded that there was nothing in the Immigration Act 1971 or common law that grants a "constitutional" right to British citizens to live in the UK with non-EEA partners without the right of abode. He concluded "There is no absolute right to marry and found a family in the UK if it involves marriage to a non-EEA citizen who then wishes to reside in the UK."

12. I also gave Mr Byrne the opportunity of considering the most recent decision of the Court of Appeal in England and Wales regarding the interplay between the Rules and Article 8: *SS (Congo) and Others v SSHD* [2015] EWCA Civ 387.

13. It is not in dispute that the appellant could not succeed under Appendix FM in the light of his unlawful presence unless the criteria in s.EX is satisfied. That provision in force at the time of the immigration decision is in these terms:

> "Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent
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> EX.1. This paragraph applies if –
>
> (a) ...
>
> (b) the applicant has a genuine and subsisting parental 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.
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> 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."

14. Ground 5 appears to challenge the lawfulness of the Tribunal's decision on the basis that reliance had been placed on the insurmountable obstacles test in assessing the proportionality of removal of spouses of British nationals. This assertion is misplaced in my view. The judge carried out an assessment of the case under Section EX and was unarguably correct in considering whether there were insurmountable obstacles to the couple continuing their family life outside the UK. She then turned to Article 8. Although the proportionality exercise is slightly unstructured, there is no suggestion that the judge impermissibly imported the insurmountable obstacles test in assessing proportionality. The judge correctly directed herself with regard to part 5A of the 2002 Act which relevant to the issues in this appeal is in these terms:

"117B Article 8: Public interest considerations applicable in all cases

(1) The maintenance of effective immigration control is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on tax payers, and

(b) are better able to integrate into society

(3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on tax payers, and

(b) are better able to integrate into society

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully

(5) ...

(6) ..."

15. Section 117D includes a qualifying partner as a partner who is a British citizen.

16. The Court of Session in *Mirza* was concerned with a challenge to the Secretary of State's decision between a British citizen and a citizen of Pakistan who had remained without leave on expiry of his working holidaymaker visa in March 2005. Here too the petitioner could not meet the requirements of Appendix FM because of his unlawful status but for the possibility of succeeding under s.EX or on Article 8 grounds. The focus of argument before the court was on the latter. Lord Eassie observed at [16] that the right to marry and to found a family was a fundamental right protected by Article 12 of the Human Rights Convention. He also explained at [18] that a principle to be borne in mind is that a British citizen cannot be required to leave the United Kingdom. As to the impact of that citizenship, he concluded at [19]:

"19. ... But it did mean that the right of residence in the United Kingdom, and all that went with such residence, included the benefits of citizenship of the European Union, weighed heavily on the assessment of proportionality of the interference with the couple's human rights to cohabit together as spouses. The assessment had to be conducted on the basis of separation of the couple; it was not open to the Secretary of State to contend that any incompatible interference with the

> couple's Article 8 rights could simply be avoided by stating that the couple might move to another country."

17. Lord Eassie also observed at [20] that "... when it comes to an assessment of proportionality, it is not appropriate to apply a test of whether there might be an 'insurmountable obstacle' to the petitioner's wife being able to join him in Pakistan". He considered that the Secretary of State had applied the wrong test in assessing whether refusal of leave to remain would lead to "unjustifiably harsh consequences". Lord Eassie also noted that approval for marriage had been granted without qualification or any question being raised as to the petitioner's precarious immigration status. These matters led him to quash the decision of the Secretary of State.

18. Mr Matthew submitted that the approach to proportionality by Lord Eassie found echo in *SS (Congo).* At [33] Sales LJ held:

> "33. In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict a test of exceptionality or a requirement of 'very compelling reasons' (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in *Nagre* at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., *Haleemudeen* at [44], per Beatson LJ."

19. Sales LJ had observed earlier at [29]:

> "(29) It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see *Nagre*, paras. [38]-[43], approved by this court in *MF (Nigeria)* at [41]-[42]."

20. A possible weakness of Judge Murray's decision may be that she embarked on a proportionality exercise outside the Rules and concluded [48]

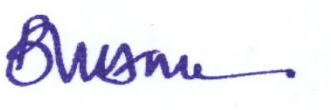
> "I find that there is nothing exceptional in this case. There is no good reason for considering the appeal outside the Immigration Rules."

21. It is not easy to reconcile this concluding sentence with the Article 8 analysis that had begun earlier. Even so it cannot be said that the judge applied the insurmountable obstacles test to the proportionality exercise. Whilst the judge may have overstated the public interest in identifying that it was "all important", the very substantial hurdle that the appellant had to overcome was the impact of the relationship having been developed during his unlawful presence and the requirement in primary legislation of the little weight that the relationship could be afforded as a consequence. To that extent the proportionality scales were preloaded by this factor. The relationship was the basis on which the appellant had sought leave to remain. With little weight being given to that relationship, the other considerations which are dependent upon that relationship continuing acquire less significance. Accordingly, any error by the judge in the proportionality exercise is not material.

22. Returning to the remaining grounds, it is understandable why Mr Byrne did not wish to develop those further before me. It is clear when considering s.EX the judge had in mind Ms Singh's relationship to her father and her consequent concerns. The judge earlier recorded the evidence regarding the father's worry and there is no reason to believe she did not factor these matters into her assessment of the obstacles to the relationship continuing abroad.

23. The complaint made in ground 2 is not developed in the grounds. It is difficult on the evidence to see how the definition in EX.2. could have resulted in a different outcome. As to ground 3, I do not consider any error by the judge could have material impact. Ground 4 challenges the judge's failure to make a finding on whether there was family life between Ms Singh and her parents. I do not find any error on this account absent further evidence the fact of some care being provided by Ms Singh to her parents is not of itself to establish family life. The judge was clearly aware of the nature of the relationship and its strong expression as part of her private life. But such matters, however, were dependent upon a relationship which primary legislation has required the judge to give little weight. The adverse impact on Ms Singh's relationship with her parents would only come about if she felt compelled to leave the United Kingdom in respect of a relationship which could be afforded little weight.

24. I am not persuaded that the judge made a material error in her decision. For the above reasons the appeal is dismissed.

Signed 

Dated 17 August 2015

Upper Tribunal Judge Dawson