Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20395/2019

THE IMMIGRATION ACTS

Heard on 19 January 2021
At a remote hearing via Skype

Decision & Reasons Promulgated
On 28 January 2021

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

KULWANT SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Nasim, Counsel
For the respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has appealed against a decision of First-tier Tribunal ('FTT') Judge Buttar, sent on 28 April 2020, dismissing his appeal on Article 8, ECHR grounds.

Background

2. The appellant is a citizen of India born in 1987. His immigration status is not in dispute: although he arrived lawfully as a spouse dependent of a student in 2011 (who he divorced in 2017), he remained as an unlawful overstayer when

his visa expired on 23 September 2012. He did not seek to regularise his immigration status until he made his human rights application on 26 July 2019, which was refused on 27 November 2019. This was based upon his relationship with a British citizen partner, who I shall refer to as P. This relationship began in 2017 with a religious marriage taking place on 7 October 2018. The relationship has been accepted to be genuine and subsisting, and was not challenged by the SSHD at the FTT hearing. It was also accepted that P suffered from a chromosomal disorder from early childhood and other medical concerns, such that she was supported by CAMHS and received disability allowance and personal independence allowance ('PIP'). In addition, P turned to both her mother ('M') and the appellant for help and support, in the light of her medical and mental health concerns.

FTT's findings

3. The FTT heard evidence from the appellant and M. The FTT accepted that the appellant was in a genuine and subsisting relationship with P, and noted that P's medical issues were accepted by the SSHD. The FTT then immediately turned to the issue of 'insurmountable obstacles' and made findings of fact from [46] to [52], before addressing the likely impact of the interference upon family life pursuant to Article 8 at [60] to [63]. These can be summarised as follows:

    (i) There would be obstacles to the couple enjoying family life in India but these would not be 'insurmountable'. In particular:
        (a) P's medical conditions could be treated in India;
        (b) P will have the support of the appellant and his family in India;
        (c) Although P depends upon her mother for day to day emotional support, she will be able to obtain that support from the appellant and in addition by using the telephone or other communication methods with M. When M went to India for eight weeks in 2017, P relied upon support from a sister in the UK.

    (ii) In any event, the appellant could be supported by her family members and keyworker in the UK, whilst the appellant returns to India to apply for entry clearance. In the circumstances, the FTT found there would be no 'insurmountable obstacles' to the continuation of family life or 'very serious hardship' if the appellant returns to India to make an application for entry clearance.

    (iii) Having considered R (Agyarko) v SSHD [2017] UKSC 11 and the principle in Chikwamba v SSHD [2008] UKHL 40, it would not be a disproportionate breach of family life to expect the appellant to apply for entry clearance when all the particular circumstances of the case are balanced against the public interest.

4. The FTT also found that the appellant would not face 'very significant obstacles' to re-integration to India pursuant to 276ADE of the Immigration

Rules and his removal would not be a disproportionate breach of his private life pursuant to Article 8 – see [53] to [59] of the FTT's decision. These findings have not been appealed and I need say no more about them.

Appeal to the Upper Tribunal ('UT')

5. The appellant applied for permission to appeal against the FTT's decision in four grounds of appeal, which can be summarised as follows.

   (i) In determining whether the requirements in EX.1 of Appendix FM to the Immigration Rules were met, the FTT took into an account an irrelevant matter – the separation would only be short because the appellant could apply for entry clearance, and failed to apply the test of 'insurmountable obstacles' in a "*practical and realistic sense*" (see Agyarko at [43]).

   (ii) The FTT failed to adopt a structured approach to the assessment of family life pursuant to Article 8.

   (iii) The FTT unlawfully speculated about the prospect of the appellant meeting the requirements for entry clearance.

   (iv) The FTT failed to have regard to s. 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), which sets out the public interest considerations.

6. Designated Judge Shaerf granted permission to appeal in a decision dated 16 June 2020. He observed that the grounds of appeal were not easy to follow and read more like submissions but that it was arguable that the FTT failed to give adequate reasons for finding there would be no 'insurmountable obstacles' and failed to factor in the extent to which the appellant met the Immigration Rules when assessing proportionality. Judge Shaerf considered ground (iv) to be weak but granted permission to appeal on all grounds.

7. Mr Nasim relied upon the four written grounds of appeal. After hearing from Mr Nasim I indicated to Mrs Pettersen that I only needed to hear rom her in relation to ground (i). She submitted that the FTT was entitled to reaching the findings it did. I make reference to the parties' respective submissions in more detail below.

8. At the end of the hearing I reserved my decision, which I now provide with reasons.

Error of law discussion

Ground (i) – EX.1 and 'insurmountable obstacles'

9. The FTT clearly accepted that P's circumstances were such that there would be obstacles to family life continuing in India but they were not 'insurmountable'.

EX.2. defines 'insurmountable obstacles as "*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*."

10. Contrary to Mr Ahmed's submission the FTT applied this test in a "*practical and realistic sense*" - see Agyarko at [43]. The FTT clearly considered the practical and realistic situation for P in India and made findings of fact accordingly. The FTT acknowledged there would be obstacles at [48] having set out the evidence as to P's difficulties and the claimed obstacles in relocating to India in some detail at [16] to [33]. The FTT concluded that notwithstanding these difficulties P would be able to cope with the support of the appellant in India.

11. The FTT's finding of fact as to P's ability to cope in India with the support of her husband but without her mother or the statutory agencies in the UK, in the light of her medical conditions, might be described as harsh. The appellant must however establish that this finding of fact is infected by an error of law. I was not been taken to any material evidence that was omitted by the FTT. The finding cannot properly be described as perverse and Mr Ahmed did not seek to do so. I note that P had considerable experience of India (see [31] of the FTT's decision). Although P has always relied upon M and continued to do so, M's own evidence described the changes in P's source of emotional support from M to the appellant. Although M continued to play an important role in supporting P (which the FTT was clearly aware of – see [52]), I was not taken to any evidence to support the submission that this role could not be fulfilled by the appellant in India, with additional support provided by M via modern methods of communication.

12. In my judgment the FTT provided tolerably clear reasons for finding that the high threshold of 'insurmountable obstacles' was not met. That finding was sufficient to determine the EX.1 issue. The FTT went on to address 'insurmountable obstacles' at [52] on an alternative footing - the FTT considered the eventuality that separation would only be for a short period because the appellant could apply for entry clearance. Mr Nasim submitted that no time period was considered. Both representatives agreed that any entry clearance application should be straightforward because the requirements of the Immigration Rules appear to be met: in particular the genuineness of the marriage was not disputed and the SSHD had no concerns regarding 'suitability' or financial requirements of the Rules. In relation to the latter both parties agreed that P's PIP meant that she was exempt from the financial requirements. At the time of the FTT hearing (pre-March 2020 'lockdown') the FTT was therefore entitled to approach the matter on this basis that the entry clearance application was a straightforward one that could be determined in a matter of months.

Ground (ii) – no structured approach to Article 8

13. Mr Nasim did not pursue this ground in oral submissions. The FTT's Article 8 balancing exercise could have been better structured and the use of a 'balance sheet' would have been helpful. However, it has not been submitted that when the decision is read as a whole that any material factor relevant to the Article 8 balancing exercise was omitted. The FTT made findings of fact that were open to it and clearly considered all the relevant circumstances concerning family life and the difficulties P would face in India, having expressly repeated them at [60]. The FTT was clearly aware of the public interest considerations in s. 117B of the 2002 Act, having referred to those matters at [55] to [57], albeit there was no explicit reference to the 2002 Act. The FTT was entitled to regard the public interest in maintaining immigration controls to be strong in this case given the appellant's lengthy unlawful immigration status and disregard for immigration control.

14. Contrary to the vague submission in the grounds of appeal, the FTT clearly considered the appellant's case 'outside the Rules' by undertaking the requisite balancing exercise.

15. The suggestion in ground (ii) that the FTT was wrong to consider 'temporary separation' is difficult to follow, particularly when the appellant relied upon the Chikwamba principle.

Ground (iii) – Chikwamba principle

16. Ground (iii) as drafted is difficult to follow. Mr Nasim clarified that the appellant would meet all the requirements of the Immigration Rules in any entry clearance application and this together with [51] of Agyarko obliged the FTT to conclude that there was no public interest in removing the appellant from the UK in order to make an entry clearance application that would be certain to succeed.

17. The President addressed a similar submission in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) at [83] to [99]. When that guidance is applied to the FTT's findings the following lawful approach on the part of the FTT emerges: the FTT found that the appellant would probably be granted entry clearance within a few months of his return to India; although it would be difficult for P to be separated from her husband during this time, she would be ably supported by M and other members of her own family such that she would not suffer serious hardship; the appellant's immigration history and entry into a relationship when he was a long standing overstayer (see s. 117B(4)(b) of the 2002 Act) when considered alongside all the relevant factor meant that the impact of the temporary separation did not outweigh the public interest.

Ground (iv) – s. 117B

18. This ground entirely failed to engage with [55] to [57] of the FTT's decision. These paragraphs clearly demonstrate that the FTT applied s. 117B of the 2002 Act, albeit without explicit reference to the 2002 Act.

Notice of decision

The FTT decision does not contain an error of law and I do not set it aside.

Signed: *Melanie Plimmer* Dated:
Upper Tribunal Judge Plimmer 19 January 2021