**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/26331/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 13th June 2016** | **On 8th July 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MR HARCHARANJIT SINGH KULAR**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms S. Haji of Counsel
For the Respondent: Ms Brocklesby-Weller, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of India born on 15th March 1989. He appealed against a decision of the Respondent dated 3rd June 2014 which was to refuse him leave to remain in the United Kingdom under the Immigration Rules HC 395 as amended. His appeal was allowed by Judge of the First-tier Tribunal Majid sitting at Taylor

House on 9th September 2015. The Respondent appealed against that decision and the matter came before me on 14th March 2016 to determine whether there was an error of law in the First-tier decision. On 26th April 2016 I gave my decision that there was indeed an error of law and I set aside the decision of the First Tier and directed that the appeal should be reheard before me on a date to be fixed. I have now reheard the appeal and give my decision herein. For the sake of convenience I shall continue to refer to the parties as they were known at first instance.

2. The Appellant's case was that he was in a genuine and subsisting relationship with a British citizen Ms Gabrielle Crawford ("the Sponsor") a relationship which began in 2010. The parties married on 10th August 2013 and the Appellant argued that the Respondent's decision was both contrary to the Immigration Rules and to Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The burden of establishing this rested upon the Appellant and the standard of proof was the usual civil standard of balance of probabilities.

3. I set out the background to this case in my decision of 26th April 2016 when I wrote:

> *"2. The Appellant claimed that he had entered the United Kingdom in December 2007 after leaving India due to ill-treatment as a result of a refusal to follow the Sikh faith. The Sponsor required his support as she suffered from depression and was on medication. Should he be removed this would have a detrimental effect on his wife's health. The Respondent accepted the relationship between the Appellant and the Sponsor but considered that there were no insurmountable obstacles to the Appellant continuing his family life outside the United Kingdom. The Sponsor would be able to join the Appellant in India as he could help her through the transitional period on relocation to that country. If necessary she could receive medical treatment in India.*
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> *3. At the hearing at first instance Judge Majid heard oral evidence from both the Appellant and the Sponsor. She told the Judge that she was earning £27,000 per annum as a medical secretary. She had never been to India. In allowing the appeal the Judge found at paragraph 23 of his determination that the Appellant should be helped by the system because the Sponsor was "a partial" and has the constitutional right to be protected. If the only solution was that the Appellant should go back to India and apply to join his wife in this country then she should be given the benefit of discretion and the appeal should be allowed outright.*
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> *4. The Respondent appealed against that decision arguing that the Judge had failed to give adequate reasons for making findings on a material matter. There was no indication of the balancing exercise. The Appellant had arrived in the United Kingdom as an illegal entrant in 2008 and had not sought to regularise his immigration status until after he was arrested for working illegally in 2013. The grounds of appeal also took issue with certain factual matters and concluded that it was notable that the First Tier Tribunal had had no regard to the factors contained in Section 117B of the Nationality, Immigration and Asylum Act 2002 particularly the precarious nature of the Appellant's immigration status prior to making a claim.*
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> *5. Judge of the First-tier Tribunal Pooler in granting permission to appeal found it arguable that Judge Majid had failed to give adequate reasons for his findings. There were disputed matters in respect to which the Judge arguably failed to make findings*

*and that the Judge arguably gave weight to irrelevant matters. Insofar as the Judge considered Article 8 outside the Rules he arguably misdirected himself by failing to take into account the provisions of Section 117B of the 2002 Act.*

6. *At the hearing before me Counsel sought to argue that there was no error of law in the Judge's decision. He had made it clear that he had analysed the evidence and there was a lot of documentary evidence. The Judge found the evidence of the witnesses credible. The Appellant's wife could not relocate to India. She had depression. The Appellant had also given evidence at the Tribunal about why he could not relocate to India. He feared retribution from his father because the Appellant did not consent to an arranged marriage.*

7. *After hearing Counsel's submissions I indicated that I found clear errors of law in the determination which was almost completely devoid of reasoning. Despite brave efforts by the Appellant's Counsel to support the determination it was clear that it had to be set aside. It was impossible from this determination for the losing party (in this case the Respondent) to see why they had lost. It was not at all clear how the Judge had arrived at the conclusion that the appeal should be allowed outside the Immigration Rules under Article 8 and there were a few if any findings on any of the relevant matters upon which the Judge needed to make findings. These included the matters listed in the grant of permission to appeal.*

8. *Having indicated that the appeal needed to be reheard I considered whether the matter should remain in the Upper Tribunal or be remitted back to the First-tier. I have considered the Senior President's Practice Direction and am of the view that this case does not fall into the category of those cases which need to be remitted. The case turns on whether the appeal should be allowed outside the Immigration Rules. There is documentary evidence already and this can be readily supplemented by further statements and/or oral evidence. I had hoped that I would be able to obtain the First-tier Tribunal's Record of Proceedings which would be a record of the evidence given below. That would mean that the Appellant and Ms Crawford would not need to give evidence any further and the matter could be dealt with by way of submissions. Unfortunately it has not been possible for me to obtain a Record of the Proceedings and therefore it will be necessary for me to reconvene the case for oral evidence to be given by the Appellant and Ms Crawford.*

9. *I therefore set aside the First Tier decision on the grounds of an error of law and will proceed to rehear the matter on a date to be fixed when the Appellant and Ms Crawford should attend to give oral testimony. It is open to the Appellant and his witness to put in further updated statements if so advised. Any such statements should be filed and served at least fourteen days before the next hearing. I make no anonymity direction as there is no public policy reason for so doing."*

**Documentary Evidence**

4. For the hearing before me the Respondent relied on the bundle filed for the First-tier proceedings which contained immigration information on form PF1; correspondence with the Appellant's representatives and Statement of Additional Grounds; statements of the Appellant and Sponsor; divorce documents regarding the Sponsor and her ex-husband; utility bills and employment documentation of the Sponsor;

medical evidence for the Sponsor; letters of support and other supporting documents.

5. For the Appellant reliance was placed on the bundle filed at first instance which comprised chronology, statements of the Appellant and Sponsor; copy of the Appellant's Indian passport; photographs of the couple and correspondence showing the genuineness and subsisting nature of the relationship; financial information for the Sponsor and a bundle of case law.

**The Rehearing Before Me**

6. Both the Appellant and Sponsor attended and gave oral testimony. They were examined and cross-examined but neither were re-examined.

**The Evidence of the Appellant**

7. The Appellant adopted his statement in which he stated he was born on 15th March 1989 in the Punjab province of India. He left school at aged 13 or 14 years and worked thereafter on the family farm. He had a poor relationship with his father who abused him for no reason and arranged that when the Appellant became 18 years old that the Appellant would marry the daughter of a family friend (who lived in the United Kingdom) called Sonia. The Appellant did not wish to do this. His mother sympathised with her son and arrangements were made for the Appellant to travel to Italy in November 2007. Later in December 2007 he arrived in the United Kingdom by car. After two years he moved to south London where he assisted a family friend running a chicken takeaway shop.

8. He got to know the Sponsor through his work at the shop and they began going out around about December 2010. He lost his job in 2011 and moved in with the Sponsor in December of that year and they have lived together ever since. She was aware of the difficulties the Appellant had with his father. In January 2013 members of his family took him to a temple in Manchester to force him to marry Sonia. He explained to Sonia he did not wish to marry her and travelled back to London. The Appellant was reluctant to inform the police of this incident as he had no lawful status in this country and was concerned he might be removed. As the relationship with the Sponsor deepened the parties decided to marry and did so on 10th August 2013 the Appellant having converted to Christianity after meeting the Sponsor.

9. The Appellant came to the attention of the authorities following a burglary in the street where the Appellant lived. The police carried out routine checks and discovered the Appellant had no status to be here. He was given instructions to report weekly to the Respondent. This the Appellant did and in May 2014 he instructed a solicitor to make an application on the basis of his relationship with the Sponsor. This was refused by the Respondent on 3rd June 2014. The Appellant indicated in his statement (dated 4th February 2014) that he did not wish to return to India as he could not get in touch with his own family because he had brought shame upon them for not agreeing to the arranged marriage they had organised.

10. In oral evidence-in-chief the Appellant accepted that he had been working illegally for two years helping out his uncle. His sister's husband had been looking after the Appellant at first but his brother in law had returned to India and the Appellant had nowhere else to stay. If he had not taken that job he would have ended up sleeping on the street. He could not return to India because he still had problems with his father. It would put the Sponsor in danger if he were to return with her, she had a job and friends here, it was impossible for her to leave the United Kingdom.

11. In cross-examination the Appellant accepted it was not in fact an uncle who had given him employment it was a family friend but he referred to the friend as uncle. The friend had helped because he knew of the Appellant's circumstances, that the Appellant's father was an alcoholic who had assaulted the Appellant in India. The friend could not help the Appellant if he was returned. The Appellant was helping out in the kitchen when the deliveries came in. He would sort the food out and put it in the refrigerator. He could not leave his wife and go to India, internal relocation to a city within India was impossible as everything was new to him, he had no skills, his education was limited. Sometimes he was in contact with his mother but no one else.

**The Evidence of the Sponsor**

12. In her statement she confirmed she was born on 9th March 1964 in the United Kingdom and was a British national. She had met the Appellant in or about October/November 2010 when she used to frequent the local chicken shop. She was suffering from depression and had been prescribed medication as she had split up with her ex-partner. The relationship with the Appellant deepened and they saw each other as partners from about March 2011. The Appellant informed her then about his family problems and the arranged marriage that the family wanted him to undergo. Following advice from an Immigration Officer the couple approached a solicitor and made an application after their marriage for the Appellant to remain in this country which was refused.

13. In examination-in-chief she said that she would not relocate to India even if the Appellant's appeal was dismissed and he was forced to go back. She had her job in this country which she had had for the last ten years and her mother was here. The Sponsor's mother depended heavily on the Sponsor. The Sponsor herself was still being treated for depression. She had been off work for four months and helped through it by her GP, she was going back to work now on a graduated basis. The Appellant gave her a lot of support. She could not just leave everything. She was only now just getting back to full health. She did not speak any Indian languages and the health care system out there was private. The couple had no savings or money to live on. She herself was on disability benefits.

14. In cross-examination the Sponsor said she had two brothers and one sister. One brother lived in Australia and the sister lived in Penzance, Cornwall. Her second brother had a high flying job. All of the care required by the Sponsor's mother fell upon the shoulders of the Sponsor. The Sponsor's mother lived on her own having

divorced from the Sponsor's father but she did not have a carer. She saw her mother two to three times per week. Her mother had some friends who also came and visited but whenever the Sponsor's mother wanted something it was the Sponsor that the mother turned to. The Sponsor had been on medication since 2002 and had various amounts of counselling recently sorted out by the GP. She was waiting for the referral to be processed. She had not looked into the possibility of employment in India for either herself of the Appellant.

**Closing Submissions**

15. In closing for the Respondent reliance was placed on the refusal letter. This had accepted that the relationship between the Appellant and the Sponsor was genuine and subsisting but did not accept that there would be any difficulties for the Appellant and Sponsor to establish a family life in India. Treatment for mental health including medication and support was available in India should the Sponsor require this upon relocation.

16. The Presenting Officer indicated that the Appellant would be able to support himself, the alleged difficulties with individuals in this country had never been reported to the police nor had the Appellant made any complaint to the authorities in India. The Appellant's claim at its highest was a fear of his own family. The Appellant was still in contact with his mother and he could relocate to a large city in India.

17. The Appellant could not succeed under the Immigration Rules particularly under EX1 because the Appellant had no status in this country at the time that he made his application for leave. In **Agyarko [2015] EWCA Civ 440** the Court of Appeal had said that the phrase "insurmountable obstacles" to family life with a British citizen partner continuing outside the United Kingdom clearly imposed a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test was 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. The criterion had to be satisfied before an applicant was entitled to be granted leave to remain, it was not simply a factor to be taken into account. However in the context of a wider Article 8 assessment outside the Rules it was a factor to be taken into account, it was not an absolute requirement which had to be satisfied in every single case. In a case involving precarious family life it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion (see paragraph 31 of **Agyarko**). The fact the Sponsor was a British citizen was not of itself something which made the case exceptional for the purposes of the test under Article 8 (see paragraph 33 ibid). Similarly that a Sponsor had lived all his or her life in the United Kingdom and had a job here (and hence might find it difficult and/or might be reluctant to relocate to another country to continue their family life there) could not constitute insurmountable obstacles to the applicant so doing (see paragraph 25 ibid).

18. The issue of the Sponsor's mental health was set out in the refusal letter. There were adequate medical provisions should she wish to relocate. She was well aware that

the Appellant had no status in the United Kingdom when the relationship was formed. There were no children in this case. The care given by the Sponsor to her mother was limited to two to three times per week. The Appellant was a fit and able young man who could obtain work in India. He had not lost all ties to India. The test in EX1 was not made out. All visa applications from India were processed within a 90 day period. Should the Appellant wish to return and make an application for settlement (on the basis for example that the Sponsor could satisfy the financial requirements of Appendix FM) he could do so in those circumstances. There was no need to look at Article 8 outside the Rules in this case but if one did the family life enjoyed by the Appellant and the Sponsor was a precarious one due to the Appellant's lack of status. Pursuant to Section 117B of the Nationality, Immigration and Asylum Act 2002 little weight could be afforded to it.

19. For the Appellant Counsel argued that there were insurmountable obstacles to the Appellant relocating to India such that the Appellant could bring himself within Section EX1 of Appendix FM. One had to look at matters in a practical and sensible way and at the degree of difficulty in relocating to India. There would be serious interference. The Appellant had come to the United Kingdom in fear of retribution from his father who was an alcoholic. The Appellant had no real ties and could satisfy paragraph 276ADE of the Immigration Rules in relation to his private life claim. There was no real connection to India anymore. The only effective support was with his mother. His level of education was very low. He had never worked in India (I pause to note here that that in fact is not the Appellant's evidence as per his statement, the Appellant said that he had worked on the family farm).

20. The Appellant's wife would also experience very significant obstacles to travelling with the Appellant as she had suffered from depression for the last twenty years and was receiving ongoing treatment for that depression. An interruption of her medical treatment was sufficient of itself to create an insurmountable obstacle. She was vulnerable and relied on the Appellant for support. Any temporary separation would affect her state of mind. The couple had no accommodation in India to settle in. She was earning in excess of £27,000 per annum and the Appellant would meet the entry requirements. There was no reason why he should be made to return to India to apply from there. The Respondent's figures as to visa processing times were not reliable. In reality one did not know how long it would take for the visa to be processed. The couple now were financially independent within the meaning of Section 117B of the 2002 Act. Both were Christians and it would not be safe for the Sponsor to relocate given her vulnerability. This was an exceptional case and would lead to unjust and harsh consequences if the Appellant were required to return.

**Findings**

21. The Appellant has never had leave to be in this country and could only bring himself within the Immigration Rules if his case falls within Section EX1 of Appendix FM in relation to his family life with the Sponsor or paragraph 276ADE in relation to his claim for private life in this country. In order to succeed under Section EX1 the Appellant must show that he is in a genuine and subsisting relationship with a

partner who was a British citizen and that there are insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom in this case India.

22. The genuine and subsisting nature of the relationship is accepted as is the Sponsor's nationality. The test under the Rules is one of insurmountable obstacles. The Respondent relies heavily on the case of **Agyarko** which I have summarised above. The insurmountable obstacles test is relevant at different stages of the case. The first is in deciding whether Section EX1 is satisfied. It is only if there are insurmountable obstacles that Section EX1 can be satisfied. Should the case proceed thereafter to a consideration of the appeal outside the Immigration Rules to Article 8 then the question of insurmountable obstacles is a factor although not necessarily the decisive factor when weighing up the proportionality of interference with protected rights.

23. Concentrating at first however on Section EX1 under the Rules, I find that the Appellant cannot make out that there are insurmountable obstacles to family life continuing outside the United Kingdom. The Appellant lived in India for most of his life, was educated there and worked there on the family farm. He speaks the language and if he does not wish to return to his home area because of difficulties with his family I see no reason why he cannot reasonably be expected to relocate to one of the very many large cities of the most populous country in the world. The Sponsor could accompany him in that relocation if she so wished. For much of her life in this country she has suffered from depression particularly following the break-up of a previous relationship. There is ample evidence of adequate medical facilities in India should she require treatment in that country. Whilst India might be unfamiliar to her at first, as the Respondent points out in the refusal letter there is no reason why the Appellant could not assist the Sponsor with relocation. Family life could therefore be continued elsewhere and Section EX1 is not met.

24. In relation to the Appellant's claim to private life under the Rules, the Appellant must show that he can satisfy the requirements of paragraph 276ADE. The Appellant has not lived in this country for twenty years. He can only show he has been resident in this country for at most just under nine years. He was approximately 18 years old when he arrived in this country and thus has not spent at least half of his life in the United Kingdom. He has spent the majority of his life in India including his formative years. The Appellant would therefore have to show that there would be very significant obstacles to his integration into India. This replaced the test prior to 28th July 2014 which was that the Appellant would have to demonstrate he had no ties including social, cultural or family with India. That test was applied by the Respondent in the refusal letter dated 3rd June 2014 but by HC 532 the very significant obstacles test applies to all applications under paragraph 276ADE decided on or after that date.

25. I do not consider that there are very significant obstacles to the Appellant's relocation to India. I have already set out the reasons why I do not consider that the Appellant personally would have any difficulties in relocating and those factors apply equally under paragraph 276ADE. In any event even if the earlier test of no ties is applied, it

is clear that the Appellant retains ties to India. He has family ties in the form of the contact he has with his mother who still lives in India and he has social and cultural ties given that he can speak the local language and has lived most of his life there. The Appellant thus cannot succeed under the Rules in this case on either private or family life.

26. I therefore turn to consider whether the Appellant's claim can succeed outside the Rules. Any such claim has to look through the prism of the Rules. The Appellant and Sponsor have an established family life which will be interfered with by requiring the Appellant to return to India on his own or with the Sponsor. That interference will be pursuant to the legitimate aim of immigration control since the Appellant has had no leave since entering this country. The issue is whether the interference is proportionate to that legitimate aim. In the first place I consider that it is reasonable to expect the Appellant to return to India and make a proper application through the Entry Clearance Officer. This is not a case where it could be said that it is so obvious that the Appellant would succeed that it is a mere bureaucratic formality to require him to return to apply from there. Although the Sponsor's income through work and benefits is said to be well in excess of the £18,600 limit, issues would arise over the suitability requirements which would have to be considered given the Appellant's persistent (and admitted) breaches of immigration law. These are not limited just to illegal entry but also to illegal work.

27. In the first place the Appellant could reasonably be expected to return to India and make an application from there. The only evidence I have of how long that process might take was provided by the Respondent. Although the Appellant objects to it, no alternative evidence was given to me to suggest that the Respondent's figures are incorrect. I do not consider that the time it might take for an Entry Clearance Officer to consider the Appellant's application is so unreasonable that the Appellant cannot be expected to return to his country of origin and make a proper application for entry clearance in the usual way. That of itself disposes of the Article 8 claim to family life but I would go further and say that just as I found that there were no insurmountable obstacles to family life continuing in India, I do not find that the Appellant and Sponsor can pray in aid the Sponsor's reluctance to travel to India with the Appellant to show that interference would be disproportionate.

28. The Sponsor's concerns are that she has not been to India before, she is concerned for her health and she is concerned for the care of her mother. That she would give up her job is not of itself a sufficient reason, see **Agyarko**. The care which she gives to her mother could be supplemented by other members of the Sponsor's family or public authorities if necessary. The Sponsor's evidence of her own ill-health is somewhat limited. As I have indicated it is clear that there are adequate medical facilities in India for treatment on an outpatient basis of depression. Whilst some or all of that treatment might have to be paid for by the Appellant and Sponsor, the Appellant has a work history in India and I see no reason why he could not find work again upon return. The Appellant has apparently applied for a number of jobs in this country besides working illegally here and I see no reason why he should not be able to apply for and work in his country of origin.

29. I appreciate the Sponsor's concern about travelling to a new country which she has not previously visited. Nevertheless she was aware that the Sponsor's status in this country was precarious if not unlawful and thus any family life built up between the couple during that time would be afforded little weight. Article 8 does not afford the right to a couple to choose where to enjoy their married life. Little weight can thus be given to the relationship between the Appellant and Sponsor in the balancing act I have to perform whereas considerable weight should be given on the Respondent's side of the scales in part at least because of the illegal nature of the Appellant's life in this country. I find no reason why this appeal should be allowed either under the Immigration Rules or outside the Rules under Article 8 and I dismiss the appeal on both grounds.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I remake the decision in this case by dismissing the Appellant's appeal against the Respondent's decisions to refuse leave.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 7th day of July 2016

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Deputy Upper Tribunal Judge Woodcraft

**TO THE RESPONDENT**
**FEE AWARD**

No fee has been paid in this case and the appeal has been dismissed and therefore there can be no fee award.

Signed this 7th day of July 2016

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Deputy Upper Tribunal Judge Woodcraft