



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/16500/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1st August 2019**

**Decision & Reasons Promulgated
On 15th August 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**JATINDER KUMAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp of Counsel, instructed by SMK Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 26 April 2019, Upper Tribunal Judge Finch found an error of law in the decision of First-tier Tribunal Judge Gribble promulgated on 5 November 2018 and set aside the decision. The hearing was adjourned for remaking in the Upper Tribunal.
2. The Appellant is an Indian national, born on 4 May 1971, who claims to have entered the United Kingdom unlawfully in January 1997 and has remained here without leave ever since. His applications for leave to remain in 2012 and 2014 were unsuccessful and he made a further human

rights claim on 31 May 2017 on the basis of his relationship with his British citizen partner in the United Kingdom.

3. The Respondent refused the application in a decision dated 26 July 2018 on the basis that the Appellant could not meet any of the requirements of Appendix FM to the Immigration Rules for a grant of leave to remain on the basis of family life with his partner, specifically because he could not meet the immigration status requirement and could not in the alternative establish that there were insurmountable obstacles to family life continuing outside of the United Kingdom to satisfy paragraph EX.1. The application was also refused under paragraph 276ADE of the Immigration Rules on the grounds of private life, primarily because there would be no very significant obstacles to the Appellant's reintegration in India on return. The Respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain in the United Kingdom and in respect of the Appellant's partner, medical treatment was available for her in India and also in the United Kingdom even if the Appellant were removed.
4. The Appellant's claim is on the basis that his partner's medical conditions are such that the couple face insurmountable obstacles to continuing their family life in India such that paragraph EX.1 of Appendix FM to the Immigration Rules is satisfied, as are the remaining conditions for a grant of leave to remain where this paragraph is applicable. In the alternative, the Appellant relies on exceptional circumstances under paragraph GEN.3.2 of Appendix FM.

Applicable law

5. The requirements for limited leave to remain as a partner, so far as relevant to the present appeal are contained in R-LTRP.1.1 (d) of Appendix FM to the Immigration Rules. There is no dispute that the Appellant satisfies the requirements in (d)(i) and (ii) of this section, the issue is as to whether satisfies (d)(iii) that paragraph EX.1 applies.

"EX.1 This paragraph applies if

(a) ...

(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.

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 would not be overcome or would entail very serious hardship for the applicant or their partner."

6. The stringency of the test of insurmountable obstacles been confirmed by both the Supreme Court in Agyarko v Secretary of State for the Home Department [2015] EWCA Civ 440 and by the Court of Appeal in Wasif v Secretary of State for the Home Department [2016] EWCA Civ 82.
7. Paragraph GEN.3.2 of Appendix FM provides that where a person has made an application for leave to remain which does not meet the requirements of Appendix FM or Part 9 of the Immigration Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply. That provides:

“(2) Where sub- paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.”
8. In TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109, confirmation was provided that in the context of a human rights appeal, where a person satisfies the requirements of a particular Immigration Rule so as to be entitled to leave to remain, provided that Article 8 of the European Convention on Human Rights is engaged, an appeal would be allowed on human rights grounds as the refusal would be a disproportionate interference with the right to respect for family and/or private life given that there would be no public interest in the maintenance of immigration control in such a case.
9. When considering the public interest as part of the assessment of proportionality for the purposes of Article 8 of the European Convention on Human Rights, a Tribunal is required by section 117A of the Nationality, Immigration and Asylum Act 2002 to have regard in all cases to the considerations listed in section 117B of the same act. Section 117B, so far as relevant, provides as follows:
 - (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 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) ...

The evidence

10. In his written statements, the Appellant states that he first met his partner in 2000 and began cohabiting with her from 2008. Following the death of his partner's son in 2009, she developed depression and her health deteriorated. She had an operation on her kidney in 2013, following which she was unable to return to work and became increasingly reliant on the Appellant for her care. The Appellant's partner's health has deteriorated further and more recently and on 3 January 2019 she was awarded Personal Independence Payment and was provided with mobility aids for the home.
11. The Appellant attended the oral hearing, adopted his written statements dated 23 October 2018 and 18 February 2019 and gave oral evidence through a court-appointed Punjabi interpreter. The Appellant confirmed that his partner travelled to India in 2009 with her sister and sister-in-law and they stayed in her sister's old house in India. The Appellant's partner has no family remaining in India, they are all in the United Kingdom. The Appellant's partner travelled to India again in 2016, also with her sister and sister-in-law and stayed in the same place whilst there. Her family were able to assist with daily needs during the trip but the Appellant stated that her condition has deteriorated again within the last two years. Those family members do not live close enough to the Appellant's partner in the United Kingdom to assist her on a regular basis here.
12. When asked about the Appellant's partner's condition since 2016, the Appellant stated that her condition became more serious after this point, she was crying a lot, unable to lift her hands up, continued to have problems with her kidneys and joint pains, and was unable to move her head side to side. The Appellant did not know if medical treatment was available or not for his partner in India.

13. In his written statement, the Appellant's partner's son, Mr Gurpreet [S], confirmed that the Appellant was responsible for his partner's day-to-day care and had been a father figure to him.
14. Mr [S] attended the oral hearing, adopted his written statement dated 23 October 2018 gave oral evidence in English. He states that he has always lived with his mother, has worked in the past but at present is looking for work with a view to living more independently in the future. Mr [S] has been to India maybe five times, the last time about four years ago and he has travelled both with friends and with family there. In India, Mr [S] has an aunty (his mother's sister) and uncle (his father's brother) and his uncle's family. He is in touch with his aunty more than with relatives on his father's side.
15. Mr [S] states that he helps his mother a lot in the United Kingdom, cooking for her and also driving her to appointments. He stated that she is a lot of pain due to an accident many years ago, with back and elbow pain and following a kidney operation; although painkillers do help.
16. In her written statements, the Appellant's partner, Balwinder [B], states that she is unable to care for herself, with the Appellant now being responsible for all of her daily care. Ms [B] is on medication for depression, diabetes, kidney pains and neck pains and has very limited mobility, with aids in the home to assist her. She states that she is suffering from anxiety and suicidal ideation at the thought of being separated from the Appellant and that she would be unable to relocate to India because of a lack of access to medical treatment and the stigma in relation to mental health there in particular. Ms [B] further states that she would be unable to travel by air to India, even with painkillers and suppressants. Although she travelled to India in 2009 and 2016, both trips were for compelling family circumstances and her health has deteriorated since.
17. Ms [B] attended the oral hearing, adopted her written statements dated 23 October 2018 and 18 July 2019 and gave evidence through a court-appointed Punjabi interpreter. Ms [B] confirmed that the Appellant provides much of her daily care for her, with her son helping a little bit and driving her to appointments. Ms [B] states that she could not travel to India again in the future because of her poor health, specifically the level of pain she is in and the discomfort she suffers when sitting down for long periods. She stated that she gets relief from pain medication for a little bit but then the pain returns. She could not identify any particular detriment on her health caused by her travel to and from India in 2016, although she said she was in better health at that point. Ms [B] confirmed that she has a brother and sister in India and on the last occasion was able to travel and stay with family.
18. The medical evidence in relation to the Appellant dates back to June 2016, which shows that the Appellant has been suffering from elbow and neck pain from 2008, with back pain for 30 years; as well as continuing pains

after the kidney operation in approximately December 2013. She is stated to have recurrent depression and diabetes for one year. The same conditions are confirmed by Ms [B]'s GP in April 2017 and October 2018, together with the same list of medication being prescribed (with only paracetamol added).

19. In the letter from her GP dated 5 October 2018, the following is said about Ms [B]:

“Regarding air travel, it is unlikely she can manage long haul flights due to the chronic pains in her neck, elbow and back. Her depression worsens before and during a flight due to increased anxiety.

Regarding personal care: it is very likely she will become more depressed if the care element provided by her partner is no longer present. I think with the death of her son, in 2009, she has had difficulties with her depression, understandably, which will not be made any easier by the potential loss of her long-term partner and main carer, Mr J Kumar.

I do not think her long-term personal care will be met if she is to return to India for any length of period. Her best hope would be to remain in this country with extra support from her one and only remaining son, Gurpreet [S].”

20. The most recent medical evidence is in a letter from the GP dated 7 June 2019 which sets out new findings from an x-ray of Ms [B]'s neck and also that her depression is not improving such that an increase in the dose of her anti-depressants may be considered in the future. Otherwise the medication prescribed remains the same as it was in previous letters and no new diagnosis or conditions are identified.

Closing submissions

21. On behalf of the Respondent, Ms Chuna relied on the reasons for refusal letter dated 26 July 2018. Although it was accepted that the Appellant provides care to his partner, it was not accepted that there were insurmountable obstacles to their family life continuing in India. The Appellant's partner has travelled to India in 2009 and 2016, after the onset of her health problems and the second time in particular after her kidney operation in 2013 and the continuing pain she has been in since then. The Respondent submits that the Appellant's partner could travel again in the future and there is nothing to suggest she would not be able to obtain stronger painkillers for the journey or use the assistance that is readily available from airlines for those with mobility needs. It was submitted that there is simply no evidence from the Appellant that support would not be available for his partner to travel to India, as she has in the past with family support. On return to India, the Appellant's partner has family support and medical treatment would be available for her.
22. In the alternative, it was submitted that there were no exceptional circumstances to warrant a grant of leave to remain outside of the

Immigration Rules. The Appellant's relationship was formed at a time when his immigration status was not only precarious, but he had been in the United Kingdom unlawfully throughout with no legitimate expectation that he would be able to remain here lawfully. The Appellant has access to medical treatment for himself in the United Kingdom, to which he was not entitled and for which he has not paid. Overall, there would be no unjustifiably harsh consequences on the Appellant or his partner by the refusal of leave to remain and those consequences which are likely would not outweigh the public interest in removal in this case.

23. On behalf of the Appellant, Mr Fripp relied upon the personal and medical evidence available in relation to the Appellant's partner and submitted that there had been no substantive challenge to the factual situation as claimed. On the facts of this case, the evidence was sufficient to establish insurmountable obstacles to family life continuing in India, primarily the Appellant's partner's mental and physical health which is an impediment to travel, although it was not claimed that medical treatment was not available for her in India.
24. In the alternative, the test of unjustifiably harsh circumstances in paragraph GEN.3.2 of Appendix FM is met on the facts of this case.

Findings and reasons

25. There is no dispute in the present appeal that the Appellant is in a genuine and subsisting relationship with his partner, who is a British Citizen; nor is there any substantial dispute as to her medical conditions nor the acceptance on behalf of the Appellant that medical treatment would be available on return to India for his partner.
26. The facts are found as follows. The Appellant's partner suffers from pain, in particular in her neck, elbow and back as well as in her stomach following a kidney operation in 2013 and in addition she suffers from depression and diabetes. The joint pain has been in existence since at least 2008 and pain in her stomach since an operation in 2013. Ms [B]'s depression has been recurring since her son died in 2009 and her diabetes has been relatively recent since around 2015. Her diagnosis and medication has been stable since at least 2016, save for the addition of paracetamol as additional pain relief medication in 2017. The latest letter from Ms [B]'s GP in June 2019 refers to a lack of improvement in her depression such that her medication may be reviewed in the future; but there is nothing else in the medical evidence to show any specific or general deterioration in Ms [B]'s physical or mental health since 2016 and there has been no further conditions diagnosed or medication prescribed. Other than a recent x-ray on her neck, there is nothing to indicate any ongoing investigations or treatment other than repeat prescription medication.
27. Ms [B] has mobility and care needs, as reflected by her award of Personal Independent Payment for both components since early 2019 and the

relatively recent provision of aids at home to assist her. The Appellant provides significant support on a daily basis for his partner, with some support also being provided by her son. There is nothing to suggest that this support can not continue to be provided by the Appellant if the couple were to return to India, nor is it contended that medical treatment is not available to Ms [B] in India.

28. The GP letter dated 5 October 2018 is contradictory in relation to personal care, emphasising first the importance of care continuing to be provided by the Appellant for Ms [B]'s mental health but then stating that long-term personal care could not be met on return to India for any length of period and the best outcome for the Appellant would be to remain in the UK with extra support from her son. No reasons are given for either conclusion, nor is there any recognition that Ms [B] would only realistically relocate to India with the Appellant if he were not granted leave to remain in the UK, such that he could continue to provide personal care for her in India as he does now.
29. As to the practicalities of Ms [B] travelling to India, her evidence is that she is no longer able to do so and the letter from her GP dated 5 October 2018 states that she is unlikely to manage a long haul flight due to chronic pain. However, given the lack of any medical evidence supporting the witness evidence that Ms [B]'s condition has deteriorated significantly since her last long haul flights to and from India in 2016 and the lack of any consideration by the GP or otherwise as to whether additional support or pain relief could be used to manage a long haul flight; I do not find that taken at its highest, the evidence supports a conclusion that Ms [B] would not be able to travel to India, nor would she face insurmountable obstacles in doing so. The relatively recent award of Personal Independent Payment and provision of mobility aids does not of itself show a recent deterioration in Ms [B]'s condition, particularly against the medical evidence showing long-term pre-exiting conditions which have been stable and treated with the predominantly the same medication since at least 2016 when Ms [B] last travelled.
30. Ms [B] has family in India and both she and the Appellant speak Punjabi; such that they would be able to communicate and support would be available for them both to integrate or re-integrate on return to India.
31. In these circumstances and taking the evidence, particularly the medical evidence at its highest, I do not find that there would be insurmountable obstacles to the Appellant and his partner continuing to enjoy family life together outside of the United Kingdom in India. Whilst it is appreciated that the journey is likely to be difficult for Ms [B], it is one that she has successfully completed a number of times before, most recently in 2016, and whilst there may be some difficulties in adapting to life in India; these are not matters which meet the stringent test of insurmountable obstacles in that they are not, on the evidence, hurdles which could not be overcome or entail very serious hardship for either the Appellant or Ms [B]. There is family support available in India, both speak the language and

medical treatment is available for Ms [B]. Ms [B]'s son is aged 33 and is an adult planning for greater independence, who has visited India on several occasions such that their relationship could be maintained through modern means of communication and visits. I do not find that the Appellant satisfies paragraph EX.1 of Appendix FM nor therefore does he satisfy the requirements in R-LTRP.1.1(d) of Appendix FM for a grant of leave to remain as a partner.

32. In the alternative, the Appellant relies on there being unjustifiably harsh consequences on the Appellant, his partner and/or her son by the refusal of leave to remain such that he satisfies paragraph GEN.3.2 of Appendix FM and/or his removal would be a disproportionate interference with their right to respect for private and family life.
33. The findings above are equally relevant to this alternative provision and no other factors have been identified or relied upon by the Appellant over and above his partner's mental and physical ill-health to show unjustifiably harsh consequences on him, Ms [B] or her son. These matters must be weighted against the public interest in the Article 8 balancing exercise. When considering proportionality and the public interest, I am required to take into account the following factors in section 117B of the Nationality, Immigration and Asylum Act 2002. These are that the maintenance of immigration control is in the public interest; as is the ability to speak English and be financially independent (neither of which the Appellant has established) and that little weight should be given to family life established when the Appellant was in the United Kingdom unlawfully, as this Appellant has always been. Little weight should also be given to the Applicant's private life for the same reasons.
34. Taking all of these factors into account, I do not find that there are any unjustifiably harsh consequences on the Appellant, Ms [B] or her son in the refusal of leave to remain; there are no exceptional circumstances for a grant of leave to remain and the Appellant's removal would not be a disproportionate interference with his right to respect for private and family life. For all of these reasons, the appeal is dismissed on human rights grounds.

Notice of Decision

For the reasons set out in the decision of Upper Tribunal Finch promulgated on 26 April 2019, the making of the decision of the First-tier Tribunal did involve the making of a material error of law, such that the decision was set aside.

The decision is remade as follows:

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed 

Date 8th August 2019

Upper Tribunal Judge Jackson