



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08598/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 April 2018

Decision & Reasons Promulgated
On 15 April 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR KAWALJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Mold, Counsel, instructed by MT Solicitors

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India, has permission to appeal the decision of Judge Turquet of the First-tier Tribunal (FtT) sent on 29 March 2017 dismissing his appeal against the decision made by the respondent on 7 December 2015 refusing to grant leave to remain on the basis of family life with his wife, a British citizen.

2. The grounds of appeal raise essentially four points, it being contended that the judge erred in (1) failing to properly apply the Chikwamba [2008] UKHL 40 principle; (2) failing to take into account the fact that the protracted delay in the enforcement of immigration control measures against the appellant diminished the public interest; (3) finding that there were no insurmountable obstacles to the couple living in India; and in (4) failing to give adequate consideration to the issue of exceptional circumstances.
3. I am grateful to Mr Mold and Ms Fijiwala for their succinct submissions.
4. It is convenient to take the grounds in reverse order.
5. I consider ground (4) devoid of merit. It essentially argues that the fact that the appellant's wife would lose her well-paid job in the UK and miss out on her UK-based family life and face an uncertain future would amount to exceptional circumstances. This argument amounts to a mere disagreement with the judge's assessment. Read as a whole, it is clear that the judge considered that there were a number of factors that would mean that the appellant's removal would not result in unjustifiably harsh consequences, including the fact that the appellant's wife was a Sikh of Indian ethnicity who had visited India on a number of occasions and whose work experience in the UK would assist her in finding employment in India. Her son was now an adult.
6. Ground (3) fails for very similar reasons in that the judge's assessment of the couple's circumstances in the UK and in India identified a number of valid reasons why they would not face insurmountable obstacles.
7. As regards ground (2), Mr Mold is right to point out that the Supreme Court in Agyarko [2017] UKSC 11 confirmed that:

"The cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish – or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase – if there is a protracted delay in the enforcement of immigration control" [52].

However, in the appellant's case the judge clearly did not consider that the appellant's was a case of protected delay since she specifically rejected his contention that the alleged delay was attributable to the Home Office (it being contended by the appellant that at some stage the Home Office lost his passport and that it took him some time to organise a new one). At para 31 the judge found that the appellant "had not given a satisfactory explanation for not applying for a new passport at the Indian High Commission". Even if it could be argued that some of the period of delay was the respondent's fault, it cannot reasonably be argued that the appellant experienced protracted delay in the context of the appellant's family life circumstances. The respondent did serve an IS151A on the appellant in June 2012, but the couple did not marry until March 2014 and the respondent made her refusal decision in December 2015. It is not entirely clear to me why his appeal against that decision took until March 2017 to be heard (the reference in the refusal decision to a reasons for refusal letter dated 15 March 2016 suggests there was a delay between the decision to refuse and the issuance of the reasons for refusal letter), but it remains that the period involved

cannot be deemed excessive, particularly given the lack of any indication that the appellant sought an earlier hearing once given date of notice of the decision (on 15 March 2016). The hearing before Judge Turquet took place on 21 March 2017.

8. That leaves ground (1). Mr Mold has argued that the judge should have found that **Chikwamba** principles applied to the appellant's case so as to require the appeal to be allowed. He points to the fact that the judge appeared to have recognised the relevance of **Chikwamba** in para 30 of her decision wherein it was said:

"30. In **Agyarko** in the Supreme Court it was stated that the Secretary of State had defined the word "exceptional" as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal would not be proportionate". The Appellant would be able to return to India and make an application to return supported by his Sponsor, if she did not wish to accompany him to India, whilst he made an application to join her. It would appear that the financial and language requirements are met. Local enquiries could be carried out by the ECO in India and, in the absence of any negative findings by the ECO, the period of separation might be short. The Appellant can keep in contact by modern methods of communication including Skype and Facetime. If the Sponsor travels to India whilst he makes the application she will be able to keep in contact with her family in the UK."

but to have failed to follow through on the implications of this analysis for her eventual decision.

9. The difficulty with Mr Mold's submissions on this point is that this paragraph of the judge's decision is superfluous to her effective reasons for finding that the decision was a proportionate one. I have already made reference to those reasons. As a result, the appellant's is a case in which he was properly found to be (a) unable to meet the requirements of the Immigration Rules; and (b) unable to demonstrate exceptional or compelling circumstances warranting a grant of leave outside the Rules. Mr Mold submits that the judge found that the appellant met the financial and language requirements of the relevant Immigration Rules relating to partners - rules that applied in-country and, out of country. That is broadly true (although strictly speaking the judge only said that it "would appear that" these requirements were met), but in respect of the appellant's Article 8 circumstances which the appellant relied on in his appeal, he failed to meet not only the suitability requirements but also the substantive requirements as regards insurmountable obstacles; and in relation to his case outside the Rules he failed to demonstrate exceptional or compelling circumstances. His was not a case where his appeal was or stood to be refused for purely procedural reasons. He was not someone who (in Lord Reed's words in **Agyarko** [2017] UKSC 11) "was otherwise certain to be granted leave to enter". His was not a case where there was no point sending him back because he was bound to succeed in any application for entry clearance under the Immigration Rules from abroad. (His history of unlawful stay would be also a relevant factor in the ECO considering whether to apply general grounds of refusal). As regards any human rights claim, by virtue of the fact that he had remained in the UK unlawfully for nearly seven years and had commenced his relationship with his wife at a time when he was

here unlawfully, there was a strong public interest to be weighed in the Article 8 proportionality assessment. Thus the appellant's case was not one that was assisted by Chikwamba principles: see Hayat [2012] EWCA Civ 1054 at [22]-[23] and Tikka [2018] EWCA Civ 642 at [25].

Notice of Decision

10. For the above reasons I conclude that the FtT judge did not materially err in law and her decision must stand.
11. No anonymity direction is made.

Signed:

Date: 10 May 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'y'.

Dr H H Storey
Judge of the Upper Tribunal