



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05623/2020

THE IMMIGRATION ACTS

Heard at Field House

On 25 November 2021

**Decision & Reasons
Promulgated
On 23 February 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**MRS USHA RANI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Y. Din, Counsel, instructed by GLS Solicitors

For the Respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Eldridge promulgated on 5 May 2021 in which he dismissed an appeal by the appellant, a citizen of India born on 10 May 1960, against the decision of the respondent dated 1 April 2020 to refuse her human rights claim to remain in the United Kingdom.

Factual background

2. The appellant arrived in this country on a six month visitor's visa on 24 July 2004. Before her arrival, she had met Swarna Ram, a British citizen of Indian descent born in 1932, in India, and they commenced a relationship in 2004. In 2005, the appellant's marriage to her former husband was dissolved, and, in 2016, the appellant and Mr Ram married in religious and civil ceremonies. Save

for the initial period of her leave as a visitor, the appellant has been without leave for the entirety of her time in the UK. She has made a number of unsuccessful applications to the Secretary of State to regularise her status. The most recent was submitted on 25 June 2019, on the basis of her family life with Mr Ram, and her private life. It was the refusal of that application that was under appeal before the First-tier Tribunal.

3. The judge reached a number of findings of fact which have not been challenged. The appellant had inherited assets from her late husband valued between £500,000 and £600,000. There was no suggestion that she had been threatened or harassed for money by any of the remaining relatives she has in India. She could relocate and liquidate the assets remotely. The Secretary of State's policy for bereaved spouses did not cover her situation, as she had never been in the United Kingdom with leave as a partner.
4. An argument advanced by the appellant before the judge had been that, if the Secretary of State had made a "timely" decision on her application for leave to remain, her husband would still have been alive, albeit in poor health. That being so, the Secretary of State would - or should - have accepted her claim that there would be "insurmountable obstacles" to continuing family life with her husband in India. At the very least, the Secretary of State would have been likely to have given favourable consideration to the application in light of *Chikwamba* [2008] 1 WLR 1420, and the delay in the consideration of her application unfairly deprived her of that opportunity. She also claimed that she would experience "very significant obstacles" to her own integration in India on account of her age and the time away from the country. Finally, she claimed that her private life was such that it would be a disproportionate interference for her to be removed.
5. Turning to the judge's decision, at [1] to [19] the judge set out the factual, procedural and legal background. His operative reasoning began at [20], and at [26] to [28] he addressed the *Chikwamba* argument, in terms to which I shall return.
6. At [29], the judge said that, in any event, notwithstanding the claim that the appellant suffered on account of the Secretary of State's "delay", his task was to deal with the position at the date of the hearing and at the date of the respondent's decision. By then, the appellant was a widow, and was able only to rely on her private life. The judge concluded that the appellant would not face "very significant obstacles" to her integration in India. She would return to India as a relatively wealthy woman, and would be far from destitute upon her return. She has some relatives in India. She had made friends here, and would be able to make friends upon her return. She spoke Punjabi fluently and had not lost significant cultural ties to her home country. The judge stated that, while he did not underestimate the challenge of having to readjust to life in India, there would not be "very significant obstacles to her leading a reasonably comfortable life on return to India. I realise she does not want to do that but this is not a question of choice but much more of reality." See [32].
7. The judge considered article 8 outside the rules, adopting a "balance sheet" approach.
8. At [36], the judge emphasised the public interest in the maintenance of effective immigration controls under section 117B(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant had resided

here unlawfully for many years, and had a very poor immigration history. She could not speak English.

9. At [37], the judge set out the proportionality factors in favour of the appellant. In light of her wealth, she would be financially independent, although that was “little more than neutral” (see [37]). Her private life attracted little weight, in light of section 117B(4) of the 2002 Act, as it was established when she was present unlawfully. The relationship with her late husband also attracted little weight.
10. The judge recalled his earlier findings concerning the lack of “very significant obstacles” the appellant would face upon her return to India, and concluded that she could return to India with “every prospect of living a reasonably comfortable life”: see [40] and [41]. The interests of the State, found the judge, outweighed those of the appellant, with the effect that the Secretary of State’s decision was lawful. He dismissed the appeal.

Grounds of appeal

11. There are four grounds of appeal. First, the appellant contends that the judge erred in his assessment of the putative “insurmountable obstacles” the appellant’s husband would have been found to have faced, had he still been alive at the time of the Secretary of State’s decision. The judge failed to have regard to the evidence provided. Secondly, the judge erred in his assessment of Article 8 outside the rules; section 117B of the 2002 Act was not a straightjacket, and the judge failed to consider its inherent flexibility, especially in relation to the appellant’s desire to remain in this country in order to attend the site of her husband’s ashes. Thirdly, the judge misapplied section 117B(4)(b) of the 2002 Act, in light of the fact the appellant’s relationship with Mr Ram was formed *before* she arrived in the UK. Finally, the judge mis-paraphrased the “very significant obstacles” test; rather than following the leading authorities on the term, such as *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152, the judge applied his own, erroneous, gloss.

Discussion

12. There is no merit to the first ground of appeal. The appellant’s husband had sadly died by the time the Secretary of State considered the application, so it was not incumbent upon the Secretary of State – or the judge – to speculate as to what the decision might have been, had it been taken at an earlier stage, or had the Secretary of State herself speculated as to what her decision would have been, had Mr Ram not died. In fact, the judge did engage with this submission to an extent at [28], although, as Ms Ahmad submits, it was not necessary for him to do so, because, as he correctly identified at [29], he was required to deal with the situation at the date of the respondent’s decision and the appeal before him, which is the approach he adopted in his operative reasoning.
13. Mr Din placed considerable emphasis on what he submitted was the judge’s failure properly to apply the so-called *Chikwamba* principle. The principle was summarised in the following terms by Lord Reed PSC in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, at [51]:

“If... an applicant even if residing in the UK unlawfully was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in

his or her removal. This point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*.”

14. This submission again rests on the premise that the appellant’s husband had not died, but even putting its speculative core to one side briefly, on no view could it be said that the appellant was “otherwise certain to be granted leave to enter” if she made an out of country application. As the judge noted at [28], there was no certainty that the appellant would meet the English language requirements; she had given evidence in Punjabi, and there was no evidence that she could otherwise meet that requirement. There was simply no basis for the judge to conclude that an entry clearance application would have been certain to succeed, had the Secretary of State taken the decision at an earlier point.
15. Under ground 2, Mr Din submits that the judge failed to consider one of the reasons for wanting to remain in the UK given by the appellant at [41] of her witness statement: to visit her husband’s ashes. I find that the judge did not err by not expressly considering this issue.
16. First, the point does not appear to have been raised by the appellant’s representative in the First-tier Tribunal (Mr Din did not appear below). At paragraph 4 of her skeleton argument before the First-tier Tribunal, the appellant set out a range of public interest factors which she relied upon in favour of the appeal being allowed. Being able to scatter her husband’s ashes did not feature among the 11 sub-paragraphs of reasons why the appeal should be allowed, and nor was it raised elsewhere in the document.
17. Secondly, it is trite law that a judge need not expressly deal with every point arising in the evidence or submissions, even if the point had been advanced before him in express terms: see, for example, *English v Emery Reimbold & Strick Ltd*. (*Practice Note*) [2002] EWCA Civ 605 at [17]:

“I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case...”(quoting *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All E.R. 119))
18. Thirdly, the judge expressly stated at [17] that he had considered all the documents referred to him by the parties.
19. Fourthly, the appellant’s desire to visit the site of her husband’s ashes is a facet of her private life. As the judge correctly identified at [38], her private life attracted little weight, as it was formed almost entirely during the currency of her unlawful residence. To the extent that she held leave to remain in the past, her status was at best highly precarious; as a visitor, during her initial six months, which accordingly only attracted little weight also. See Section 117B(4)(a) and 117B(5).
20. I turn now to the third ground of appeal. Mr Din submits that the judge erred in ascribing only little weight to the appellant’s relationship with her husband, by misapplying section 117B(4)(b) of the 2002 Act. Section 117B of the 2002 Act contains public interest considerations to which a court or tribunal must have regard when assessing the proportionality of an individual’s removal under Article 8 of the ECHR. Section 117B(4)(b) provides:

“(4) Little weight should be given to—

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.”

21. Mr Din submits that, because the relationship between the appellant and Mr Ram was formed in India, it was not “established” at a time the appellant was in the UK unlawfully. It was established before the appellant’s arrival in the UK, and the “little weight” provision does not apply, he submits. I reject this submission for the simple reason that Mr Ram was dead at the time of both the impugned decision of the Secretary of State and the hearing before the judge. Section 117B(4)(a) addresses the Article 8 *family life* implications of extant relationships. By definition, family life can only exist with a living person. That is not to say the appellant’s relationship with her late spouse was of no relevance to the proportionality assessment; the judge rightly recognised at [30] that it formed part of the fabric of her private life she had established in this country, and took that into account:

“Understandably, she wanted to remain in the house where she had lived with her late husband for many years... She says that she has been dependent upon her husband for many years.”

22. I also reject Mr Din’s submission that, by granting the appellant consent to marry Mr Ram, the Secretary of State had sanctioned their marriage, with the result that the “little weight” provisions fell away. Quite apart from the fact that that submission flies in the face of section 117B(4)(b), which is not subject to or otherwise affected by the quite separate regime for granting consent in marriage cases, it is based on the same erroneous premise as many of Mr Din’s submissions in this case, which rest on an attempt either to turn back the clock to speculate as to what the position would be were Mr Ram still alive, or to ascribe significance to a relationship with a person who is no longer alive, over and above the weight already ascribed by the judge to the appellant’s marital history as a facet of her private life.
23. That leaves the fourth ground of appeal, pursuant to which Mr Din criticises the judge’s application of the “very significant obstacles” test contained in paragraph 276ADE(1)(vi). Mr Din submitted that the judge applied the wrong test.
24. This is the terminology used by the judge; at [31]:

“She would be far from destitute on return. The test is really whether she could be **expected to live a reasonably normal life in India...**”

At [32]:

“I conclude that whilst I would not wish to underestimate the challenge of having to readjust, there are not very significant obstacles to her **leading a reasonably comfortable life on return to India**. I realise she does not want to do that but this is not a question of choice but more of reality.”

And at [41]:

“I consider... **that she has every prospect of living a reasonably comfortable life within in India.** She has connections there and she speaks a relevant language well and understands the culture and lived in India for the first three quarters of her life.”

(Emphasis added in all quotes.)

25. The leading authority on the term “very significant obstacles” to integration is *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152. At [14], Sales LJ (as he then was), said that “integration”:

“...is not confined to the mere ability to find a job or to sustain life while living in the other country. **It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use.** The idea of ‘integration’ calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.” (emphasis added)

26. In my judgment, Mr Din’s submission is a criticism of form over substance, and it falls into precisely the trap that Sales LJ, as he then was, cautioned against in *Kamara*, of attempting to subject the language to a “gloss”. I accept that the judge did not use exactly the same terminology as Sales LJ. However, the judge addressed precisely the matters highlighted by Sales LJ: the appellant’s cultural understanding of how life in India operates; her previous life experience in the country; the impact of her substantial financial means; and her ability to make friends as she has done here. In doing so, the judge paraphrased those detailed findings by stating that the appellant would be able to lead a “reasonably comfortable life” in India; that was not an error of law, but rather shorthand summaries of the judge’s clear findings of fact and application of the principles encapsulated by the term “very significant obstacles”.
27. Drawing this analysis together, the grounds of appeal are without merit and are disagreements of fact and weight.
28. The appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law.

No anonymity direction is made.

Signed Stephen H Smith

Date 1 February 2022

Upper Tribunal Judge Stephen Smith