



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22837/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
on 11 May 2017

Decision & Reasons Promulgated
on 16 May 2017

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

GURNAM MATHARU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Alfred instructed by Bhavsar Patel Solicitors
For the Respondent: Mr C Bates – Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Colyer ('the Judge'), promulgated on 4 August 2016, in which the Judge dismissed the appellant's appeal under the immigration rules and on human rights grounds (ECHR) against the refusal of an application for leave to remain.

Error of law

2. The appellant is a national of India born on 25 November 1975.

3. In a lengthy but detailed decision, the Judge examines the evidence put before him from all sources before setting out his findings of fact at [24] to [91] of the decision.
4. The decision-maker considered the application pursuant to Appendix FM of the Immigration Rules under the 'Partner Route'. Having considered the definition of a "partner", as defined in GEN 1.2, the decision-maker concluded:

"It is noted that you claim to have been residing together since January 2013, but sufficient evidence of this has not been provided, and therefore you have not been living together in a relationship akin to marriage for at least two years. You therefore do not meet the definition of partner, as defined in GEN 1.2., and cannot meet the requirement of R-LTRP. You failed to qualify for leave by virtue of E-LTRP 1.2. as you are not considered to have a partner in the UK in accordance with Appendix FM."

5. Gen 1.2 defines a partner as (i) the applicant's spouse; (ii) the applicant's civil partner; (iii) the applicant's fiancé (e) or proposed civil partner; or (iv) a person who has been living together with the applicant in a relationship akin to marriage or civil partnership for at least two years prior to the date of application. The appellant claimed he is able to satisfy Gen 1.2(iv).
6. The decision-maker concluded that as the application has been refused under the eligibility requirements of the Immigration Rules, the appellant was unable to benefit from the criteria set out in EX.1. which was therefore not considered by the decision-maker.
7. The Judge considered the evidence regarding the relationship before finding at [43] and [44]:

43. I find that the Appellant has failed to provide sufficient independent evidence with his application to demonstrate that he has been living together with his partner in a relationship akin to marriage from the date of their religious ceremony which was 5 January 2013. The date of decision is put at 28 May 2015 which is more than two years from the date of the ceremony and therefore if there was evidence he should have been able to provide that.

44. I do have his word that there was cohabitation but in view of my doubts as to his credibility I am not prepared to accept that as sufficient proof. There is however the word of his partner and I am prepared to accept her evidence that she and the appellant lived together from 5 January 2013, however on the date of the respondent's decision the respondent did not have the advantage of hearing the appellant's sponsor give evidence.

8. The Judge noted the appellant had no status in the United Kingdom and that the decision-maker had stated that the appellant failed to meet the eligibility requirements of the Immigration Rules.
9. It was not made out before us that a person's immigration history, of the nature of that applicable to this appellant, means they will fail to meet the eligibility requirements of the Immigration Rules such that they are prevented from relying upon the exception to the rule found in paragraph EX.1. The only basis on which the decision-maker appears not to have considered that paragraph is the finding the appellant had not proved the required two year's cohabitation akin to husband-and-wife, which was rejected by the Judge in [44].
10. The grounds seek permission to appeal, made on the basis that in light of the finding at [44] the Judge was required to consider paragraph EX.1, has arguable

merit and we find that legal error is made out on this basis. This was not challenged by Mr Bates on behalf the Secretary of State.

11. We do not at this stage find such error is material to the decision to dismiss the appeal. It is necessary to consider the test set out in EX.1. and the findings made by the Judge. If the Judge considered the test, albeit in a different context, and made sustainable findings then any error made may not be material to the decision to dismiss the appeal.
12. The advocates were therefore invited to make submissions to the Upper Tribunal in relation to the question of the materiality of the error.

Materiality - Discussion

13. The relevant part of paragraph EX.1. is EX.1.(2)(b) which reads:

The applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

14. The term “insurmountable obstacles” is defined in paragraph EX.2. as:

For the purposes of paragraph EX.1. (b) “insurmountable obstacles” means the 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.

15. The Judge noted at [35] that “his principal argument now appears to be he should remain because of his wife’s medical treatment and I will refer to that later.” The Judge was therefore clearly aware of the core issue in the appeal.
16. The Judge made several relevant findings in relation to this matter which are set out as follows:

51. The reference to children is somewhat erroneous as the appellant does not have any children of his own and his wife/partner has children from her first marriage but they are now adults and are capable of living independent lives.
52. The Respondent makes a conclusion which I find is supported by the evidence before the Tribunal that being that the Appellant’s wife could settle back into Indian society and that he would not have to be separated from his wife if she returned to his country of nationality with him. I consider that the Appellant and his wife could both return to India as a couple.
53. I accept that throughout his stay in the United Kingdom the Appellant’s circumstances have always been precarious. I also find that it is most probable that the appellants partner would have been aware of his precarious immigration status at an early stage in their relationship.

Return to India

54. I find that the Appellant has failed to establish that there would be significant obstacles to his integration into India. For example, I note that he spent his formative years and part of his adult life in India and I find that his period away from his country of nationality has not been so significant that he could not adapt to the lifestyle and culture of India on his return. I find that the appellant has spent the majority of his life in India. Moreover he

spent the formative years of his life in that country. I find that the Appellant will be aware of the culture, customs and traditions of his home country on account of having lived in India for his formative and adolescent years.

55. I find that there is no evidence that the Appellant suffers from any significant medical ailments or from any physical infirmity which would prevent him from being able to relocate or adapt to life in India.
 56. No objective evidence has been provided which would corroborate that the Appellant would be incapable of obtaining employment or accommodation in his home country. I find that any claims based on poor living conditions, high unemployment or lack of accommodation for an appellant in India do not ordinarily engage Article 3 of the ECHR. The fact that living standards in the home country of an appellant may not be comparable to those currently enjoyed by the Appellant in the United Kingdom is not sufficient to engage Article 3. I refer to the Court of Appeal case of **Q and Others, R (on the application of) v Secretary of State for the Home Department [2003] EWCA Civ 365**. I would also refer to the case of **MA (Proved destitution) Jamaica [2005] UKAIT 00013**.
 57. The Appellant's family are from India and there may be family and friends to whom the Appellant may have access to on his relocation to his country of nationality.
 58. I note that the appellant's wife and her family are originally from India and that therefore she too will be aware of the culture, customs and traditions of India. I find that it would not be unreasonable to expect the appellant to return to India and for his wife to accompany him there if she wishes.
 59. In her statement the appellant's wife refers to recently undergoing a bypass operation from which she is still recovering. She has referred to having regular appointments with the cardiac team at Glenfield Hospital in Leicester.
 60. Her operation was obviously successful. The appointments are check-ups rather than for treatment. There is no medical evidence before me to show that she is unfit to travel to India should she so wish. There are medical facilities available in India should she relocate to her husband's country of origin/nationality.
 61. If she did not wish to relocate to India permanently it is open to her to accompany the appellant whilst he makes an application for legal entry to the UK; or (more likely) she can remain in the United Kingdom from where she can support his application to rejoin her, but this time under the provisions of the immigration rules.
17. In relation to the proportionality assessment under article 8 ECHR, the Judge found that the respondent's decision to refuse the application did not prejudice the family and private life of the appellant in a manner sufficiently serious to amount to a breach of a fundamental right protected by article 8, and that it was just and proportionate to require the appellant to return to his home country and that there was nothing sufficiently serious in the family or private life circumstances that could possibly outweigh the need for immigration controls to be enforced in this case [90].
18. It was submitted on the appellant's behalf that since the hearing before the Judge the appellant's wife had experienced complications but these are post hearing matters which, if they warrant the appellant being permitted to remain in the United Kingdom if this appeal does not succeed, can be the subject of a fresh application. The main point that arises is that these were matters of which

the Judge had no knowledge as they were matters that had not come into existence at the date of the hearing.

19. It was submitted on the appellant's behalf that the Judge's conclusions regarding availability of medical treatment in India were flawed especially as the appellant was unable to afford to meet the costs of such treatment. The Judge made a clear finding that medical treatment for cardiac problems is available in India, which is in accordance with the country information, and it has not been shown to be a finding infected by arguable legal error. In relation to the ability to afford the cost of such treatment, it was submitted the appellants will be destitute as they have no accommodation, no housing, and no employment, but the Judge clearly found that there is likely to be family in India and that there was no evidence to corroborate the claims that the appellant was incapable of obtaining employment or accommodation. The claim the appellant will be unable to afford any treatment his wife may require is therefore not arguably made out, sufficient to establish material legal error.
20. In relation to the appellant's wife, it was not shown that she is a seriously ill person for whom substantial grounds had been made out showing that she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in India or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering or to a significant reduction in life expectancy.
21. It is important to remember, however, that the core finding of the Judge is that the appellant's wife was receiving monitoring and check-ups with no evidence of ongoing treatment being required. The finding that article 3 was not engaged is a finding reasonably open to the Judge on the evidence.
22. The submission the Judge had elevated himself to a medical expert when referring to the appointments being for check-ups has no arguable merit. There is only one letter before the Judge referring to a post-operative appointment where the appellant's wife may see the Consultant or another member of the medical team. It was fully open to the Judge to conclude this was a post-operative review/check-up appointment and he was not acting in the capacity of medical expert in coming to such a conclusion.
23. In relation to the Judges suggestion that the appellant could return to India to make an application for entry clearance, it was submitted that this was not feasible as the appellant's wife had held down two jobs which enabled her to earn the requisite income threshold but, following her surgery, it was unlikely she could return to such a level of work meaning that she would be unable to satisfy the minimum income threshold required for a foreign spouse to enter the United Kingdom.
24. Mr Bates referred to an exception within the immigration rules relating to the minimum income requirement if a person is in receipt of State Benefits. The appellant's representative informed the Upper Tribunal at the outset of the hearing that the appellant's wife was in the process of making an application for State Benefits, probably Disability Living Allowance. This is one of the benefits that would allow her to seek an exception from the minimum maintenance requirement.

25. Whilst we appreciate that such an application may take time, and if the appellant was returned with his wife remaining in the United Kingdom during that time there may be a period of separation, it was not made out before the Judge that any such period will be such as to make separation disproportionate in all the circumstances where there was no evidence before the Judge of the need for the appellant to remain in the United Kingdom.
26. The appellant's immigration history is very poor and there is a strong public interest in maintaining immigration control in such situations as that in which the appellant finds himself.
27. The arguments put forward on the appellant's behalf in relation to the existence of insurmountable obstacles has not been made out. Indeed, the Judge considered whether there were very significant obstacles relating to reintegration into India when considering 276ADE(1)(vi) and carefully considered the question of the possibility of family life with the appellant's partner continuing outside the UK.
28. We do not find it has been made out that the error made by the Judge is material for, had the Judge applied his mind to EX.1.(2)(b) and the insurmountable obstacle test as defined in EX.2, he would have arrived at the same conclusion and dismissed the appeal.
29. We do not find the finding in relation to circumstances for the family unit back in India have been shown to be infected by arguable material legal error, nor do we find the conclusion that it is proportionate for the appellant to return to the United Kingdom to make an application to return with valid entry clearance infected by arguable legal error either.
30. As stated above, if there has been a material change in circumstances since the matter was considered by the Judge it is open to the appellant to make a fresh application, although he must appreciate the need to support such an application with cogent medical and other evidence establishing a need for him to remain in the United Kingdom.
31. The appeal is dismissed.

Decision

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

Anonymity.

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

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

Signed.....

Upper Tribunal Judge Hanson

Dated the 11th of May 2017