



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00902/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
on 24 October 2017

Decision & Reasons promulgated
on 27 October 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HARPREET BANGER
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R H Rashid instructed by Murria Solicitors

For the Respondent: Mr D Mills Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Aziz promulgated on 4 January 2017 in which the Judge dismissed the appellant's appeal under the Immigration Rules and outside the Rules pursuant to articles 3 and 8 ECHR.

Background

2. The appellant is a national of India born on 6 February 1985 who entered the United Kingdom on 20 October 2010 as the dependent partner of his wife, a Tier 4 student. The applicant's leave was valid to 29 February 2012. On 27 February 2012, the applicant applied for leave to remain outside the Immigration Rules which was refused on 29 October 2012 and an appeal against the decision dismissed. An appeal to the Upper Tribunal was partially successful in that the appeal was allowed to the limited extent it was returned to the respondent for a lawful removal direction to be made with all other findings being preserved.
3. The respondent, instead of just making a lawful removal direction, is said to have revisited the entire application and in the decision dated 29 January 2016 refused the application for leave to remain on private and family life grounds, against which the appellant appealed.
4. The preserved findings from the determination of original First-tier Tribunal, Judge P Clark, was summarised in the decision of the Upper Tribunal in the following terms:
 4. Judge Clarke analysed the evidence in detail in paragraphs 9 to 11 of his determination before setting out his findings at paragraphs 17 to 33 which can be summarised as follows:
 - i. That the Judge was not being told the whole truth about the situation of the appellant and his prospects if he were returned to India. Paragraph 17.
 - ii. That the appellant's family were doing all they could to try to ensure that he remained in the UK. Paragraph 17.
 - iii. That the appellant's marriage has broken down although the Judge did not consider it necessary to determine the precise cause of the breakdown. The appellant and his wife lived together in India for a few years before they arrived in the United Kingdom; although did not live together for more than a few days, weeks at most, in this country after his arrival. Paragraph 18 (i).
 - iv. Shortly after arrival the appellant moved to live with his parents and brother in Coventry where he has remained, bar a short period after an assault by the appellant on his father, when he was advised to leave the property; although the accounts of this were found to be infected by significant discrepancies and to lack credibility. Paragraph 18 (ii) with reference to paragraphs 9 (xxiii) and 10 (xxv).
 - v. The appellant's employment with Foleshill Metal Finishing Co ended on 23rd October 2012 although his claim to have been dismissed was not accepted. Paragraph 18 (iii) with reference to paragraph 9 (xxv).

- vi. The claim the appellant has no ties to India was found to be inaccurate for two reasons: (1) the oral evidence showed there are a considerable number of family members in India. The evidence did not support a claim they could not help the appellant in various ways if necessary. Paragraph 18 (v) with reference to paragraph 9 (xxxi) and (xxxiv).
- vii. (2) Although no mention was made in a witness statement about the appellant's family owning a house in India, divergences in the evidence regarding ownership of the property and three accounts about when the property was allegedly sold, meant Judge Clarke was not satisfied it had been sold at all. Paragraph 18 (v) with reference to paragraph 9 (ix).
- viii. There are number of aspects of Dr Maganty's report of concern. It was unclear how much of the report is based upon his own diagnosis and how much was reliance upon what he been told during the consultation with the appellant during which he was accompanied by his parents and brother. Paragraph 18 (vi).
- ix. Dr Maganty indicates the appellant may harm himself and others but does not explain fully why this is so and what material he relies upon for stating that. Paragraph 18 (vi).
- x. The diagnosis of an underlying depressive illness is difficult to reconcile with the evidence of his parents and brother. The only reference to suicidal tendencies as distinct from self harm is from the appellant himself as this phrase is not used by Dr Maganty. Paragraph 18 (vi).
- xi. The appellant claims to have private life but the only documentary evidence is a letter from the local temple. His brother claimed he has no friends and did not say that he previously had friends but no longer did. Paragraph 18 (vii) with reference to paragraph 9 (xxviii) and (xxxii) above.
- xii. The respondent's submission that the marriage was concocted and used as a device to enable the appellant to enter the United Kingdom as a means of enabling him to remain here is not supported by adequate evidence. Paragraph 18 (viii).
- xiii. The appellant lives with his parents and his brother and there are ties between them although much of the material relating to the ties was based upon the appellant's needs as an individual suffering from depression. Paragraph 22.

- xiv. The appellant is 27, was living with his mother and brother in India before they came to the UK, lived in India with his wife for about a year, and has only lived with his parents for the last two years or so. Taking all matters cumulatively it was not accepted that there was a family life between the appellant and his family members. Paragraph 22.
 - xv. It is accepted the appellant has developed private life in the United Kingdom although on the evidence he has little contact outside his family. Paragraph 24.
 - xvi. The principal claim relies upon his medical condition. Paragraph 25.
 - xvii. Judge Clarke did not consider the appellant was a suicide risk although it is accepted there was a possibility he may self harm. It is accepted he is depressed although there was no clear evidence he was actually receiving treatment save for prescribed medication, although if he tried to obtain it he will obtain such treatment. Paragraph 29.
 - xviii. Facilities for treating mental health are available in India although it is accepted they may not be to the same standard as that available in the United Kingdom. Paragraph 30.
 - xix. The respondent's decision would not affect the private life of the appellant on return to India where he could receive medical treatment and where his private life could be carried on. Paragraph 32 (i).
 - xx. In the alternative, if the issue was one of proportionality, taking into account the length of the appellant's stay in the United Kingdom, his depressive illness, the availability of medical treatment in India, the presence of relatives, the fact he may be able to work in the future, the fact he is a graduate, the fact he has worked as a sweet maker in India and in a factory in the United Kingdom which is indicative of an education and willingness to undertake a range of jobs, and little evidence of his private life, the Secretary of State had shown the decision was proportionate. Paragraph 32 (iv).
 - xxi. That although Article 3 was not mentioned in submissions, the circumstances the appeal fall far short of the high threshold in N v UK (2008) 47 EHRR 885. Paragraph 33.
5. The Judge was entitled to take as a starting point the previous decision. The Judge sets out in detail the appellant's case and applicable legal provisions

and has clearly considered the evidence with the required degree of anxious scrutiny. The appellant's case relied on before the Judge was largely the same as that put forward before Judge Clarke.

6. Judge Aziz sets out the findings of fact in relation to the December 2016 appeal, relevant points of which can be summarised in the following terms:
 - a. The factual basis of the appellant's family and private life claim is largely the same as that put forward in the previous appeal [61 - 62].
 - b. Since the hearing before Judge Clarke the appellant has accrued a further 3 ½ years private and family life in the United Kingdom [72].
 - c. Since the decision of Judge Clarke there have been two instances of the appellant having been sectioned under the Mental Health Act 1983 on 30 January 2013 and on 23 May 2015 [73].
 - d. Judge Clarke had considered medical evidence suggesting that the appellant's mental health would stabilise over the next year and that he could even return to employment which has been shown to be an incorrect prognosis in light of what has happened since the appeal hearing. Not only has the appellant been sectioned twice but the report of a Dr Elanjithara makes it clear the appellant's condition is much more serious than had originally been thought and he has not recovered within the anticipated one-year period [76].
 - e. Whilst accepting the observations in respect of the two occasions the appellant was sectioned and the findings of Dr Elanjithara in his April 2013 report, there was no up-to-date psychiatric/medical report which put the First-tier Tribunal in a difficult position when making any sort of reliable findings as to the appellant's current diagnosis, his current medication, his current treatment (if any), and his prognosis [77].
 - f. The observations in [77] were accepted by the appellant's representative who referred the First-tier Tribunal to a number of documents including letters from the appellant's GP dated 2 November 2015 and 4 November 2016 which reaffirmed the appellant has the same condition, depressive psychosis, for which he is on regular medication, and that he was not fit to attend the court or tribunal hearing [78].
 - g. The Judge carefully considered the medical evidence/notes contained in the appellant's bundle all of which were taken into account [79].
 - h. The Judge accepted the prognosis made regarding the appellant's mental health in the earlier psychiatric report was wrong when concluding the appellant could potentially recover from his mental health condition and return to work in a 12-month period [80].

- i. At [82 – 83] the Judge finds:
 82. Therefore, apart from the psychiatric reports which are now several years old, the Tribunal has before it to the testimony of the witnesses and a limited amount of medical correspondence/notes appertaining to the appellant having ongoing treatment for his mental health issues. However, this evidence is scant and lacking in detail. There is also no country information as to the availability or otherwise of healthcare in India. I remind myself that the burden of proof is upon the appellant to establish each and every aspect of this case.
 83. Therefore, whilst I am prepared to accept that the appellant's prognosis may have been more severe and long-lasting than had been originally anticipated when the First-tier Tribunal heard his first appeal in early 2013, the absence of an up-to-date medical/psychiatric report puts Tribunal in some difficulty in making any sort of reliable assessment as to the current state of his mental health, his prognosis and severity of his suicidal ideation as of the date of hearing. As commented, there is also a lack of country information or objective evidence as to what level of health care and medication will be available in India to deal with the appellant's mental health issues.
- j. The Judge reminded himself the previous Tribunal had disbelieved the appellant's parents claims that the appellant would not have any family support or home to return to in India. Two witnesses who gave evidence on this issue had given evidence at the previous hearing. That evidence was not found to be credible. There was nothing presented to the Judge which led that Tribunal to conclude that it could depart from the findings of the previous Tribunal [84].
- k. The Judge noted the appellant relied on paragraph 276 ADE(vi) [86].
- l. In [87] the Judge finds:
 87. In light of my findings at paragraph 80 – 84 above, I am not persuaded that the appellant has been able to establish that there are insurmountable obstacles to his integration into India if he were returned. He is an Indian national and has resided in the country for the majority of his life. The previous Tribunal made findings that he has a home to return to and that there would be family members who could assist him. He can continue to be financially supported by his father from the UK.
- m. The appeal could not succeed under Article 3 ECHR on the basis of the evidence made available [88].
- n. In the alternative, taking the appellant's case at its highest and accepting the severity of his condition has proved to be worse than that predicted at the previous hearing, the appellant would struggle to meet the high threshold set out by the Article 3 case law [89].

- o. The appellant does not meet the requirements of the Immigration Rules in relation to article 8 [90].
- p. When considering article 8 ECHR, it is accepted the appellant has a family and private life in the United Kingdom, it is accepted the degree of interference is sufficient to engage article 8. The issue was that of the proportionality of the decision. [91 - 93].
- q. Section 117B Nationality, Immigration and Asylum Act 2002 applies [95].
- r. Considering whether the countervailing public interest in removal will be outweighed by the consequences for the health of the applicant because of disparity of healthcare, this was not shown to be one of those cases that fell in the appellant's favour [96].
- s. The appellant cannot succeed under article 3 or 8 ECHR.

7. At [98] the Judge makes an observation in the following terms:

98. Whilst the appellant's appeal cannot succeed under the Immigration Rules or Articles 3 and 8 ECHR for the reasons set out above, I still have some level of sympathy for the appellant and his parents and I find that there are compassionate circumstances in the appellant's case (even if those compassionate circumstances fall short of his appeal succeeding outside of the Immigration Rules). If the appellant is able to submit to the respondent an up-to-date psychiatric report detailing his diagnosis, treatment and prognosis, then I would not seek to dissuade them from considering that evidence and look into granting the appellant some form of discretionary leave outside the Immigration Rules on compassionate grounds. As indicated, there are compassionate circumstances in this case despite the above findings. However, I fully recognise that it cannot compel the respondent to grant the appellant any such leave. It will be a matter entirely at the discretion of the respondent.

- 8. The above observations do not introduce any element of contradiction in the decision under challenge as the core finding of the Judge is clearly that the appellant has not established any arguable basis for being permitted to remain in the United Kingdom either under or outside the Rules.
- 9. Despite the Judge referring to the poor quality of the evidence provided in support of this appeal in relation to the appellants health issues, Mr Rashid advised the Upper Tribunal that there was still no up-to-date report available detailing the appellants current situation.
- 10. Permission to appeal was sought and initially refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Allen on limited grounds on the basis "it is on balance arguable that the judge erred in his evaluation of the claim in respect of paragraph 276ADE(1)(vi), as contended in the grounds and as a consequence it is arguable that the judge's decision contains an error or errors of law".

Error of law

11. The pleaded error in relation to paragraph 276 ADE relates to the wording of the decision. The relevant paragraphs are [86 – 87]. Paragraph 87 is set out above in which the Judge finds the appellant has not been able to establish there are insurmountable obstacles to his integration into India if he was to be returned. The correct test is that set out at [86] where the Judge states:

86. Immigration Rules: the appellant relies upon paragraph 276ADE(vi); that he is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment), but there would be very significant obstacles to the appellant's integration into the country to which he would have to go if required to leave the UK.

12. It is submitted on the appellant's behalf that the Judge applied an incorrect test when assessing whether very significant obstacles to the appellant's integration existed rather than whether there were insurmountable obstacles.

13. In *Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC)* it was held that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of "very significant hurdles" in paragraph 276 ADE of the Immigration Rules.

14. The term insurmountable obstacles appears in the Immigration Rules (in relation to Article 8) under Appendix FM paragraph EX.1. It was held in *Agyarko [2017] UKSC 11* that the definition of "insurmountable obstacles" at EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner" was consistent with Strasbourg case law. The court referred to the case of *Jeunesse v Netherlands*. Leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face "insurmountable obstacles" (as defined) in continuing their family life together outside the UK. Even in a case where such difficulties did not exist leave to remain could nevertheless be granted outside the rules (according to the IDIs) in "exceptional circumstances" i.e. "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate". The rules and IDIs together were compatible with Article 8. This was not to say that decisions in individual cases would necessarily be compatible with Article 8. "Exceptional circumstances" did not mean that a unique or unusual feature was to be sought and in its absence the application rejected. A proportionality test had to be carried out. A court or tribunal considering whether a refusal of leave to remain was compatible with Article 8 in the

context of precarious family life had to decide whether the refusal was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, whilst also considering all factors relevant to the specific case in question, it should give appropriate weight to the Secretary of State's policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. "The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".

15. Whilst it is accepted that the terminology relates to two separate aspects of the Immigration Rules and that the Judge while setting out the correct wording in [86] sets out the incorrect phrasing in [87], the real question is whether this is a typographical error rather than a misunderstanding of the correct legal test and application of the same.
16. The Judge was clearly aware that the correct test was the very significant obstacles test. The Judge was clearly aware that this test could not be satisfied on the basis of mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience. It is necessary to read the decision as a whole to ascertain the Judge's findings. The finding is that having weighed up the previous determination, the medical and other evidence made available and representations made by the appellant's advocate, the appellant had not established he could satisfy the requirements of paragraph 276ADE (vi) as he had not established there were very significant obstacles to his integration into India.
17. Mr Mills submitted that despite the different wording the tests were, effectively, the same and that any discussion that has arisen arises as a result of the respondents decision to use different wording in the Immigration Rules. The Supreme Court have found that the definition of "insurmountable obstacles" at EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner". There is therefore an arguable overlap between very significant obstacles and insurmountable obstacles.
18. Having considered the findings made by the Judge and the arguments put to the Upper Tribunal I conclude the appellant has failed to make out legal error material to the decision to dismiss the appeal. Whilst the wording in [87] is wrong, which admits of finding of legal error, it has not been made out to Judge applied an incorrect test or that that error is based on a misunderstanding of what that test should be for this is clearly set out in

[86], or that the Judge having set out the correct test then completely ignored it. The evidence as a whole clearly shows the Judge found there were no very significant obstacles to the appellant’s integration into India on the basis of the evidence relied upon before the First-tier Tribunal. This is an arguably sustainable finding.

Decision

19. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

20. 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.....
Judge of the Upper Tribunal Hanson

Dated the 24 October 2017