IAC-AH--V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24263/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 5 March 2020	**On 18 March 2020**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHAMSHER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer,
For the Respondent: Mr S Tariq, legal representative, West London Solicitors Ltd

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Lebasci, promulgated on 20 August 2019. Permission to appeal was granted by Upper Tribunal Judge Canavan on 21 January 2020.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. On 24 May 2018, the respondent sought leave to enter the United Kingdom under Appendix FM, as the partner of Sukhraj Kaur Bal, a British citizen whom he married in India in 2015. Hitherto, the respondent entered the United Kingdom clandestinely during 2005 and remained in the United Kingdom without leave until 18 November 2015, when he voluntarily returned to India. While in the United Kingdom, the respondent used the name Sandeep Singh Sidhu. A previous application made for leave to enter the UK as a partner was refused on 14 March 2016 and his appeal against that decision was unsuccessful.

4. In refusing the application on 20 November 2018, an Entry Clearance Officer considered the respondent's history and was satisfied that he had "*previously contrived in a significant way to frustrate the intentions of the Immigration Rules*." Reference was made to his illegal entry, using an assumed identity, working without leave, absconding and residing in the UK for a decade without seeking to regularise his stay. The ECO considered that the respondent's exclusion was conducive to the public good and refused the application under EC-P.1.1(c) of Appendix FM, with reference to S-EC-.1.5. Otherwise, it was accepted that the respondent met the eligibility, relationship, financial and English language requirements. In assessing whether there were any exceptional circumstances, the ECO considered the medical evidence relating to the sponsor but was nonetheless satisfied that the interference with family and private life was proportionate. It was noted that at the time the respondent met the sponsor, he had been in the UK for 9 years without valid leave and it was reasonable to assume they knew the precarious nature of his stay. Reference was made to the comments of the judge as to the respondent's behaviour when his previous appeal on the same basis was being considered. The ECO was of the view that the relationship could continue through messaging, calls and visits and that there were no exceptional circumstances to suggest the sponsor could not join him in India.

The decision of the First-tier Tribunal

5. The judge accepted that the respondent could not meet the suitability criteria. Thereafter, she set out the findings of First-tier Tribunal Judge Lewis but found that they did not preclude genuine contrition by the respondent for his past behaviour. Mention was made of the sponsor's sister who has a disability as well as the deterioration of the sponsor's mental state. The judge concluded that the sponsor would "*feel unable*" to join the respondent in India and thus they would be unable to enjoy their married life together. The effect of the Secretary of State's decision was said to amount to a disproportionate breach of the family life of the respondent and his sponsor.

The grounds of appeal

6. The grounds were twofold. Firstly, it was argued that the judge lowered the threshold of insurmountable obstacles and that her findings were in conflict with the guidance given in *Agyarko* [2017] UKSC 11. Secondly, it was said that the judge did not take the findings of the previous judge as a starting point and appeared to have considered the matter afresh, in circumstances where the facts were fundamentally the same.

7. Permission to appeal was granted on the basis sought. In addition, the judge granting permission made the following comment:

"it is also arguable that there may not have been adequate scrutiny of the weight to be given to public interest considerations in light of the findings made by the previous First-tier Tribunal and the judge's own finding that the appellant's conduct justified refusal under the 'Suitability' criteria."

8. The respondent's Rule 24 response was received on the day of the hearing and established that the appeal was opposed. Essentially, it was argued that the issue of insurmountable obstacles was no more than a relevant factor in considering Article 8 outside the Rules, considering *GM (Sri Lanka)* [2019] EWCA Civ 1630 at [48]. It was further argued that the First-tier Tribunal gave adequate and proper consideration to the public interest.

The hearing

9. Ms Everett relied on the Secretary of State's grounds of appeal as well as the grant of permission. She argued that the judge failed to provide adequate reasons for finding there were insurmountable obstacles to family life taking place in India. Furthermore, the judge did not give consideration to the public interest on the basis of the previous judge's findings but made findings solely based on future reoffending. Ms Everett rejected the suggestion that the test under Article 8 outside the Rules was less onerous to that under the Rules.

10. In response, Mr Tariq emphasised that the judge had dismissed the appeal under the Rules and that the issue of insurmountable obstacles was part of that assessment. Referring to *GM*, he argued that it was wrong to say that a failure to qualify under the Rules meant that the claim must fail outside the Rules and that there was no need for a unique feature. Mr Tariq argued that the respondent's case could be distinguished from that of the claimants in *Agyarko* [2017] UKSC 11. The judge had mentioned Hesham Ali {201]6 UKSC 60 at [28], taken into account that the sponsor's sister had learning difficulties and there had been a sufficient balancing exercise.

11. In closing, Ms Everett argued that the judge when conducting the proportionality assessment at [39] onwards says that the sponsor feels

unable to join the respondent and they are unable to enjoy their married life in India. There was not enough emphasis on the public interest and an inadequate Article 8 consideration.

12. At the end of the hearing I announced that the First-tier Tribunal made material errors of law and that the decision was therefore set aside. I give my reasons below.

Decision on error of law

13. In one brief paragraph, the judge allowed the appeal on Article 8 grounds outside the Rules, principally because the sponsor "*would feel unable*" to go to India for dietary reasons and also owing to her close relationships with her disabled sister and parents in the UK. The judge did so without consideration of the test approved in *Agyarko* at [60]:

> *"It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.*

14. While it was not necessary for the judge to cite *Agyarko*, it was not necessary for her to apply it. There is no indication that she did so. The phrase "*unjustifiably harsh consequences*" appears nowhere in her findings. Consequently, the judge materially erred in arriving at her conclusions without assessing whether this test was met.

15. At [38], the judge very briefly mentioned the public interest and made a passing reference to the respondent's immigration history. Yet, in carrying out the balancing exercise at [39], the judge mentioned only factors on the respondent's side of the balance, such as that his wife felt unable to join him in India, that the respondent would not pose a future risk and the strength of the various family relationships. All were relevant factors, but in failing to balance them against the factors set out in section 117B of the 2002 Act, the Entry Clearance Officer's concerns, the previous findings

under paragraph 320 and the judge's own findings regarding suitability, she materially erred.

16. Lastly, while the judge summarised the previous judge's findings and provided an extract from *Devaseelan*, she did not demonstrate that she took the previous decision as a starting point when conducting her findings in relation to Article 8 outside the Rules. What the judge said at [37] was that she had taken Judge Lewis' determination "*into account*." This was insufficient given the previous findings made just two years earlier as to the appellant's conduct, credibility and contrition.

17. For the foregoing reasons, the judge's decision and reasons is unsafe and is set aside, with no findings preserved.

18. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is my view that the respondent has yet to have an adequate consideration of his human rights appeal at the First-tier Tribunal, in that the suitability issue was inadequately challenged on his behalf at the previous hearing. I had no confidence that it would be adequately addressed by the representative from West London Solicitors Ltd if I proceeded immediately to remaking this appeal. I suggested to Mr Tariq that counsel be instructed to assist with this appeal. I consider that it would be unfair to deprive the respondent of such assistance.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Newport, with a time estimate of 2 hours by any judge except First-tier Tribunal Judge J Lebasci.

Signed: Date: 6 March 2020

Upper Tribunal Judge Kamara