IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/42085/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th March 2016	**On 14th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

PARDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Nasim - Solicitor
For the Respondent: Mr Staunton - Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Pardeep Singh, a citizen of India born 11th January 1975. He appeals against the decision of the Respondent made on 30th September 2014 to remove him from the United Kingdom. The Appellant's appeal against that decision

was allowed by First-tier Tribunal Judge Maka and the reasons for that set out in a decision promulgated on 18th June 2015. The Secretary of State appealed against the decision of Judge Maka and on 19th December 2015, having heard submissions I found that there was a material error of law in the determination of Judge Maka and I set his decision aside with no preserved findings of fact.

2. The facts of the case are that the Appellant claims to have arrived in the UK on 2nd February 1997. He sought asylum on 13th February 1997 and this claim was refused on 10th April 1997. He was arrested three times, on 14th March 2011, 24th January 2013 and 25th January 2013 for driving without a licence and with no insurance. On 25th March 2013 he was detained for a period at IRC Morton Hall. He had made further representations on 29th January 2013 then on 8th July 2014 and 19th September 2014 asked for his case to be reconsidered. Following that the Respondent, having refused his application on 30th September 2014, issued removal directions. It is the appeal against that decision that is before me today.

3. The Appellant has apparently done odd jobs as a labourer during his time in the UK. He has no national insurance number and no bank account. He is registered with a GP. He has been in a relationship with his partner, Darshana Pall, a British citizen since 2002. She has adult children. She also has some medical conditions including diabetes and problems with her shoulders. She has had surgery on one shoulder and expects to have surgery on the other. The Appellant has been in the UK for almost nineteen years. He has never had leave to be here.

4. The Secretary of State in refusing the application found that the Appellant meets the suitability and eligibility requirements for limited leave to remain in the United Kingdom as a partner as set out in Appendix FM of the Immigration Rules. She went on to consider whether the requirements of paragraph EX.1. of Appendix FM are met. EX.1(b) states that:

> "This paragraph applies if –
>
> (b) The applicant has a genuine and subsisting 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."

5. This is followed by EX.2. which states:

> "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."

6. The Secretary of State concluded that the requirements of EX.1. are not met because whilst she accepted that the Appellant does have a genuine and subsisting

relationship with his partner who is a British citizen no evidence had been provided to show that Mrs Pall could not return to India if necessary. She was born in India and is likely to be familiar with the language and culture of that country. The Secretary of State accepted that it may be initially difficult for the Appellant's partner to relocate but said there is no evidence of any insurmountable obstacles. She would have the support of the Appellant who has lived in India for the majority of his life. He would be able to work there.

7. The Secretary of State went on to consider whether the Appellant meets the requirements of paragraph 276ADE (1) of the Immigration Rules. The only provisions that could possibly assist the Appellant are sub-paragraphs (iii) and (vi). Sub-paragraph (iii) requires that in order to be granted leave to remain in the UK on the basis of private life in the UK an applicant must show that at the date of application he has been in the UK for 20 years. The Appellant does not meet this provision. Sub-paragraph (vi) provides that an applicant must establish that there would be very significant obstacles to his integration into the country to which he would be returned, in this case, India. The Secretary of State does not accept that there would be very significant obstacles, saying that the Appellant had lived most of his life in India and has social and cultural ties to that country. He has not established otherwise.

8. The Secretary of State considered whether there are exceptional circumstances which would warrant a right to remain in the UK outwith the Rules but concluded that there are no such circumstances.

9. I have a large bundle of documents including statements from the Appellant and from his partner, Darshana Pall.

10. The Appellant states that he has been here since 1996 and has not returned to India in the interim. The asylum claim he made in 1997 was refused. An application was made for leave to remain on the basis of his relationship with Darshana Pall and a further application was made for his case to be considered under the Legacy Scheme. He did complete a legacy questionnaire and sent it back to the Home Office, receiving an acknowledgement on 13th October 2007. He has heard nothing else although his solicitors wrote several reminders to the Home Office. He started his relationship in March 2002 and he and Mrs Pall have been living together since then as husband and wife. He said he does not understand why his case has been refused under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He has established a private and family life during his stay of nineteen years. He has no ties to India. His partner has three children from a previous relationship, two daughters and a son. She has a grandson too. The children all live in the UK and are settled here. He is very attached to the children and has a good relationship with them all. He would not want to leave them. They live as a proper family. His partner's daughter recently married and that was a proud moment for him. He says they cannot return to India and leave the children behind because they love them and are close to them. It is a big step. He and his partner would have difficulty finding work. He says that considering their age they

would not manage very well. He has provided letters from friends supporting his application to remain.

11. In her statement Darshana Rani Pall confirms that she is a British citizen and that she and the Appellant have been in a relationship since March 2002 living as husband and wife. She confirms his closeness to her children. She says he has no-one in India and no ties to that country. She does not consider it reasonable for the Secretary of State to suggest that the Appellant can return to India where he has nothing and no family. He has not kept in touch with anyone there. It is harsh and unfair to suggest that she can move to India with him. Her place is here with her family. She cannot imagine life without him. He has been here for nearly twenty years.

12. There are statements from family and friends confirming the relationship. There are copies of letters from the Appellant's representative chasing up the application under the Legacy Scheme.

13. I heard oral evidence from the Appellant and from his partner.

14. I should say at this point that at the start of the hearing Miss Nasim requested an adjournment. She told me that the Court of Appeal are in the process of dealing with a case which will define "insurmountable" as it applies in paragraph EX.1. of Appendix FM. She handed to me a decision **Agyarko and Others v Secretary of State for the Home Department [2015] EWCA Civ 440**. In that case the First Appellant and the Third Appellant had commenced judicial review proceedings to challenge the decision of the Secretary of State to refuse leave to remain on human rights grounds. In each case the Upper Tribunal refused to grant permission to seek judicial review so the Appellants applied to the Court of Appeal. Miss Nasim pointed out that the Court of Appeal had said at paragraph 23 that although "insurmountable obstacles" involves a stringent test it is obviously intended in both the case law and the Rules to be interpreted in a sensible and practical rather than a purely literal way. They went on to say in paragraph 24 that in the context of making a wider Article 8 assessment outside the Rules it is a factor to be taken into account, not an absolute requirement that has to be satisfied in every single case across the whole range of cases covered by Article 8. The Court of Appeal found that the Secretary of State's assessment that there were no insurmountable obstacles to family life continuing outside the UK could not be said to be irrational or unlawful in any way. The submissions of Miss Nasim were not at all clear and I can see nothing in the decision which she presented to me that would suggest that what the Court of Appeal intend to do is to provide a decision setting out a standard definition of "insurmountable obstacles". Miss Nasim and I indeed had a considerable discussion about this. She appeared to be hopeful that the Court of Appeal would provide a decision setting out perhaps a list of things that would constitute "insurmountable obstacles". She wanted me to adjourn this case pending the issue of the substantive decision. I am far from satisfied that any such decision would assist the appeal before me but in any event it is not the practice of this Tribunal to stay cases pending decisions of this Tribunal or a higher court except in very exceptional circumstances.

15. The Appellant gave evidence in Punjabi with the assistance of an interpreter. He adopted his statement. He spoke of the problems his wife has with her shoulder and his relationship with his stepchildren. I have to say that he did indeed say that he had three children in this country and a grandchild which is not the case. They are his stepchildren and it was only when he was pressed that he conceded this. The children are all adults. He said his wife's daughter could not help her at home because she works. He confirmed that his wife had visited India for two weeks in January 2015 visiting family and attending a traditional religious ceremony for their grandson. She has a brother living there. She is not working at the moment.

16. Darshana Rani Pall adopted her statement. She said her family is in the UK. She would have nowhere to live in India. She was asked how they support themselves and said that her children are working. She has applied for Jobseekers Allowance. She said she does not get housing benefit but the evidence they ultimately gave about the home they live in was not at all clear. It seems that she and her daughter bought the house that she lives in, in their joint names. Ms Pall had said initially that the house was rented from the Council and that the rent was just over £20. She could not say whether this was per week or per month. It was extremely difficult to get any information from her at all about their financial circumstances. She said her son "sometimes" gives her £100 a week. Her daughter helps with the rent and buys some shopping. Her younger daughter pays the monthly bills. I did ask Mrs Pall why the rent was so low and it was at that point that she said she and her daughter had bought the house from the Council. Initially she said it was £200.000 then she said they bought it four of five years ago for the discounted price of £40,000 and her children contributed to this. In re-examination she confirmed to Miss Nasim that the rent she spoke of is actually ground rent. I asked her if she has any family in India and she said that she has a brother and sister. I followed that up with a question as to whether or not she has any nieces and nephews and she said that she does.

17. In his submissions Mr Staunton said he would rely on the refusal letter. He submitted that there are no insurmountable obstacles to the Appellant's partner going to live in India with him. The Appellant does not work. His partner does not work. They have no income. His family who are supporting them here could support them in India. With regard to paragraph 117B(vi) he pointed out that the Appellant gave evidence in Punjabi. He has not integrated here. He has no financial independence here. There is nothing to prevent him returning to India.

18. In her submissions Miss Nasim said that the relationship is accepted as genuine. The Appellant has been here for nineteen years. He has tried to stay in touch with the Home Office. His partner has medical issues. They are supported by their children. The Appellant's partner looks after her grandchild.

My Findings

19. I have given careful consideration to all the evidence put before me in this case.

20. The question is whether there are insurmountable obstacles to the Appellant's partner returning to India with the Appellant. I also consider paragraph 276ADE,

paragraph 117B of the Nationality, Immigration and Asylum Act 2002 and Article 8 ECHR.

21. I would say too that I accept that the Appellant applied under the Legacy Scheme but I do not accept that this adds weight to his appeal against the refusal of leave to remain. In saying this I rely on the decision **AZ (Asylum – "legacy" cases) Afghanistan [2013] UKUT 270** in which the Tribunal said that where an appellant in an asylum appeal had previously been informed that his case is being considered as a 'legacy case' but no decision under that process had been made, a subsequent immigration decision is not rendered unlawful by reason of the failure to make a decision under the Legacy Scheme.

22. With regard to EX.1. I do not accept that there are insurmountable obstacles to the Appellant's wife going to India with him, bearing in mind the guidance on the interpretation of "insurmountable obstacles" set out at paragraph EX.2. I accept that she has health problems but these are not problems that would not be treatable in India and they are not problems which would prevent her moving to India and setting up home there with her partner. I accept that she has a family in the UK and that it would be very difficult for her to leave them and go to live in India. I accept that she has a grandchild and it would be particularly hard to leave the child behind. The fact of the matter is however is that she has been in a relationship with the Appellant for a number of years fully in the knowledge that he did not have any leave to remain in the United Kingdom. He did makes applications but this does not mean that they should not at some point have considered the possibility that he might be asked to leave the country and the possibility that she may have to consider going to India with him. She is a British citizen and of course has a right to remain in the UK. When two people of different nationalities decide to enter a relationship or marry it seems to me to be unavoidable that there is some discussion at some point about where they are going to exercise their family life together. The Appellant's partner is of Indian origin. She speaks fluent Punjabi. She still has family in India. I have to say that it was clear that she did not want to admit that she had family in India but eventually admitted that she does indeed have siblings and nieces and nephews. In these circumstances it cannot in my view be said that there are insurmountable obstacles to her living there. Her family are supporting her. They could continue to do so. She has worked in the past. It is stated in the Appellant's statement that he would have difficulty getting work in India. He refers to "our ages" but he is only 40 years old and I do not accept that he would not be able to get work to support his partner. I do not accept that they would suffer very serious hardship if they were to move to India where they clearly have family support.

23. With regard to paragraph 276ADE I accept that the Appellant has been here for nearly twenty years but he has not been here for twenty years yet and certainly had not been at the date of the application. I cannot allow an appeal under the Rules on the basis of a 'near mss'.

24. With regard to paragraph 276ADE(vi) I rely on the points I made above about his partner. I accept that he has a family life here but his stepchildren are all adults and

have their own independent lives. His partner has made visits to India and there is no reason why her children cannot do this. I take into account that the Appellant is of

25. Indian origin. He speaks Punjabi as does his partner. He spent most of his life in India and his partner has family there. I think it is possible that he has not been candid about what family he has there but that is of no real import. He is a relatively young man who I believe could work in India and have a satisfactory life there. There is no evidence of any very significant obstacles to him making a life in India and integrating there

26. I turn to Article 8 ECHR. It was stated in **Razgar v Secretary of State [2004] UKHL 27** that there are 5 questions that must be asked in considering the question of a breach of Article 8,

(1) Is there an interference with the right to respect for private life (which includes the right to respect for physical and moral integrity) and family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) Is that interference in accordance with the law?

(4) Does that interference have a legitimate aim?

(5) Is the interference proportionate in a democratic society to the legitimate aim to be achieved.

I also take account of s. 117B of the Nationality Immigration and Asylum Act 2002 which sets out public interest considerations that should be taken into account when considering Article 8 ECHR i.e

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

(2) It is in the public interest, and in particular in the interests of the economic well-being 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 taxpayers, 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 well-being 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 taxpayers, 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) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

27. I accept that the Appellant has a family life with his partner. I accept that he has developed a private life in the years he has been here. He has friends. He has no job and he and his partner appear to be virtually totally financially reliant on her children. I am aware from the previous hearing that the Sponsor has worked in the past but frankly her evidence about their current financial situation was vague and unimpressive. Certainly I cannot be satisfied that there is no reliance on public funds. I have considered the appeal in the light of s. 117B especially ss. 4 bearing in mind that the Appellant has been in the UK unlawfully. Even if I were to take into account his unsuccessful asylum application and the various other applications he has made including that under the legacy scheme the fact is that he has never had leave to remain.

28. The question is whether in all the circumstances, taking particular account of his life with his partner and her children in the UK, the Appellant's removal and the resultant interference with his family life would be proportionate to the need for immigration control. I have had some difficulty with this case mainly because of the length of time the Appellant has been in the UK but the fact is that he does not meet the requirements of para. 276ADE of the Immigration Rules in relation to a long period of residence and cannot simply allow the appeal on the basis that he very nearly meets those requirements. The length of time is of course a factor and I do place a lot of weight on the length of time he has been here but that has to be considered in the round with the rest of the evidence and bearing in mind the public policy considerations of s.117B. I have already found that there are no insurmountable obstacles to his partner returning to India with him.

29. The Appellant could of course return to India voluntarily and apply for entry clearance as a partner which would mean that he would have to meet the financial requirements of Appendix FM. I take into account too that it seems to me that both the Appellant and his partner were less than candid in their evidence. I do think that the Appellant exaggerated the health difficulties his partner has and the amount of

assistance he has to give her and I have already expressed doubt about their evidence about family in India and about their financial circumstances in the UK.

30. I conclude that the removal of the Appellant from the UK would in all the circumstances be proportionate to the need for effective immigration control.

Notice of Decision

The appeal is dismissed under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed Date: 4th April 2016

N A Baird
Deputy Judge of the Upper Tribunal