Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21172/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 20th June 2019	**On 15th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR ASHWANI [K]
(No anonymity direction made)

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Maguire, Solicitors

DECISION AND REASONS

1. This appeal is brought by the Secretary of State against a decision by Judge of the First-tier Tribunal Peter Grant-Hutchison allowing an appeal on human rights grounds by Mr Ashwani [K] (hereinafter referred to as "the claimant").

2. The claimant is an Indian national. He came to the UK in 2011 as a student. Later the same year his leave was curtailed because

of non-attendance. In 2015 the claimant was encountered working illegally and was served with a notice of liability to detention and removal. Subsequently the claimant was given leave until 24th February 2018 as a spouse. His relationship with his wife broke down and in 2017 he entered a new relationship with his current partner (referred to hereinafter as "AF").

3. In November 2017 the claimant's leave was curtailed. He was detained for a period. Following an application on human rights grounds and a judicial review, the claimant was refused leave on 5th October 2018. The appeal to the First-tier Tribunal was brought against this decision.

4. In his decision the Judge of the First-tier Tribunal accepted that AF has mental health issues and is heavily emotionally dependent upon the claimant. The judge found that the claimant lived in India until the age of 25 and he has family there. He is described as having had a reasonable education. He would be able to arrange accommodation for his partner and himself in Punjab, where English is widely spoken. He would be able to assist his partner in facing what the judge referred to as "cultural difficulties". The reasons given by AF for not wanting to accompany the claimant to India had "some little merit" but, according to the Judge of the First-tier Tribunal, they did not justify a refusal to accompany the claimant to India.

5. The Judge of the First-tier Tribunal might have ended his findings at this point. Instead the judge went on to find that "notwithstanding the availability of some medical facilities in India given the particular severity of [AF's] mental health issues and the intensity of the medical treatment that she requires it cannot reasonably be expected that she returns with the [claimant]".The judge then added: "This is particularly true given that she is now pregnant." The judge concluded that there were "indeed insurmountable obstacles" to the claimant's return to India and the claimant was "successful under the rule."

6. The Judge of the First-tier Tribunal then purported to allow the appeal under the Immigration Rules, instead of allowing it on human rights grounds, although in this context, as Mr Govan observed, nothing material turned on this mistake.

7. The Secretary of State applied for permission to appeal on the basis, first, that the Judge of the First-tier Tribunal misdirected himself over the application of the test of "insurmountable obstacles" in paragraphs EX.1.(b) and EX.2 and, secondly, that the judge did not give adequate reasons for finding that the requirements of paragraph EX.1 of Appendix FM were met. It was not clear why pregnancy would be an obstacle to carrying on family life in India. There was no evidence of any

complications and the pregnancy was not so far advanced as to restrict travel. There was no evidence that AF's treatment for her mental health could not continue in India. The emotional support provided for AF by the claimant could continue in India because the claimant and AF would be together there. It was further submitted that the decision of the First-tier Tribunal was perverse.

8. Permission to appeal was granted on the basis that it was arguable that the Judge of the First-tier Tribunal did not properly direct himself on the issue of "insurmountable obstacles" and his reasons appeared to be brief and were possibly contradictory.

Submissions on error of law

9. At the hearing Mr Govan addressed me in relation to the application for permission to appeal. He pointed out that although the Judge of the First-tier Tribunal referred to paragraph EX.1, he did not refer to the definition of "insurmountable obstacles" in EX.2. At paragraph 16 the judge found that there were "insurmountable obstacles" to the claimant's return to India on his own, but this was not the correct test. Although the judge referred to AF's medical treatment and the support she receives from the claimant as reasons for allowing the appeal, the judge did not explain how these amounted to "insurmountable obstacles". There was a medical report on AF before the First-tier Tribunal but no evidence from AF's own psychologist or from her GP. There was no evidence about the availability of medical facilities in India.

10. Mr Govan submitted that if it was accepted that the Judge of the First-tier Tribunal erred in law in the way that he contended then the decision was perverse. The decision could be re-made on the basis of the evidence before the First-tier Tribunal.

11. For the claimant Mr Winter submitted that the argument was about form rather than substance. It was not necessary for the judge to have set out the terms of paragraph EX.2 if the judge was in substance aware of these. The judge had directed himself to EX.1 and EX.2 and referred to the refusal letter, which contained the relevant rules. The judge also referred to the skeleton argument for the claimant. In substance the judge recognised the test he was applying. In terms of Agyarko [2017] UKSC 11 the issue was one of "reasonable expectations" – could the couple be reasonably expected to move?

12. Mr Winter continued by submitting that as far as the mental health of AF was concerned, it was not settled that there were no suitable medical facilities in India but her health was likely to deteriorate. At Annex H of the Home Office bundle there were

letters dating from November 2017 from AF's key worker and at Annex I was the psychologist's report. The decision made was open to the Judge of the First-tier Tribunal and clear and adequate reasons were given. Reliance was placed upon MA (Somalia) [2010] UKSC 49 to the effect that the Upper Tribunal should be cautious in finding an error. The Secretary of State was not able to point to convincing reasons leading to contrary conclusions, as referred to in MS YZ [2017] CSIH 41. The judge set out the submissions for each side and had regard to the refusal letter, the skeleton argument for the claimant and the medical reports.

13. Mr Winter pointed out that in terms of R(Iran) [2005] EWCA Civ 982 there was a high threshold for perversity. The judge's decision was not outwith the range of reasonable responses.

Decision on error of law

14. It is an indication of the difficulty the judge had in giving reasons for his decision that he did not differentiate properly between the requirements of the Immigration Rules and the application of Article 8. The starting point for the judge should have been the Immigration Rules. If the relevant requirements of the Rules were satisfied, then the public interest would not weigh against the claimant in the balancing exercise under Article 8. Mr Govan rightly acknowledged that the judge's mistake in purporting to allow the appeal under the Immigration Rules was not material but in my view it was a sign of the judge's difficulty in identifying and analysing the issues.

15. In terms of paragraph EX.1.(b) it was for the claimant to show that he has a genuine and subsisting relationship with a partner who is in the UK and, so far as this appeal is concerned, is a British citizen and there are insurmountable obstacles to family life with that partner continuing outside the UK. "Insurmountable obstacles" are defined in paragraph EX.2 as meaning "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."

16. As was said by the Supreme Court in Agyarko at paragraphs 44-45, paragraphs EX.1.(b) and EX.2 mean that leave would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship.

17. With this in mind it is puzzling that at paragraph 16 of his decision the Judge of the First-tier Tribunal should have written that there were insurmountable obstacles to the applicant returning to India alone and that he could not be expected to leave behind "his seriously ill and pregnant wife" for whom he was the major support. As Mr Govan pointed out, this is not the test under paragraphs EX.1.(b) and EX.2. The issue is whether the couple can continue their family life together outside the UK, not whether the claimant can be expected to return to his country of origin alone. The judge finds that AF would be deprived of the claimant's support by the claimant returning without her but this is not be a part of the test of insurmountable obstacles, which applies to return together.

18. Mr Winter argued that the judge did not err at paragraph 16 where he stated that AF could not be "reasonably expected" to return with the claimant. In support of his argument he relied on paragraphs 42-44 of the decision in Agyarko. I have to say, however, that nowhere in Agyarko did I find the test of "insurmountable obstacles" equated to one of "reasonable expectations".

19. In paragraphs 42-44 of Agyarko the Supreme Court considered the meaning of the term "insurmountable obstacles" under the case law of the European Court of Human Rights and expressed the view that the definition in EX.2 was not incompatible with the Strasbourg case law. In paragraphs 45-48 the Supreme Court went on to point out that it was the Secretary of State's policy that the test of "insurmountable obstacles" should be used to determine whether removal was justified, whereas under European case law other factors might also be taken into account. The Secretary of State's policy was nevertheless not incompatible with Article 8 as exceptional circumstances could be taken into account where the test of insurmountable obstacles was not met. According to the Secretary of State these would be circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal would be disproportionate.

20. Mr Winter submitted that the judge did not need to set out in explicit terms the test of "insurmountable obstacles" as he was clearly aware of it. It was referred to for instance at paragraph 14 of the decision. Mr Winter's submission on this point would have more weight if the judge had properly applied the test, which he did not. At paragraph 16 the judge not only attempted to apply the test to the claimant returning to India on his own but equated the test with what the claimant and AF could reasonably be expected to do. This is not the correct test and amounts to a clear error of law, as contended by the Secretary of State.

21. The reason given by the judge for allowing the appeal was that AF could not relocate to India because of her mental heath difficulties and her pregnancy. As was submitted for the Secretary of State, neither of these grounds for not relocating would stand up to scrutiny. There was no medical evidence to support the proposition that AF could not travel because she was pregnant. There was no medical evidence to show that medical treatment would not be available for her in India. It was further submitted that she would be with the appellant, who was described as her main source of emotional support.

22. The reasons given by the judge as to why AF could not relocate to India do not stand up to scrutiny. They are inadequate and are not founded upon the evidence. It is not necessary for me to decide if the decision was also perverse. The Judge of the First-tier Tribunal misdirected himself as to the test to be applied and did not give adequate reasons. He thereby erred in law and the decision must be set aside and re-made.

Submissions for re-making the decision

23. In re-making the decision Mr Winter asked me to rely upon the skeleton argument for the claimant which was before the First-tier Tribunal.

24. For the Secretary of State Mr Govan referred me to the reasons for refusal letter and the “insurmountable obstacles” test in paragraph EX.1.(b) and EX.2. The onus of showing this test was satisfied was on the claimant, who would not succeed under the Immigration Rules. Attention should then be directed to sections 117A-D of the 2014 Act and, in particular, section 117B. the claimant was an overstayer. He could speak English and there was some evidence of integration. His relationship with AF did not start when the claimant was in the UK illegally but arguably he had been in breach of his visa.

25. Mr Winter responded by pointing out that in re-making the decision I was in a position to make findings on the existence of obstacles for the couple which had been rejected by the Judge of the First-tier Tribunal.

Re-making the decision

26. The skeleton argument for the claimant is based upon the proposition that there are insurmountable obstacles to the couple carrying on family life in India or that it would be disproportionate to expect them to do so. The factors to be taken into account in this regard were, first, AF’s mental health issues, including self-harm in the past. AF was pregnant by the time of the hearing before the First-tier Tribunal. She and her

partner relied on the support of her family, all of whom were in the UK. The couple's accommodation was in the UK. AF had no ties to India. She did not speak Punjabi and would face cultural difficulties and an adverse climate. There would be a lack of access to health facilities and limited employment opportunities. There was a high level of violence against women in India. There was no guarantee of permanent residence.

27. A major issue among these factors is the health of AF. There was a psychologist's report dated 7th August 2018 before the Tribunal. This states that AF suffers from PTSD consequent upon sexual assault as a teenager. She is described as "extremely vulnerable" if she were to be separated from her husband, who is a significant source of support for her. The report stresses the adverse consequences of AF being separated from the claimant. This is not, however, the issue I am being asked to consider, which is whether there are insurmountable obstacles to the couple carrying on family life together in India.

28. There are two letters dated 22nd November 2017 from AF's key worker. One of the letters is a quite formal medical report and the other is a more personal letter of support. The first letter confirms the diagnosis of PTSD. It states that separation from her partner would adversely affect her condition. The second letter refers to the importance of her relationship with the claimant.

29. So far as health care in India is concerned, I was referred by Mr Winter to a report by an Indian advocate on the conditions the couple were likely to encounter were they to relocate. It is stated that AF would not be entitled to free health care. Healthcare standards overall are lower than in the UK. It is said that because of this AF would be "disadvantaged" in India. The report also sets out the type of cultural, employment and accommodation issues AF would face.

30. Although this report makes detailed contrasts between life in the UK and life in India, there is nothing in the report which would amount to an "insurmountable obstacle", as defined in EX.2, to the couple carrying on family life together in India. Indeed, the Judge of the First-tier Tribunal recognised this at paragraph 15 of his decision, where he pointed out that the claimant has a reasonable education and has family in India. He could be expected to arrange accommodation and assist with cultural difficulties. English is widely spoken in Punjab. It would be possible for AF to obtain permanent residence if she was prepared to give up her British citizenship and take Indian nationality. It is pointed out in the advocate's report that if AF did not become an Indian national she would have to rely on a restricted visa renewable every 5 years. The report also refers

to crime against women, including sexual crime against foreign women. In addition, I was referred to a Home Office report of April 2015 on gender-based violence in India. The evidence does not show, however, that a woman in AF's circumstances, with an educated, English-speaking partner, faces a real risk of being a victim of sexual or gender-based violence in India.

31. I note, however, that at the time the reports were prepared AF had never been outside the UK, although the couple were contemplating taking a holiday in Spain. She is clearly accustomed to having her family around her and it would be a considerable wrench for her to leave her family. It is, however, difficult to see how this separation from her family, as an adult with a partner, would entail very serious hardship. It is implied by the medical reports that AF relies upon her partner for support more than her family.

32. I am not satisfied that the factors relied upon by the claimant to show insurmountable obstacles to carrying on family life in India amount either individually or cumulatively to very significant difficulties which could not be overcome or would entail very serious hardship for the claimant or for AF. Accordingly the claimant has not shown on the balance of probabilities that he satisfies the requirements of paragraph EX.1.(B) and EX.2 of Appendix FM of the Immigration Rules.

33. As is pointed out in Agyarko, the claimant may still show that there are exceptional circumstances which are sufficiently compelling to outweigh the public interest in maintaining effective immigration controls and which would result in unjustifiably harsh consequences such that the interference with private or family life in the UK of the claimant and AF would be disproportionate. In this regard I was referred by Mr Govan to section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended).

34. It is not disputed that the claimant and AF have family life together as a couple. Mr Govan acknowledged that the claimant can speak English and that there is evidence of his integration in the UK. He formed his relationship with AF in March 2017, when he was lawfully in the UK with a visa as a spouse, although his relationship with his wife had broken down. As his visa was for a limited period, his immigration status was precarious and this reduces the weight to be given to his private life in the balancing exercise, although not to his family life.

35. The question I must ask therefore is whether there are unjustifiably harsh consequences arising from the removal of the claimant from the UK. Were the couple to be permanently separated as an inevitable consequence of this, then an

argument might be constructed, giving full weight to the medical evidence, that this would be unjustifiably harsh. It has not, however, been shown that permanent separation would be an in inevitable consequence. On the contrary, there is the possibility of the couple carrying on their family life together in India. Difficult though this might be for AF, who would have to leave her family in the UK, it has not been shown that it would entail very serious hardship or unjustifiably harsh consequences. Accordingly the appeal by the claimant will not succeed.

Conclusions

36. The making of the decision of the First-tier Tribunal involved the making of an error of law.

37. The decision is set aside.

38. The decision is re-made by dismissing the appeal.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and I see no reason of substance for doing so.

M E Deans
Deputy Upper Tribunal Judge

9th July 2019