IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002792
UI-2024-002793

First-tier Tribunal Nos: PA/60020/2023
HU/53150/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th October 2024

Before

UPPER TRIBUNAL JUDGE FRANCES
UPPER TRIBUNAL JUDGE GREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

P R
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M. Parvar, Senior Home Office Presenting Officer
For the Respondent: Mr M. Mohzam, Solicitor at Twinwood Law Practice Limited

Heard at Field House on 7 October 2024

Although this is an appeal by the Secretary of State, we shall refer to the parties as in the First-tier Tribunal

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The respondent appeals against the decision of First-tier Tribunal Judge Phull ('the Judge') promulgated on 9 May 2024 allowing the appellant's appeal against the refusal of her human rights claim on Article 8 grounds. There was no challenge by the appellant to the Judge's decision to dismiss her appeal on asylum and humanitarian protection grounds.

2. The respondent applied for permission to appeal to the Upper Tribunal on 13 May 2024 on the grounds the Judge had made contradictory findings. The Judge found that the appellant had not made out her claim to be at risk on return to India from either her family or the authorities, but subsequently concluded that it would be "unduly harsh" to expect her to return to India with her husband and child because of her family's disapproval of her marriage. The grounds assert that the Judge failed to take account of a material consideration in failing to consider whether the appellant could return with her husband and child to another area in India, such as her husband's home area; or whether she could return to her home area in India in view of the Judge's finding that the appellant's family has no influence over the authorities.

3. Permission to appeal was initially refused by First-tier Tribunal Judge Bibi on 23 May 2024. As set out in the respondent's application to the Upper Tribunal, it is unclear on what basis the grounds were rejected by Judge Bibi or whether the Judge Bibi was aware that the application had been brought by the respondent rather than the appellant.

4. Permission to appeal was granted by the Upper Tribunal Gill on 9 July 2024 on all grounds. Judge Gill's decision goes on to state:

> " Although the grounds appear to argue that the threshold of undue hardship on relocation is the applicable threshold, the parties will be expected to address the Upper Tribunal on the question whether the threshold in considering proportionality for someone whose partner is not a British citizen, a refugee or someone with settled status must at least be the same (if not higher) than the threshold specified in EX 1.2, Appendix FM of *"insurmountable obstacles to family life with that partner continuing outside the UK"* which is applicable in the case of someone whose partner is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection."

The Judge's decision

5. The Judge heard evidence from the appellant and her husband and made the following findings.

6. The appellant is a national of Indian who is married to a Sikh and is a low-level supporter of the Khalistan movement. There is no evidence that the Indian authorities have an adverse interest in the appellant. It is plausible that the appellant's brothers, who are Hindu, disapprove of her marriage to a Sikh man but there is insufficient evidence that her brothers have any influence over the police or that she would be at risk on return to India. These findings are unchallenged.

7. The appellant has an established family life with her husband and child (aged four at the time of the hearing) and private life ties in the United Kingdom. The appellant's husband has limited leave to remain in the United Kingdom. The appellant is an overstayer and her immigration status is precarious. She speaks

English and is supported financially by her husband. It is in the best interests of the appellant's child to remain with both parents.

8. The appellant could not look to her family in India for support because of their disapproval of her marriage and her family would not accept her husband because he follows the Sikh faith. The appellant and her husband have serious concerns about their child's welfare and how he will be treated by the appellant's family. There are exceptional circumstances because of the consequences of the appellant's family disapproval of her marriage, such as *"inciting others against them for having an inter-faith marriage"*, which could result in unduly harsh consequences for the appellant, her child and her husband. Consequently, the Judge found that removal of the appellant was not in the public interest and the respondent's decision refusing her human rights claim was disproportionate.

Grounds and submissions before us

9. Mr Parvar drew our attention to the grounds of appeal before the First-tier Tribunal and the separate grounds before the Upper Tribunal which challenged the First-tier Tribunal refusal of permission. The respondent filed a skeleton argument which expands on the grounds of appeal and challenges the Judge's approach to the Article 8 proportionality assessment including a failure to adopt a balance sheet approach or give consideration to section 117A and 117B of the 2002 Act, and a failure by the Judge to explain her finding of exceptional circumstances. The skeleton argument asserts that the decision is "rationally insupportable".

10. Mr Parvar submitted that in finding that the appellant had demonstrated exceptional circumstances due to her family's disapproval of her marriage, the Judge had wholly failed to consider whether the family could live in another area of India away from her family. The country is vast and the appellant could move elsewhere. The appellant is over the age of 40, at an age when you would not expect the wider family to provide a big pillar of support. No issues were raised in relation to the ability of the appellant and her husband to find employment on return to India and the Judge had made no findings in this respect. Furthermore, it was submitted that the Judge had failed to take account of her own findings on the appellant's protection claim. The relevant findings were that the appellant's family do not hold any influence over the authorities in India. She could return to her home area in India and seek redress from the authorities there in the event of any difficulties arising. Mr Parvar submitted that the test of "insurmountable obstacles" was not the appropriate test in the appellant's circumstances. The test was one of exceptional circumstances which is a high bar that the appellant cannot meet.

11. Mr Mohzam took us to the witness statement of the appellant's husband and submitted that the appellant's husband has been living in the United Kingdom for over 20 years and was unwilling to return to India. In these circumstances, relying on the Judge's finding regarding the best interests of the child, he submitted that the appellant would either have to return to India alone without her husband and child, or with her child thus separating him from his father. He submitted that it was in the best of the interests of the child for both parents to remain with their child in the United Kingdom. He cited GM (Sri Lanka) [2019] EWCA Civ 1630 and submitted that the Tribunal is required to consider the practicality of the appellant's situation, namely that her husband has limited leave to remain in the

UK and is unwilling to leave. Removal of the appellant to India will give rise to unjustifiably harsh consequences because it will result in a family split.

12. Mr Mohzam submitted that it was clear the Judge had taken into account the matters which he raised before us even though she did not make specific findings on these. He referred to the fact the witness statement of the appellant's husband was before the Judge and submitted that this evidence had not been challenged by the respondent and so was accepted in its entirety. He submitted that although there were no specific findings by the Judge on the amount of time the appellant's husband had spent in the UK and his unwillingness to return to the UK, it was implicit in the decision and could be inferred from the Judge's findings at [29] and [30] of the decision. Mr Mohzam accepted that the decision was generous but submitted that the Judge considered all relevant matters, made findings open to her on the evidence and came to a proper conclusion.

Conclusions and reasons

13. There was no challenge to the Judge's finding that the appellant enjoyed family and private life in the UK such that Article 8(1) is engaged. The challenge before us relates to the Judge's findings in relation to the proportionality exercise in respect of Article 8(2).

14. It is accepted the appellant is unable to meet the requirements of Appendix FM in relation to either the partner route or parent route. The appellant's husband is not a British citizen, settled in the UK or with refugee leave or humanitarian protection. He has limited leave to remain in the UK. The appellant's child is not a British citizen nor has he lived continuously in the UK for at least seven years. Thus, the provisions of EX.1. and EX.2. of Appendix FM concerning insurmountable obstacles to family life continuing outside the UK, do not apply to the appellant.

15. In order to find that the respondent's refusal of the appellant's human rights claim was a disproportionate interference with her Article 8 rights, the appellant is required to meet the provisions of GEN.3.2 of Appendix FM. The appellant must show, on the balance of probabilities, that the respondent's refusal gives rise to exceptional circumstances which could result in unjustifiably harsh consequences for the appellant, her partner or her child.

16. We find that the Judge made a clear error of law in failing to consider the option of the appellant and her family moving to an area in India away from her family, potentially to her husband's home area. We consider this to be material in view of the fact the only circumstances referred to by the Judge in finding there were exceptional circumstances were on account of her family's disapproval of her marriage. This is a situation that could be avoided by the appellant relocating to another part of India.

17. Further, we find the Judge's Article 8 assessment failed to take into account her own findings in respect of the appellant's protection claim. Having found it was not established that the appellant's family has any influence over the authorities and police in India, it is not clear why it is not an option for the appellant to return with her husband and child to her home area in India and seek redress from the authorities in the event of any difficulties arising with her family. We find that this error was material to the outcome of the Article 8 proportionality exercise and assessment of whether the appellant could establish exceptional

circumstances which could result in unjustifiably harsh consequences for the appellant, her partner or her child.

18. In his submissions Mr Mohzam did not directly address the grounds raised by the respondent or the submissions made by Mr Parvar. He did not address us on why the appellant and her family could not relocate to another part of India or return to her home area in view of the unchallenged findings of the Judge in relation to the asylum claim. We do not accept that it is implicit in the decision that the Judge accepted the appellant's husband has been resident in the UK for over 20 years or that he is unwilling to return to India in the event of the appellant's removal.

19. The Judge found that the appellant had demonstrated exceptional circumstances due to her family's disapproval of her marriage and because she could not look to her family in India for support in these circumstances. We find that the Judge's failure to consider either the option of relocation or the ability to seek the assistance of the authorities in India to be a material error of law. We accept that Mr Parvar's suggestion that the appellant could return to India without the support of her family in India without giving rise to exceptional circumstances which would could result in unjustifiably harsh consequences.

20. For these reasons we find that the Judge erred in law and that the errors of law were material to the outcome of the appeal. Consequently we set aside the Judge's decision in relation to the Article 8 proportionality assessment at [28] to [30] of the decision and proceed to re-make the decision. The Judge's findings at [15] to [27] of the decision are preserved. In addition we preserve the findings at [28] of the decision that the appellant speaks English and is financially supported by her husband.

21. The decision of the Judge was promulgated on 9 May this year following a hearing on 28 March. Mr Mohzam was not aware of any change in the appellant's circumstances, having taken no instructions on this, and we therefore determine this appeal on the basis of the factual findings made by the Judge five months ago and the evidence before her.

22. The appellant's child is dependant on the appellant's appeal. We find it is in his best interests to live with both parents. He turned five years old in May this year. He is at start of his educational journey and at an age when the centre of his world lies predominantly with his parents. We find he is of an age where transition to life in another country would not of itself lead to unjustifiably harsh consequences for him.

23. We are not persuaded by Mr Mohzam's submission that the appellant's husband would refuse to leave the UK. We do not accept that his witness statement goes so far as saying that he is unwilling to return to India should his wife be removed there. In his statement he claims that he would not be able to relocate and re-establish himself in India having spent more than 20 years in the UK and because there is nobody in India who could assist them.

24. The evidence before us does not demonstrate that the appellant's husband would face unjustifiably harsh consequences should he return to India. He may choose not to do so. That is a matter for him.

25. The appellant arrived in the UK in 2011 and has remained unlawfully since 2012. She formed a relationship with her husband in 2015 and married him in 2017. She is now 47 years of age.

26. In accordance with section 117B(4) we attach little weight to the appellant's private life and her family life established with her husband whilst she has been in the UK unlawfully. We have preserved the findings of the Judge in relation to the appellant's ability to speak English and being financially independent of the state. These are neutral factors in the balancing exercise.

27. In the appellant's 13 years spent in the UK she has demonstrated that she is able to live without the support of her wider family in India. We accept Mr Parvar's submission that at her age the family is not likely to be a significant pillar of support and it is not unreasonable to conclude she would not require the support of her family in India to readjust to living there. The appellant has spent the majority of her life in India and is familiar with the culture, society and language. We find that on return to India the appellant should be able to reintegrate to life in India without facing any unjustifiably harsh consequences. She may choose to live in an area away from her family in India to avoid any difficulties from her family due to her marriage, although we find she would be able to return safely to her home area, and without any unjustifiably harsh consequences, relying on redress from the authorities in the face of any difficulties with her family.

28. In accordance with section 117B(1) we attach weight to the public interest in effective immigration control and the fact that the appellant does not meet the Immigration Rules. We have found that the appellant, her husband and child would not face unjustifiably harsh consequences on return to India and that she does not meet the requirements of GEN.3.2 of Appendix FM. For these reasons we find that the respondent's refusal decision amounts to a proportionate interference with the appellant's Article 8 rights when weighed against the public interest. The appellant's appeal against the refusal of leave to remain is dismissed.

Notice of Decision

The appeal by the Secretary of State is allowed.

The decision dated 9 May 2024 is set aside.

The decision is remade as follows: The appellant's appeal is dismissed on human rights grounds.

S E A Grey
Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 October 2024