Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40584/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 October 2015	**On 18 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SUKHVINDER SINGH SIDHU
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A. Fujiwala, Home Office Presenting Officer
For the Respondent: Mr B Singh, HSBS Solicitors

DECISION AND REASONS

1. The Claimant is a national of India, born on 25 May 1969. He arrived in the United Kingdom on 8 January 1995 and claimed asylum on 2 May 1995 but this application was refused and his appeal against this decision was dismissed in 1997. Thereafter, the Claimant remained in the United Kingdom. He married a British national but that relationship subsequently broke down. The Claimant was granted discretionary leave to remain on 13 January 2010 for 3 years. He applied for further leave to remain but this application was refused on 18 September 2013. The Claimant appealed against this decision and his appeal was heard and allowed by the First Tier Tribunal on 10 April 2014. The Respondent sought and obtained permission to appeal to the Upper Tribunal and her

appeal was subsequently allowed in a decision promulgated on 8 August 2014 and remitted back to the First Tier Tribunal. In so doing, Upper Tribunal Judge Jordan found that this did not mean further findings of fact needed to be made and preserved those made by the First Tier Tribunal at [29]-[31].

2. The appeal then came before First Tier Tribunal Judge C. A. S. O'Garro for hearing on 15 May 2015. In a decision promulgated on 18 June 2015, she allowed the appeal. The Respondent again sought permission to appeal from the Upper Tribunal on the basis that: (i) the Judge's approach to paragraph 276ADE(vi) was misconceived in respect of her understanding of 'ties' in light of the decision in Bossadi [2015] UKUT 00042 (IAC) at [16]; (ii) at [46] she considered the Claimant's case under Article 8 outside the Rules without identifying any circumstances not covered by the Rules that would warrant consideration; (iii) she erroneously applied the Chikwamba principle to the proportionality exercise, contrary to Chen IJR [2015] UKUT 000189 at [39] and (iv) the Judge's approach to section 117B was erroneous in light of the decision in AM (Malawi) [2015] UKUT 0260. (IAC) This application was granted on 25 August 2015 on three grounds: (i), (iii) and (iv).

Hearing

3. At the hearing before me, Ms Fijiwala submitted that the Judge had failed to properly engage with paragraph 276ADE of the Immigration Rules or the decision in Bossadi [2015] UKUT 00042 at [13]. She submitted that the Judge had defined the meaning of "ties" too restrictively given that at 43] she found that the Claimant had parents and sister in India, who would not be able to support him and at [42] that he had little or no knowledge of how things are done in India due to his absence and necessary for integration.

4. Ms Fijiwala sought to rely on Ground 2 of the grounds of appeal, albeit in granting permission to appeal First Tier Tribunal Judge Ransley found this to have little merit. She submitted that SS Congo [2015] EWCA Civ 387 held at [44] that there was a 3 stage approach in considering the case outside the Rules and there has to be substantive consideration of the Rules first and there has to be a reasonably arguable case to consider outside the Rules. She submitted that the length of residence is already considered under the Rules and the Judge's finding at [45] that an 18 year stay constituted an exceptional circumstance was not justifiable given that the Respondent has set the Rule at 20 years. Even if it was correct for the Judge to consider Article 8 outside the Rules she should have considered the public interest set out in the Rules over and above section 117 of the NIAA 2002.

5. In respect of Ground 3 and the Judge's reliance on Chikwamba [2008] UKHL 41 at [63]-[64] of the determination, she submitted that the Judge has not properly engaged with it in light of the decision in Chen IJR [2015] UKUT 00189 at [39]. She submitted that it was a 2 limb consideration and it needed to be shown by an individual that entry clearance from abroad would be granted and there was nothing at [63]-[64] to show that an entry clearance application would be successful, especially as there was no evidence that the Claimant's partner would meet Appendix FM in terms of maintenance and

accommodation. It had not been shown that there would be interference with family life caused by temporary removal.

6. In respect of Ground 4 and section 117B of the NIAA 2002, she submitted that at [59] the Judge finds there was no evidence before her that the Claimant could speak English but she made an assumption based on the length of his residence and because at [60] that he has been working with his brother. She relied on AM (Malawi) [2015] UKUT 0260 (IAC) in support of the contention that this did not give rise to a positive right to remain and that the Judge had further erred in attaching significant weight to the Claimant's financial independence, whereas in light of AM (Malawi) these should have been taken as neutral factors. She responded to the Rule 24 response, in that 20 years has to be completed before the date of application and so paragraph 276ADE(iii) does not apply because at the time of the application the Claimant had been in the UK only 18 years.

7. On behalf of the Claimant, Mr Singh relied on his reply at [7]-[11]. He submitted that the Judge re-assessed and took all the evidence into consideration and provided a detailed analysis of the case. He pointed out that the Claimant had been granted 3 years Discretionary Leave but his marriage broke down and there had been no deception on his part. His credibility was accepted by the previous First Tier Tribunal and Judge Jordan maintained those findings at [29]-[31]. The Judge at [43] addressed paragraph 276ADE gave reasons for her finding. The Claimant has only been once to India and he does not know the norms. These were the exceptional circumstances considered by the Judge. He submitted that the caselaw supported her decision and that she looked at Appendix FM. He submitted that the Judge had gone on to consider Article and the decision in Ganesabalan at [46]. He submitted that there was no reasoning as to why these findings are not correct and that when the caselaw is looked at in its totality there was no error of law.

Decision

8. I found a material error of law in Judge's decision and I now give my reasons for so finding. I find that the Judge did fail to correctly apply paragraph 276ADE (vi) of the Immigration Rules, in respect of the issue of whether the Claimant has ties with India, including social, cultural or family ties. The Judge held at [42] that: "*after 20 years of absence he would have little or no knowledge of how things are done in India in terms of employment, borrowing money and setting up a home which are the elements necessary for integration.*" And at [43] "*The appellant parents still live in India but they are retired living on limited income. In fact he said that he sent money regularly from his earnings to support them. I find that they would be able to offer him little or no support on his return. His sister is married and as she is now attached to her husband's family which is the culture in India, she would be in no position to offer any support for the appellant. I find that the appellant will be expected to start afresh looking to re-establish himself in a country where he has no real ties.*" Whilst I accept that the Claimant's sister may be unable to support him, I consider that the Judge misdirected herself in respect of his parents. As the Judge acknowledged at [42] setting up a home is one of the key elements necessary for re-integration however, she failed to make any finding as to why the Claimant would be unable to live with his parents at least in the short term. I further find that she erred in finding that they would be able to offer him little or no

support on his return, absent detailed consideration of this question and the role of emotional support, albeit they would be unable to provide financial support. Whilst the Judge at [39]-[41] of her decision referred to the relevant jurisprudence *viz* Ogundimu [2013] UKUT 00060 (IAC); YM (Uganda) [2014] EWCA Civ 1292 and Bossadi [2015] UKUT 00042 at [13] I do not consider that she conducted a rounded assessment that is both objectively and subjectively founded.

9. In respect of Ground 2 of the grounds of appeal, I agree with First Tier Tribunal Judge Ransley that this has little merit. At [45] the Judge made an express finding that the Respondent has failed to properly consider the Claimant's exceptional circumstances in that he has resided in the United Kingdom for over 18 years at the date of decision and has an established private and family life. These were findings of fact preserved by Upper Tribunal Judge Jordan from the decision of First Tier Tribunal Judge Trevaskis and it was open to First Tier Tribunal Judge O'Garro to find that these constituted exceptional circumstances, particularly given that the Claimant was eligible at the time of the hearing before her to make an application for leave to remain pursuant to paragraph 276ADE(iii) based on 20 years continuous residence.

10. In respect of Ground 3 and the Judge's reliance on Chikwamba [2008] UKHL 41 at [63]-[64] of the determination, Ms Fijiwala's submission was that the Judge has not properly engaged with this issue in light of the decision in Chen IJR [2015] UKUT 00189 at [39]; that it was a 2 limb consideration and it had not been shown that entry clearance from abroad would be granted or that there would be interference with family life caused by temporary removal. I have considered the decision in Chen but I do not find it of assistance on the facts of this case. In R (on the application of Thakral) v The Secretary of State for the Home Department IJR [2015] UKUT 00096 (IAC) Mr Justice Nicol made clear at [11] that: "*The Chikwamba principle is only engaged if, in the terms of paragraph [30] (a) of Hayat, the SSHD has refused the application in question "on the procedural ground that the policy requires that the applicant should have made the application from his home state.*" The Claimant sought to vary his discretionary leave to remain. He made this application prior to the commencement of his relationship with Ms W and to date, the Respondent has not considered the effect of this relationship with regard to the Claimant's immigration status at all. Consequently, the Chikwamba issue simply did not arise for consideration before the Judge. Moreover, it is clear from the jurisprudence as a whole, from Chikwamba onwards, that the issue is a fact sensitive one and the Judge was not in possession of all the material facts, such as whether or not the requirements of R-LTRP of the Immigration Rules in respect of partners were met. She further failed to make any finding as to the prospective length and degree of disruption of family life between the Claimant and Ms W. For these reasons, I find that the First Tier Tribunal Judge materially erred in finding that the Chikwamba principle was engaged as part of the Article 8 proportionality exercise.

11. I further find that the Judge erred materially in law for the reasons put forward at Ground 4 regarding the application of section 117B(2) and (3) of the NIAA 2002. There was no evidence before the Judge to justify her finding at [59] that the Claimant "*must have achieved a good understanding of English Language*" due to his long residence and employment in the United Kingdom. She acknowledged as much but based her finding on

assumption, which is impermissible. She was entitled to find at [60] that the Claimant is financially independent because she heard evidence from him and his brother that she accepted as credible, that he had been working with his brother in his business. Ms Fijwala relied on the decision in AM (Malawi) [2015] UKUT 0260 (IAC) in support of the contention that this did not give rise to a positive right to remain and that the Judge had erred in that these should have been taken as "neutral factors." However, this is not an entirely correct understanding of AM (Malawi) at [18] where the Upper Tribunal held that the Respondent is not precluded from relying upon fluency in English or financial independence as public interest factors against the claimant unless the claimant could demonstrate fluency or financial independence to the level of the requirements set out in the Immigration Rules. There was no English language test certificate before the Judge and the witness statements of the claimant and his brother indicates that he earns £1000 per month, which is below the £18,600 required to sponsor a partner, albeit I note that this amount would apply to his partner rather then to the claimant directly. In any event, the Judge neither referred to nor applied the principles set out in AM (Malawi) and thus materially erred in law for this reason.

12. Given that this appeal has been heard by the First Tier Tribunal on two occasions and has come before the Upper Tribunal on two occasions, I have decided to re-make the decision myself rather than to remit the appeal to the First Tier Tribunal for a third occasion, as I consider there are sufficient findings of fact upon which I can reach a decision. The established findings of fact, preserved by Upper Tribunal Judge Jordan are at [29]-[31] of the decision of First Tier Tribunal Judge Trevaskis:

(i) the Claimant and his witnesses are credible and consistent;

(ii) the Claimant has been residing in the United Kingdom since 1995;

(iii) he was granted discretionary leave in 2010 for 3 years primarily based upon his family life with his wife, however, it is clear that he had a close and supportive relationship with his brother which had existed since his arrival in the United Kingdom and that was also a material part of his family and private life at the time of the grant of that leave;

(iv) his relationship with Ms W post dated his application for further discretionary leave in January 2014 but they met and the relationship had blossomed and they had decided to live together and marry by the time of the refusal decision on 18 September 2013. There is no evidence the respondent has considered the existence of that relationship or its relevance to his case.

13. I further find that the finding of First Tier Tribunal Judge O'Garro at [33] that the Claimant has submitted credible evidence that he is in a subsisting relationship with his partner has not been challenged by the Respondent.

14. The issues before me are:

(i) whether the Claimant meets the requirements of the Immigration Rules;

(ii) whether or not removal of the Claimant to India would be proportionate, it having been accepted that the Claimant has established a private and family life with

his partner, brother and his brother's family in the United Kingdom.

15. Whilst at the date of the hearing and decision of Judge O'Garro the Claimant did not meet the "partner" requirements of Appendix FM he now may meet those requirements due to the passage of time. However, R-LTRP.1.1.(b) provides that: "*the applicant must have made a valid application for limited or indefinite leave to remain as a partner*." The current appeal is in respect of an application to vary his discretionary leave to remain and to date, the Claimant has not made an application for leave to remain with his current partner under the provisions of the Rules. Therefore, this is not a matter before me and even if it were before me, the evidence does not establish that the financial requirements of R-LTRP are met.

16. I turn next to the issue of the Claimant's residence in the United Kingdom since his arrival in the United Kingdom on 8 January 1995. He entered clandestinely thus there is no record of his entry, however, he made an asylum claim in May 1995 and the Respondent in her refusal decision appears to treat his date of entry as 8 January 1995. He has thus now resided in the United Kingdom for more than 20 years. The current version of paragraph 276ADE provides:

> "Requirements to be met by an applicant for leave to remain on the grounds of private life
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> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
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> (i) does not fall for refusal under any of the grounds in Section S LTR1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
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> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
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> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
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> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

17. First Tier Tribunal Judge O'Garro declined to find in the Claimant's favour in respect of paragraph 276ADE(iii) on the basis that at the date of application he had resided in the United Kingdom for 18 years rather than 20 years. However, I have had regard to

paragraph 276A0 of the Rules which provides:

> "For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:
>
> (i) …
>
> (ii) …
>
> (iii) in an appeal (subject to the consent of the Secretary of State where applicable).

Article 8 was considered by the Respondent in her refusal decision of 18 September 2013 and was clearly raised by the Claimant in his grounds of appeal to the First Tier Tribunal dated 1 October 2013 and thus the requirement to make a valid application for leave to remain pursuant to paragraph 276ADE, which he has not done to date, does not apply.

18. Therefore, I find that the Claimant has resided in the United Kingdom since 8 January 1995 and has therefore resided in the United Kingdom for in excess of 20 years. In respect of the continuity of his residence, the evidence indicates that he has only left the United Kingdom once, for a visit to his parents in India in January 2011. This was at a time when he had discretionary leave to remain both upon departure and return and thus the continuity of his residence was not interrupted. It follows that the Claimant meets the requirements of paragraph 276ADE(iii) and his appeal against he decision of the Respondent dated 18 September 2013 falls to be allowed on this basis. In light of my finding that the appeal succeeds under the paragraph 276ADE (iii) Immigration Rules I do not need to consider whether he meets the requirements of paragraph 276ADE(vi) or whether or not removal of the Claimant to India would be a disproportionate interference with his right to family and private life, contrary to article 8 of ECHR.

Decision

19. The Claimant's appeal against the Respondent's decision of 18 September 2013 is allowed under the Immigration Rules.

Deputy Upper Tribunal Judge Chapman

7 December 2015