Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07922/2017**

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**

On 9 January 2019 **On 30 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

AKHTAR JAMEEL MOHAMMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Patel (counsel) instructed by KG Solicitors Ltd
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of Designated First-tier Tribunal Judge McClure promulgated on 12 April 2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 24 January 1980. He is a national of India who entered the UK as a student on 12 February 2010. He has remained in the UK since then.

4. On 20 September 2016 the appellant applied for leave to remain in the UK on article 8 ECHR grounds. On 5 July 2017 the Secretary of State refused the Appellant's application.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. Designated First-tier Tribunal Judge McClure ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 26 October 2018 Upper Tribunal Judge Jackson gave permission to appeal stating inter alia

> "The grounds of appeal are the First-tier Tribunal has materially erred in law in its approach to insurmountable obstacles by failing to consider the appellant's partner's ability to relocate in light of her medical conditions. Although the First-tier Tribunal's assessment of family life and the appellant's partner's position once having relocated contained adequate reasons and is not directly challenged by the appellant, it is arguable that insufficient regard as been had to whether or not the appellant's partner could practically get to India in light of her agoraphobia and other mental health problems (which were evidenced before the First-tier Tribunal) or whether this in itself posed an insurmountable obstacle to family life being enjoyed outside of the United Kingdom.
>
> The First-tier Tribunal's decision does contain an arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted."

The Hearing

6. (a) For the appellant, Ms Patel moved the grounds of appeal. She told me that the Judge's approach to consideration of whether or not there are insurmountable obstacles to family life continuing outside the UK is flawed. She told me that the respondent accepts that the appellant is in a genuine and subsisting relationship with his British citizen partner and that the relationship was established in January 2012. She took me through the appellant's partner's medical conditions and produced a letter from the community mental health nurse involved in the appellant's partner's care, dated 26 November 2018.

(b) Ms Patel told me that the Judge acknowledges the appellant's partner's physical and mental health conditions but does not explain how the appellant's partner could reasonably travel to India. She told me that in the decision the Judge accepts that the appellant's partner was born in 1960 & has suffered from the same mental health conditions since she was 17 years old. She referred me to the grounds of appeal which contains a definition of agoraphobia.

(c) Ms Patel relied on paragraphs 48, 56, 57 and 60 of Agyarko v SSHD [2017] UKSC 11, and told me that the Judge's proportionality assessment is inadequate. She told me that the Judge failed to consider a Chikwamba argument, reminding me that there is a finding that the appellant's partner receives disability living allowance, so that there is no need for the appellant to meet the financial requirements of appendix FM.

(d) Ms Patel urged me to set the decision aside.

7. (a) For the respondent, Mr Bates told me that the decision does not contain an error, material or otherwise. He adopted the terms of the rule 24 response, dated 27 November 2018, and told me that it is likely that Chikwamba was not relied on before the First-tier Tribunal, so that the Judge cannot be criticised for not considering something which was not placed before him, but in any event Mr Bates told me that there is no evidence that the appellant can meet the English language requirements of the immigration rules, so that success is an application for entry clearance is not a foregone conclusion.

(b) Mr Bates told me that the Judge adequately considered the appellant's partner's medical needs, and told me that the decision contains sustainable conclusions that the appellant's partner's medical needs can be met by adequate Indian medical facilities. He reminded me that the burden of proof rests on the appellant and told me that there has been no specific evidence of an obstacle within the journey to India, nor that, if there is such an obstacle, the obstacle is insurmountable. He told me there is no real specification of the difficulties that the appellant and his partner face.

(c) Mr Bates took me to [63] and [64] of the decision, where the Judge considers what would happen if the appellant's partner was to leave the UK, and what would happen if the appellant's partner was to remain in the UK. He told me that the decision is adequately reasoned. He asked me to dismiss the appeal and allow the decision to stand.

Analysis

8. It is not disputed that the appellant does not meet either the suitability or eligibility requirements of appendix FM. In the respondent's reasons for refusal letter the respondent considers paragraph EX.1 of appendix FM. Paragraph EX.1 of appendix FM applies in cases where the eligibility

requirements are not met. It does not apply in cases with the suitability requirements are not met. However, what is central to consideration of article 8 ECHR grounds of appeal in this case is consideration of the appellant's partner's physical and mental challenges, so that the consideration of paragraph EX.1 informs the overall proportionality exercise.

9. Between [8] and [15] the Judge takes correct guidance in law. At [13] the Judge highlights the respondent's acceptance that the appellant and his partner are in a genuine and subsisting relationship and at both [13] and [15] the Judge draws a clear focus on considering whether there are very significant obstacles to family life continuing outside the United Kingdom.

10. The Judge's findings of fact lie between [16] and [45]. The Judge records the appellant's partner's mental health difficulties and, at [40], specifically finds that the appellant's partner suffers from agoraphobia. The Judge sets out the effect of the symptoms of the appellant's illness.

11. At [53] the Judge correctly sets out that the central issue is the appellant's partner's medical conditions. Between [53] and [56] the Judge finds that there is adequate medical treatment available to the appellant's partner in India.

12. No challenge is taken to the Judge's findings that the appellant cannot meet the requirements of paragraph 276 ADE(1). On the facts as the Judge found them to be, because of the appellant's age and the length of time that he has been in the UK, he cannot meet the requirements of paragraph 276 ADE(1)(i) to (v). The only remaining consideration of that paragraph is whether or not there are very significant obstacles to the appellant's integration into life in India. Consideration of the appellant's partner's ability to integrate in India is not a relevant consideration under paragraph 276 ADE.

13. At [62] the Judge is correct to take guidance from section 117B(4) of the 2002 Act. The relationship between the appellant and his partner was entered into when the appellant was present in the UK unlawfully. The Judge could only attach little weight to the relationship in the proportionality exercise.

14. In Agyarko [2017] UKSC 11 it was held that the ECHR intended that the words "insurmountable obstacles" should be understood in a practical and realistic sense, rather than as referring to obstacles which made it literally impossible for the family to live together in the country of origin of the non-national concerned. The definition of "insurmountable obstacles" at EX.2 Appendix FM as meaning "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" was consistent

with Strasbourg case law. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".

15. Although the appellant and his partner gave evidence before the First-tier Tribunal. The record of proceedings shows that the appellant merely said that his partner suffers from agoraphobia. The appellant's partner says in her oral evidence that the effect of agoraphobia was that she would only go out in a car and that she gets support from her partner. She also said that she cannot get on a train or a bus. The appellant's partner's daughter said that the appellant's partner has benefited from her relationship with the appellant and that the appellant will not go out and does not have any other social interaction.

16. The appellant's witness statement dated 8 January 2018 refers to the medical evidence from the appellant's partner's community mental health nurse. The appellant says

> "My partner simply cannot live in India with me and have the level of medical support that she has in the United Kingdom."

17. The appellant's partner wrote a letter dated 30 November 2017. In that letter the appellant's partner speaks of her relationship with the appellant, and the symptoms of agoraphobia. The appellant's partner says

> "I definitely can't travel to India. I would if I could. I can't even get on the bus …"

18. The record of proceedings tells me that no submissions were made about obstacles to travel to India. The letters from the appellant's partner's community mental health nurse say that separation would leave the appellant's partner isolated and vulnerable. They do not say that the appellant's partner cannot travel. It is only the medical report dated 26 November 2018 which says that the appellant's partner cannot use public transport. That is evidence which was not before the First-tier Tribunal.

19. On the evidence that was before the First-tier Tribunal, and the submissions made for the appellant, the question for the First-tier tribunal to consider was whether or not family life can continue in India. That is clearly the question that the Judge adequately grappled with. He sets out adequate reasons for coming to his conclusion. In effect, he took the wording of paragraph EX.1 & EX.2 of the immigration rules as the template for his overall proportionality assessment.

20. On the facts as the Judge found them to be there is provision for treatment for the appellant's partner's physical and mental conditions in India. There was no reliable evidence before the Judge driving at the practicality of travel to India. No submissions were made about obstacles to international travel. The argument made before me, and the evidence contained in the community mental health nurse's letter of 26/11/2018, were not before the Judge. In this appeal, the appellant raises a new matter.

21. In BM (Iran) (2015) EWCA Civ 491 the Appellant sought to argue that the FTTJ failed to take into account the Respondent's policy against removal to Iran in the Article 8 exercise. The Court of Appeal held that the First-Tier could not be said to have erred in law by failing to have regard to a point that was not raised before it. It was not an obvious point and there was nothing in the case law to alert the First-Tier to it, let alone support it. No evidential foundation had been laid down for it and the material before the First-Tier did not even contain the policy on which the argument was based.

22. The Judge cannot be critiscised for making his findings on the basis of the evidence and submissions laid before him.

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

24. A fair reading of the decision demonstrates that the Judge applied the correct test in law. The Judge carried out a holistic assessment of all of the evidence. There is nothing wrong with the Judge’s fact-finding exercise. There was no reliable evidential basis before the Judge for what is now argued before me. No submissions were made to the Judge about obstacles to international travel. The appellant might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

25. The decision does not contain a material error of law. The Judge’s decision stands.

DECISION

26. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 12 April 2018, stands.

Signed Date 15 January 2019

Deputy Upper Tribunal Judge Doyle