Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48936/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5th May 2016	**On 17th May 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

BEENA PRARIMAL VASA

Respondent

Representation:

For the Appellant: Mr D Clark, senior Home Office Presenting Officer
For the Respondent: Mr I Hossain of London Law Associates

DETERMINATION AND REASONS

1. Ms Vasa had applied for leave to remain as the partner of a person present and settled in the UK. Her application was refused. Her appeal, which was heard by FtT Judge Joshi on 17th June 2015, was allowed in a decision promulgated on 29th September 2015

2. The SSHD sought and was granted permission to appeal on the following grounds:

> ……[the application for leave to remain] was refused under Appendix FM (the 10 year route) as the appellant did not meet the requirements of E-

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> LTRP and EX.1 did not apply. It is apparent from Para. 25 [of the decision] that the judge is conflating the 2 different rules and he has not set out which one he is considering.
>
> In considering if there are insurmountable obstacles to the appellant's partner relocating with the appellant the judge seeks to distinguish the appellant's situation from that in **Agyarko**. He does this on the basis that he considers the appellant's status is not precarious. This is a clear error, **AM (s117B) Malawi [2015] UKUT 0260 (IAC)** sets out the definition of precarious and it ca be anyone with leave to remain. His error in distinguishing **Agyarko** has led to him properly the correct high standard required in the "insurmountable obstacle" test. Furthermore it is clear from para 33 "All the members of the family would be harshly affected and there is no evidence before me that her family will be able to relocate to India without other family support, a home or work". That he has reversed the burden of proof. His assessment of their potential difficulties appears to be based entirely on unsupported assertions by the appellant and her family.

3. It was agreed between the parties that the appellant fell under the transitional provisions and that although the application had been refused on adequacy of funds and the judge had not made a finding on that element of the decision, permission had not been sought on that ground. It was further agreed that the SSHD had not sought to appeal the decision on the grounds that paragraph EX.1 did not apply and Mr Clark accepted that under EX.1 there was no requirement for an English language certificate.

4. It was a little difficult to understand why Mr Hossein sought to reiterate submissions he had apparently made to the FtT that the appellant did not require an English language certificate because she fell within the transitional provisions (which is incorrect) or sought to reiterate submissions he had made before the FtT that she had been unable to take a language test because the respondent retained her passport. These points were not at issue before me.

5. Mr Clark submitted that although the FtT judge had failed to make findings under paragraph 284 of the Immigration Rules, being one of the reasons for refusal of leave to remain and although there appeared to be a conflating by the judge of consideration under paragraph 284 and Appendix FM the core ground of appeal was that the judge had simply failed to provide adequate reasoning for his finding that there were insurmountable obstacles to the family relocating to India; the Judge had sought to distinguish the appellant's position from that in *Agyarko* [2015] EWCA Civ 440 but had made a clear error in basing his decision on the premise that her status in the UK was not precarious. He referred to paragraph 33 of the FtT decision and submitted that in stating "there is no evidence before me that the family will be able to relocate to India without other family support, a home or work" the judge had reversed the burden of proof.

6. Mr Hossein submitted that the SSHD , in the decision, had asserted that there were no insurmountable obstacles to the family relocating to India but had not provided any evidence to that effect and had not explained why there were no insurmountable obstacles. He submitted that when the decision was read as a whole it was 'obvious' that there were

insurmountable obstacles because the husband had no work in India having sold his business and the son was in education here in the UK. There was, he submitted no family in India.

7. The FtT judge set out the evidence before him; there was no challenge to the accuracy of that record. It is plain from a reading of the decision that the judge has failed to make any findings whatsoever on whether the appellant meets the requirements of paragraph 284 of the Immigration Rules although he records that the respondent in the decision the subject of the appeal refers to the lack of a language certificate. The judge ignores this, although as I have said this was not a matter that was taken before me and therefore plays no part in my decision whether there was a material error of law in the FtT decision.

8. In paragraph 25 of the decision the judge refers to EX.1. He then self directs himself in paragraph 26 to decide whether or not there are insurmountable obstacles to family life continuing outside the UK.

9. The facts that he considers are:

   (I)Mrs Vasa's son is at an important stage of his studies (final year of 'A' levels) and has been offered a scholarship to attend university;
   (ii)Mrs Vasa and her husband have been married for 26 years and she arrived in the UK with valid leave to remain and applied for an extension of her leave to remain during the currency of an extant period of leave to remain;
   (iii)Mrs Vasa's husband is 54 years old, is a British Citizen by descent, has stable employment in the UK; does not have family or friends, work or home in India; on the balance of probabilities he is unlikely to go back to India with Mrs Vasa;
   (iv)Mrs Vasa does not have family or friends or work or a home in India;
   (v) Mrs Vasa's husband said that he would not be able to manage financially in the UK without Mrs Vasa's earnings – she works as a care worker;
   (vi) Mr Vasa's evidence was that he would not be able to support his son through education in the UK if Mrs Vasa were to return to India;
   (vii) there was no evidence before him that the family would be able to relocate to India without family support or work or a home and the future of the son would be affected;
   (viii) If Mrs Vasa remains in the UK she would be able to continue to contribute to the family finances enabling the family to remain unsupported by public funds.

10. Other evidence that was before the judge which was not challenged was as follows:

   (I) Mr Vasa's mother, father, brother and sister are all British citizens and live in the UK. His parents have now died. He used to have a business in India but no longer owns that business and he no longer has a home there. He arrived in the UK in 2009. Most of his friends

are in the UK. Mr Vasa was 54 years old at the date of the FtT hearing.
(ii) Mr and Mrs Vasa were married for some 26 years. Their son was born in India.
(iii) Mrs Vasa, who was born in 1962, and their son were granted entry clearance on 25th April 2012.

11. It appears that although not specifically stated the judge has accepted that Mrs Vasa has no relatives or friends in India and that Mr Vasa has sold his business there. There is no reference to the evidence supporting the contention that having spent so many years living and being married in India she no longer has any friends and there was no reference to any evidence what has happened to the family home or the funds from the sale of the business. Mr Vasa's evidence was that most of his friends were in the UK so it appears that he retains some friends in India – which would be logical given that he lived there until 2009 ie until he was in his mid 40s and ran a business there. There was no recorded evidence what contact he has with them or whether they would assist in relocation.

12. The judge draws an analogy with Kaur in *R (on the application of Kaur) v SSHD* [2015] EWHC 766 (Admin) where, the judge records, it was held that the SSHD had not properly considered the insurmountable obstacles that a middle aged wife and her husband would face if returned to India as the husband had lived in the UK for 18 years, was a British Citizen and was unlikely because of his age to find employment and they had no accommodation ([32] FtT decision). The citation in the judge's decision does not appear to be correct and I have been unable to find the case. From the limited information referred to by the judge it appears in any event that this was a judicial review, not a statutory appeal and the issue at large was the extent to which the SSHD had considered whether there were insurmountable obstacles. As such the decision would have been quashed for the SSHD to take a decision considering the evidence. Further, that case involved a husband who had lived in the UK in excess of 18 years and was apparently elderly and thus unlikely to find employment. It is difficult to understand on what basis a similarity could be drawn with Mrs Vasa who has been in the UK for about 4 years and whose husband has only been in the UK for some 7 years. Although the FtT judge has accepted there is no employment by Mr Vasa etc in India, there does not appear to have been any evidence before the judge as to the nature of the business sold, what funds became available, what accommodation could be available, what employment prospects there were (particularly since Mr Vasa had previously owned a business and was currently plainly able to work) or what support could be forthcoming even for a limited period of time until the family re-established itself. There does not appear to have been any evidence that Mr and Mrs Vasa would be unable to work in India. It is not for the SSHD to provide evidence of these matters – it is for an applicant to produce evidence upon which she relies to assert a particular state of affairs.

13. The judge also refers to *Agyarko* although his consideration of this is flawed. The judge draws from *Agyarko* the principle issue being that the appellant (actually an applicant) in that case had entered into her relationship when she was an overstayer and her immigration status was precarious ([33}). The FtT judge then refers to the Mrs Vasa having been married for 26 years and having arrived in the UK with valid leave to enter. *Agyarko* was also a judicial review but considered the phrase 'insurmountable obstacles' and was not merely a fact specific judgment. In giving the lead judgment, Sales LJ referred to the high threshold required to be crossed when considering 'insurmountable obstacles' as referenced in paragraph EX.1. of the Immigration Rules; it is "significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom ([21] *Agyarko*). Sales LJ continues

> "[24] ...the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in EX.1(b) which need to be satisfied before an appellant can claim to be entitled to be granted leave to remain under the Rules. In that context it is not simply a factors to be taken into account. However in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8..."
>
> ….
>
> [30] Thus it is possible that a case might be found to be exceptional for the purposes of the relevant test under Article 8 in relation to precarious family life even where there are no insurmountable obstacles to continuing family life overseas....

14. Mrs Vasa was not an overstayer but it is difficult to understand on any basis how the findings of fact made and the evidence before the FtT judge could lead to a conclusion there were insurmountable obstacles to relocation to India. Yes it may be difficult and unpleasant but there was simply insufficient evidence to reach the high threshold demanded to reach the legitimate conclusion that there were insurmountable obstacles and thus that she could meet EX.1 (b). The judge has simply misinterpreted the relevant case law and failed to address the factual matrix based on the evidence before him in the context of the relevant jurisprudence in reaching his conclusions on EX1.(b).

15. The judge segues into what appears to be an assessment of Mrs Vasa's appeal on Article 8 grounds outside the Rules. In [34] he refers to the close bond between her and her husband, that he is unlikely to return to India with her, in addition to meeting EX.1(b). He does however also say in [36] that he does not need to undertake a separate examination of Article 8.

16. Mrs Vasa's immigration status was precarious – see *AM (s117B) Malawi* [2015] UKUT 0260 (IAC). The FtT judge has not factored this into his consideration at all.

17. Even placing the highest gloss on the findings of fact made and the evidence before the judge, and despite the judge not appearing to address correctly the matters before him, not only is it plain that the judge has failed properly to apply the jurisprudence but has reached findings that are simply

unreasoned; has required the respondent to provide evidence which Mrs Vasa has failed to provide to support her claim and has reached conclusions that cannot reasonably be supported by the evidence before him.

18. The FtT judge erred materially in law in failing to apply the correct law and jurisprudence to the facts found (such as they were) and failed to provide a reasoned decision for the conclusions reached.

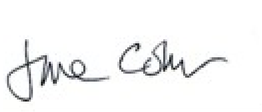
19. It is not the role of the Upper Tribunal to make findings of fact. In this case, where the findings of fact are unreasoned and evidence has not been fully considered and there has been a failure to make a finding on Article 8, the proper course is for this appeal to be remitted to the FtT for remaking, no findings of fact preserved.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit the appeal to the FtT (not before FtT judge Joshi) to be remade, no findings of fact preserved.

Date 8th May 2016



Upper Tribunal Judge Coker