



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

Appeal Number: HU/11502/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 November 2018**

**Decision & Reasons  
Promulgated  
On 7 December 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MISS RASHPAL KAUR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mrs J Smeaton of Counsel

For the Respondent: Ms J Isherwood, a Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is an Indian national born on 3 March 1975. She appeals with the permission of the First-tier Tribunal, Judge Hollingworth, who on 20 September 2018 considered that it was at least arguable that the judge who heard her appeal (Judge of the First-tier Tribunal Judge Burnett (Judge Burnett)) had not adequately reasoned his decision under Article 8 of the European Convention of Human Rights. Specifically he noted that the appellant had provided evidence of her relationship with the partner in the

UK, that the public interest analysis was not adequately reasoned, and he specifically criticised paragraphs 39 to 41 of the decision for a lack of fulsome analysis.

## **Background**

2. The appellant's immigration history is before recorded in the respondent's refusal of leave to remain dated 14 April 2016. The appellant First came to the UK on 24<sup>th</sup> October 2008 and made a number of applications which were refused before an application was made on 15 October 2015 based on her private or family life with an unmarried British partner namely Kuldeep Singh. However, that application was also refused and did not attach any rights of appeal. The appellant made a further application therefore on 11 January 2016 indicating that the appellant wish to be considered under the wider "family life as a partner (10-year route)" and "private life in the UK (10-year route). This was refused by a letter dated 14 April 2016 and on 28<sup>th</sup> of April 2016 the appellant gave notice of appeal to the First-tier Tribunal. The decision of 14 April 2016 is therefore the subject of the present appeal.
3. At the hearing before of the First-tier Tribunal, on 5 April 2018, Judge Burnett heard oral evidence by the appellant and submissions by her representative Ms Harvey, the respondent being unrepresented at that hearing. The Immigration Judge also had the benefit of a skeleton argument which set out the arguments of law in relation to that case. The judge set out at length the legal basis for the refusal and the current case law as it applied to the case. He also considered in detail the Immigration Rules and in particular EX.1(b) of Appendix FM of the Immigration Rules and noted that there had to be very significant obstacles to be faced by the appellant if she were returned with her partner to her home country. The judge found there were no insurmountable obstacles, in the sense of any very significant difficulties, to family life continuing outside the UK.
4. Furthermore, the Immigration Judge was not satisfied, if the appellant were returned to India, that an application to return to the UK would necessarily be successful. The appellant and her partner, although in the UK for some time, would not be prevented from going back to India and getting a job there. He had been back to India on previous occasions. He himself had come to the UK as an asylum seeker but that application had been unsuccessful, and I was told at the hearing that it was treated as a "Legacy case" and that is how he ultimately obtained leave to remain in the UK.
5. Having considered all the factors in the case, the judge pointed out in paragraphs 21 - 22 of his decision that he did not need to reach any view as to whether or not those Rules were met, he considered that nevertheless A Refusal of the Application under the Rules may nevertheless "inform" the human rights decision. He Concluded that the appellant did not satisfy the Rules. He then looked at the appellant's

private or family life under Article 8 and “taking a holistic approach” (see paragraph 41) in the judge’s judgment, the public interest in that case was not “outweighed by the appellant’s interests”. So, taking all factors into account he decided there was a necessary and proportionate interference with the appellant’s private or family life and he dismissed the appeal.

### **The Hearing Before the Upper Tribunal**

6. At the hearing before me, submissions were made by both representatives. Mrs Smeaton presented a detailed and careful oral argument which supported her skeleton argument which she handed in on the morning of the hearing. She stated that the Tribunal could not be satisfied that all the factors in the case had been properly considered by the First-tier Tribunal. What was required was a detailed analysis, preferably quoting the words of Sir Ernest Ryder in the case of **TZ (Pakistan) [2018] EWCA Civ 1109** (at paragraph 31):

“... Where article 8 is in issue within the Rules there will of necessity have to be a conclusion on the question whether there are insurmountable obstacles to the relocation of the appellant and his or her family. That involves the evaluation or value judgment based upon findings of fact. When a tribunal goes on to consider an article 8 claim outside the Rules (as it will do where article 8 is engaged, see **Hesham Ali [2016] UKSC 60**)...”.

He went on to say that It was at least desirable to adopt a structured approach. What Lord Thomas had said in the earlier case of **Hesham Ali** at paragraphs 82 – 84 was “strongly endorsed” by Sir Ernest Ryder. after the Tribunal has found the facts, the Tribunal should set out those factors that weigh in favour of immigration control, i.e. “the cons” against those factors which weigh in favour of family and private life – the pros, in a form of balance sheet so that it can be set out and can be examined and analysed and understood by the parties.

7. Mrs Smeaton said there was an absence of that type of analysis in the judge’s decision. There were highly material factors in relation to Section 117B(1) to (3) which considered, for example, the appellant’s ability to speak the English language and her ability to be economically independent without the need for taxpayer support which did not feature adequately in the decision.
8. On the other hand, Ms Isherwood argued that there was no material error of law. She said that it was quite right of the judge to carefully analyse the Immigration Rules as he had done. It was not accepted on behalf of the respondent that the appellant would necessarily meet the requirements of the Immigration Rules, and furthermore the respondent was the person who was entitled to consider that factor or that matter. She referred me to the case of **Chen [2015] UKUT 189**. In the case of **Chen**, Upper Tribunal Judge Gill had had to consider a judicial review application by a

Chinese citizen against the respondent's decision to refuse an application for leave to remain on the basis that article 8 was engaged. In that case, the argument was run that the appellant could return to her home country to make a fresh application. The case considered the degree to which that separation from her husband, a British citizen, could itself be an interference with her human rights. At paragraph (i) of the headnote Judge Gill pointed out that a temporary separation to enable an individual to make an application for entry clearance, may be disproportionate but in all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionally with his protected rights. Ms Isherwood also referred to the third paragraph of the headnote, which stated that on an application for leave on the basis of Article 8 the Secretary of State was not obliged to consider whether an application for entry clearance, if one were to be made, would be successful. Accordingly, her silence on this issue did not mean that it was accepted that the requirements for entry clearance would be granted.

9. Ms Isherwood submitted that there was a great deal of evidence that the appellant's private or family life could be continued in India. There was no automatic right to choose where one conducted one's private or family life and the Tribunal Judge was therefore fully entitled to reach the decision she came to on the evidence and arguments presented to her.
10. Mrs Smeaton, by way of reply, argued that the case of **Chen** was a judicial review case, and it did not follow that a statutory appeal would be treated the same way. The First-tier Tribunal Judge in that case was in a different position than the judge hearing this appeal. In this case, the appellant met all the requirements of the Immigration Rules but her separation for the purposes of making a fresh application from abroad would be an unlawful interference with her human rights.
11. At the end of the hearing I rose to consider my decision as to whether there was an error of law in the decision First-tier Tribunal, which I gave later on the day Upper Tribunal.

## **Conclusions**

12. Having had an opportunity to consider these arguments and carefully consider the judge's decision, it is clear that he fully into account the argument that there were insurmountable obstacles to the return of the appellant to India to make a fresh application for entry clearance to join her partner. I consider that the judge correctly concluded that there was insufficient evidence before the First-tier Tribunal to conclude that an application for entry clearance would necessarily have been successful. In addition, as the judge pointed out at paragraph 35 of his decision, the appellant's partner had close connections with India himself. He had been back to India on occasions and there was nothing to prevent him going there with the appellant if he desired to do so. It was a country that they were both culturally assimilated with. There was no reason, therefore, why

the appellant should not return to India and make an application for entry clearance to re-join her partner there. There was a need to recognise the importance of effective immigration controls. This was a factor, the judge was entitled to conclude, that outweighed other considerations. It was reasonable in all circumstances for the respondent to insist that the requirements of the Immigration Rules were met. The appellant had a poor immigration history and it was therefore reasonable for the respondent to insist that she did so.

13. The judge was entitled to conclude that there were no insurmountable obstacles so as to satisfy the Immigration Rules and in particular the requirements of paragraph EX. 1 (b) of Appendix FM those Rules. Furthermore, the interference with the family life would not be of such weight for the requirement that the appellant returns to India for the purposes of making an appropriate application to be disproportionate. The judge appears to have correctly considered the burden and standard of proof as he set it out in paragraphs 19 and 20 of the decision. He also referred to a number of the leading authorities, including some of those quoted by Mrs Smeaton and Ms Isherwood. The judge looked at the public interest considerations under the Nationality, Immigration and Asylum Act 2002 (2002 Act), including the requirement in section 117B (3) of the 2002 Act that a person seeking to enter the UK should be financially independent and not a burden on taxpayers. These “public interest considerations” required the respondent to look at the economic wellbeing of the UK and balance those against the individual’s interests. In the end, the judge had to decide where the balance was to be struck. He looked carefully at the individual circumstances of the appellant before reaching his decision (see paragraph 38, for example). Although there are some aspects of his analysis which could be, and were criticised by Ms Smeaton, the judge came to a conclusion that he was entitled to come to on the evidence presented before him.

### **Decision**

14. For those reasons I have dismissed the appeal to the Upper Tribunal. The decision of the First-tier Tribunal therefore stands.

No anonymity direction is made by the First-tier Tribunal and I make no anonymity direction.

Signed

Date 4 December 2018

Deputy Upper Tribunal Judge Hanbury

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

As the judge dismissed the appeal, there could be no fee award and I make no fee award.

Signed

Date 4 December 2018

Deputy Upper Tribunal Judge Hanbury