



Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: HU/04772/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal On 14 June 2017	Decision & Promulgated On 21 June 2017	Reason
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Before

UPPER TRIBUNAL JUDGE HANSON

Between

**SANDEEP SINGH
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Samra of Harbans Singh & Co Solicitors.
For the Respondent: Mr Mills Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Parkes ('the Judge') promulgated on 14 October 2016 in which

the Judge dismissed the appellant's appeal against the decision to refuse his application for leave to remain in the United Kingdom.

Background

2. The appellant is a citizen of India born on 9 July 1984 who claimed to have entered the United Kingdom illegally in July 2008 and to have remained ever since. On 15 June 2015, the appellant applied for Leave to Remain based upon his family and private life in the UK. The application was refused on 17 August 2015.
3. The decision-maker considered the application initially under the Immigration Rules by reference to Appendix FM. It was noted the appellant has no children in the UK whilst he has a genuine and subsisting relationship with his British partner, who it is acknowledged has lived in the UK all her life and is employed here, it was found no evidence was provided of insurmountable obstacles in accordance with EX.2 preventing the appellant from continuing his relationship in India.
4. In relation to the private life element, the appellant was unable to satisfy the requirements of 276ADE (1) as it was not made out that they are very significant obstacles to the appellant's reintegration into India.
5. In relation to circumstances making the decision disproportionate outside the rules, the decision-maker noted the core of the appellant's case that he had established family, friends and ties in the UK, that he has been away from India for too long to be able to establish his life there once more, and that it is not possible for his partner to leave the UK as she is a British citizen and cannot relocate as a result of employment in the UK. It is also said the partner relies upon the appellant physically and emotionally and that the future in India would be uncertain. The decision-maker, however, found the appellant had not provided any evidence to show he could not continue family life with his partner in India. Although relocating may cause a degree of hardship the appellant could assist with his wife emotionally and physically whilst they became used to living in India. It was open to the appellant to obtain employment in India with a view to securing property or land. It was also noted the appellant has family in India and there was no reason to suggest they would not adequately support and assist him and his partner upon return. Accordingly, it was not made out that exceptional circumstances had been shown to exist sufficient to warrant a grant of leave pursuant to Article 8 ECHR.
6. The appellant appeared before the Judge represented by counsel. The nature of the hearing and evidence provided, both in written in documentary form, is noted by the Judge whose findings, from [11] of the decision, can be summarised in the following terms:

- i. There was a conspicuous absence from the appellant's bundle of any medical evidence. There was nothing to show the sponsor had suffered any undue medical problems, that she continues to suffer from them or would be at risk of relapse [11].
- ii. There was nothing in the evidence to suggest the sponsor receives medical treatment or assistance now or that any treatment or medication she needs would not be reasonably available in India [11].
- iii. The evidence does not show the sponsor could not live in India [11].
- iv. The appellant's entire time in the UK has been spent here illegally. He has worked illegally [12].
- v. The focus of the decision has to be whether there are insurmountable obstacles, i.e. very significant difficulties to their continuing life together in India which could not be overcome or which would entail very serious hardship [13].
- vi. There is no evidence to show the appellant and his wife could not live in India [13].
- vii. The appellant has shown he is adaptable and has made a life for himself in circumstances that show resilience and capability, qualities he can use in India where he will be able to live legally [13].
- viii. The sponsor may not wish to live in India but that is not a reason not to move somewhere. The sponsor married the appellant knowing what his status was and must have been aware that the situation was not stable, with there being no guarantee the appellant would be permitted to remain [14].
- ix. There is nothing in the evidence that would suggest the appellant and his wife could not live in India. The ordinary consequences of such relocation cannot be said to be insurmountable obstacles [15].
- x. The appellant's situation is not contemplated by the Rules meaning the Rules have anticipated he cannot satisfy those requirements. The fact the appellant has built up a life whilst here illegally counts against him and accords it little weight [16].
- xi. As the appellant cannot succeed under the Rules, consideration has been given to Article 8 ECHR but the evidence does not show there are circumstances that make this case particularly unusual and there is nothing in the facts that would suggest that the appellant's removal would be disproportionate [17].
- xii. It is open to the appellant to return to India and apply for re-entry as a spouse in the proper way. The appellant has not shown that he could not reasonably

- do so or that it would, given his immigration history, be unfair [18].
- xiii. The fact a person could not meet the Immigration Rules on an out of country application would not be an argument for allowing them to remain under article 8 [19].
 - xiv. The evidence does not show that the sponsor is able to remain in the UK and does not show there are insurmountable obstacles to their continuing their life together in India. The appellant can, if they wish to live together in the UK, return to India and make the application he should have made some time ago [20].
7. It is noted that the hearing of this appeal occurred at Sheldon Court in Birmingham on 6 July 2016 yet the decision was not delivered until 14 October 2016. The Judge was aware of this delay and writes in [2]:
- 2. Before dealing with the substance of the appeal I must apologise to the Appellant for the delay in the promulgation of this appeal. This was my fault and came about when I misplaced this file in with other less urgent work, this was only appreciated when the other work was addressed. I understand that the uncertainty of not knowing the result will have unsettled the Appellant and his wife and I again apologise.
8. The appellant sought permission to appeal which was granted by Acting Resident Judge Appleyard on 29 December 2016, on the basis the grounds seeking permission to appeal are arguable in asserting the delay in promulgation of some three months or thereabouts prejudices the appellant and that the Judge failed to deal with various issues within the appeal.

Error of law

- 9. The appellant sets out seven heads of challenge in his application for permission to appeal which shall be taken in order.
- 10. The first of these relates to the statement the decision has been promulgated more than three months after the date of the hearing when the decision should have made sooner and not in excess of 13 weeks. This is accepted by the Judge who has tended his apology and provided an explanation.
- 11. Delay is not determinative of legal error per se although the longer the delay a greater degree of concern may arise. Early guidance from the Senior Courts was given in *Sambasivam v Secretary of State IATRF 1999/0419/4* in which Potter LJ said "*In cases of delay the matter is best approached from the starting point, where important issues of credibility arise, a delay of over three months between hearing and determination will merit remittal for rehearing unless, by reason of particular circumstances, it is clear that the eventual outcome of the*

application, whether by the same or a different route must be the same."

12. The matter was considered more recently in *Arusha and Demushi (deprivation of citizenship – delay)* [2012] UKUT 80 (IAC) in which it was held that to establish that a delay in the promulgation of a decision has led to an error of law it has to be shown that the decision was not safe and therefore unlawful. There must be a nexus between the delay and the safety of the decision: see *Secretary of State v RK (Algeria)* [2007] EWCA Civ 868. The decision in *RK (Algeria)* was relied upon by Mr Samra before the Upper Tribunal.
13. In this case, the appellant has failed to establish the required nexus and failed to establish that the decision is not safe and therefore unlawful. The Judge accepted the factual matrix outlined by the appellant and his partner in the evidence meaning no adverse credibility issues arise to the appellant's detriment, but found that applying the relevant jurisprudence to the facts relied upon by the appellant did not entitle him to succeed with his appeal. No arguable legal error material to the decision is made out on this ground.
14. The second ground asserts the normal rule of thumb is that a decision will be promulgated within three months but, for the reasons given above, that is not definitive.
15. Ground three asserts in the interest of justice the matter should be remitted to be heard afresh and determined swiftly to avoid delay. This does not identify an arguable error of law but rather contains the appellant's suggestion for how the matter should be determined in the future. This is only an issue that arises if arguable legal error material to the decision is made out. The ground does not in isolation establish such error.
16. Ground four asserts medical evidence was provided and the sponsor gave oral evidence before the Judge about her needs and the assistance provided which it is claimed the Judge has made no findings on. The Judge noted in the decision the absence from the appellant's bundle of any medical evidence which is factually correct, bar one brief letter from a GP. The Judge noted the oral evidence provided and at [9] refers to the appellant's own evidence and objection to returning to India on the basis his wife is unwell and there would be no one to look after her and that when she is unwell the appellant does the cooking, gardening and cleaning. The Judge was fully aware of the evidence relating to medical conditions but also noted there was nothing to suggest the appellant's wife receives medical treatment or assistance that would not be reasonably available in India. The Judge finds the medical matters either make it disproportionate for the appellant's wife to live with him in India or satisfy the relevant test under the Rules. These are decisions fully open to the Judge based on the evidence provided and do not disclose arguable legal error.

17. Ground five asserts the Judge has not considered section 117B. The appellant claims to have integrated into society, speaks English, and is not a burden on the taxpayer. The Judge was fully aware of the appellant's circumstances but the fact the appellant is able to satisfy these requirements does not enable him to claim greater weight should have been placed upon this element, as the ability to speak English and not be a burden on the taxpayer is in fact a neutral aspect of the case. It is also important to note, with regard to dependency, that the appellant himself is not self-sufficient. Any work the appellant has undertaken to date has been unlawful and is was not made out that he himself is self-sufficient, although it is accepted he may not be a burden on the public purse as a result of his wife's lawful employment. The reason such issues are neutral is because it means there is no adverse finding made against the appellant on the basis he cannot speak English, but the Judge made no such finding. No arguable legal error is made out on this point - *AM (S 117B) Malawi [2015] UKUT 260 (IAC)* considered.
18. Ground six asserts the Judge erred at [11] claiming the evidence did not show the appellant's wife could not live in India as she is a British citizen born in the UK, has a life, friends, and family here. It is asserted it was not reasonable to expect her to leave the UK or EU. The Judge does not make a decision that compels the appellant's wife to leave the United Kingdom. The appellant's wife is an adult. The Judge finds there was no evidence to suggest that the appellant and his wife could not live in India. The evidence did not show that, even allowing for some adjustment in relocation, finding work, and accommodation, any difficulties experienced could not be overcome or would entail very serious hardship. On the evidence this is factually correct. The Judge also noted that the appellant's wife may choose to remain in the United Kingdom [20]. The finding by the Judge that family life could continue in India is a finding within the range of those reasonably open to the Judge on the evidence. No arguable legal error is made out on this point.
19. Ground seven asserts the judge should have considered *Chikwamba* as they met the financial requirements and Appendix FM as they have a genuine bond. The Judge considered this issue by reference to the more recent case of *R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)* in which it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate.

In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

20. The evidence before the Judge did not establish that if there was temporary separation whilst the appellant returned to India to make an application to enter the UK lawfully, there will be a disproportionate interference with any protected right. This is a case in which all family and private life relied upon by the appellant has been formed at a time his status in the United Kingdom has been illegal, a fact the Judge also found the appellant's wife was clearly aware of. Applying both UK and Strasbourg jurisprudence the weight to be attached to private and family life formed in such a situation, when undertaking the balancing exercise, will be substantially reduced.
21. The final ground asserts third-party rights of the sponsor have not been considered but such claim has no arguable merit as the Judge clearly heard evidence about the appellant's wife situation and properly considers the same during the body of the decision.
22. The appellant has failed to establish any arguable legal error material to the decision to dismiss the appeal.

Decision

- 23. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 14 June 2017