



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

Appeal Number: IA/23213/2015

**THE IMMIGRATION ACTS**

**Heard at FIELD HOUSE**

**On 16<sup>th</sup> May 2017**

**Decision &  
Promulgated  
On 26<sup>th</sup> May 2017**

**Reasons**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL  
Ms. GA BLACK**

**Between**

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

**and**

**MRS NAVDEEP KAUR**

Appellant

Claimant

No anonymity order made

**Representation:**

For the Appellant: Mr T Wilding Home Office Presenting Office

For the Respondent: Ms L Turnbull Counsel instructed by Malik Law chambers solicitors

**DECISION AND REASONS**

1. I shall refer to the parties as follows; “the appellant” in these proceedings is the Secretary of State and I shall refer to Mrs Kaur as the “Claimant.” This matter comes before me for consideration as to whether or not there is a material error of law in the determination by the First-tier Tribunal (Judge Chowdhury) (“FTT”) promulgated on 12<sup>th</sup> October 2016, in which the FTT allowed the appeal on private and family life grounds.

2. The Claimant is a citizen of India and whose date of birth is 14.2.1989.

## **Background**

3. The FTT found that the appellant and her partner were in a genuine and subsisting relationship. It was accepted that the Eligibility requirements of the Immigration Rules were not met as the parties were not married nor had they lived together for the required two year period [16]. (It was accepted that at the time of hearing the parties were married but this fact was not admitted as relevant evidence [25]). The FTT considered Article 8 in terms of compelling circumstances following **SS (Congo) & others [2015] EWCA Civ 387** and **R (Agyarko) [2015] EWCA Civ 440**, and reached the conclusion that there were compelling circumstances to justify consideration of Article 8 outwith the Rules. Those circumstances were the fact that the appellant’s husband, a British citizen, would not be able to obtain employment in India and the couple had started IVF treatment. The FTT found that the couples wish to start a family was a right encompassed conditionally under Article 8 ECHR [29]. The FTT went on to consider the evidence following the approach in **Razgar** [30 - 39] and found that it was not reasonable to expect the appellant to leave the UK at this critical time where she had embarked on IVF treatment, the appellant’s husband would face severe obstacles in obtaining employment in India and difficulties in adapting to another culture. The FTT considered finance, language, and precarious circumstances in the context of public interest factors under section 117 Immigration Act 2014 [37-39]. It had regard to **Chikwamba v SSHD [2008] UKHL 40** and decided that the interference was disproportionate given the likely period of separation and consequences for the couple “who desperately want a child” [39].

## **Ground of application for permission to appeal**

4. The Appellant argued that the FTT erred in law by finding that the circumstances (IVF treatment and difficulties in obtaining employment) met the insurmountable obstacles criteria. Reliance was placed on **R (Agyarko) [2015] EWCA Civ 440**. This was a misdirection of law.

## **Permission granted**

5. Permission was granted by FTJ Kelly who found that it arguable that the FTT failed to identify (a) any insurmountable obstacles (as defined by

section EX 2 of Appendix FM) to the appellant continuing family life outside of the UK, or (b) any “compelling circumstances” that merited consideration of the appeal outside of the Rules.

## **Submissions**

6. Mr Wilding for the Appellant focused on the issue of proportionality and argued that the FTT failed to give adequate reasons for finding that the decision was disproportionate or to show that it was contrary to the insurmountable obstacles criteria. The FTT had given no reasons for finding that the appellant’s husband would have difficulty in obtaining employment or integrating in India. And further in assessing proportionality the FTT relied on those very reasons in concluding that the Immigration Rules had not been met. The issue of IVF treatment was not a sufficient reason and without more the FTT was not entitled to consider the same under Article 8 family life. The matter could be dispensed with by this Tribunal. There was no need for further hearing. In my consideration of the remaking of the decision, Mr Wilding was content to rely on the submissions already made.

7. Ms Turnbull accepted that the appellant could not meet the Immigration Rules and that the FTT erred in its approach to insurmountable obstacles criteria [32]. She submitted that the FTT properly considered the extent to which the appellant had met the Immigration Rules and took into account the IVF treatment. Ms Turnbull submitted that although the FTT erred in its approach, it nevertheless found circumstances outside of the Rules under Article 8. There was no error in the Article 8 assessment by the FTT and reliance on **Chikwamba** was correct given that there was no public interest in an application for entry clearance being made out of country. The appellant and her husband were married and she was now in her 26<sup>th</sup> week of pregnancy. The matter ought to be remitted to the First-tier for rehearing under Article 8 ECHR.

## **Discussion and reasons**

8. I find that there were material errors of law by the FTT in its consideration and approach to Article 8 both under the Rules [33, 34 & 39] and outside of the Rules. The FTT erred by finding that there were “insurmountable obstacles” in terms of the appellant seeking IVF treatment and that the appellant’s husband would face difficulty in obtaining employment on India where he would not be able to integrate. In respect of the latter in particular the FTT gave no reasons in support. As was made clear in **R (Agyarko) EWCA** those factors could not come anywhere near the criteria to show that there were insurmountable obstacles to family life in India as defined under EX 2.

9. The Supreme Court in **Agyarko** upheld the Court of Appeal on the issue of insurmountable obstacles. The Court effectively removed the

threshold test for Article 8 ECHR. The relevant issue is proportionality. I am satisfied that there was no evidence capable of supporting an argument to engage Article 8 ECHR and/or that the decision was disproportionate even having regard to **Chikwamba**. The Appellant has made out the grounds argued. I am satisfied that the Claimant and her husband could return to India and continue family life there or that the Claimant could reasonably return to make an application for entry clearance as a spouse under the Immigration Rules.

**Decision**

10. There are material errors in law and the decision shall be set aside.

**Re making decision**

11. In remaking the decision I take into account the submissions made by both representatives and the findings of fact as made by the FTT. I found no reason for the matter to be remitted to the FTT. I remake the decision by dismissing the appeal on human rights grounds under Article 8 within and outside of the Rules.

Signed Date 25.5.2017

GA Black

Deputy Judge of the Upper Tribunal

NO ORDER FOR ANONYMITY  
NO FEE AWARD AS THE APPEAL IS DISMISSED

Signed Date 25.5.2017

GA Black

Deputy Judge of the Upper Tribunal