



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

Appeal Number: UI-2021-001488
(HU/50051/2020); IA/00220/2020

THE IMMIGRATION ACTS

**Heard at: Field House
On: 29 July 2022**

**Decision & Reasons Promulgated
On: 28 September 2022**

Before

**UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE COTTON**

Between

**PETER RAMANBHAI PARMAR
(anonymity direction not made)**

Appellant

and

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

Respondent

**For the Appellant: Mr G Dingley of Counsel, instructed by Chancery
Solicitors**

**For the Respondent: Mr D Clarke of Counsel, instructed by the Home
Office**

DECISION AND REASONS

1. The appellant is a national of India, born in 1981. He appeals with the permission of the Upper Tribunal against the decision of the First-tier Tribunal dated 10 June 2021 to dismiss his human rights appeal.

Background

2. The appellant entered the UK in October 2007. He arrived on a student visa which expired in July 2009. He made an application for post-study leave to remain in October 2008 which was refused in February 2009. A further such application was made in July 2009 and refused in October 2009. On 29 December 2019 he made an application for leave to remain as a spouse. That application was refused on 17 June 2020, in part on grounds of suitability arising from his reliance upon false documents in relation to a previous application and also on the basis of there being no insurmountable obstacles to family life with his wife continuing in India. The respondent considered the appellant's removal from the UK to be proportionate.
3. The appellant appealed that decision to the First-tier Tribunal. He claimed that the respondent's decision improperly interfered with his rights to a private and family life. He had been in the UK for over 13 years by the time the First-tier Tribunal (FtT) determined the appeal, and he had been in a relationship with his wife since March 2019. They married in February 2020. The main issue between the respondent and appellant in the First-tier Tribunal was the question of insurmountable obstacles on return.
4. In a reasoned decision promulgated on the 10 June 2021 the FtT dismissed the appeal.

Appeal to the Upper Tribunal

5. The appellant advanced three grounds of appeal at the permission stage which we paraphrase here:
 - a. That the FtT failed properly to assess whether the 'insurmountable obstacles' test was met and did not make the necessary factual enquiry into the circumstances of the appellant and his wife;
 - b. The FtT erred in law in finding a requirement to give little weight to family life formed whilst the appellant's immigration status was precarious; and
 - c. The FtT erred to engage with the *Chikwamba* principle, this being the principle that it is disproportionate to require someone to leave the UK simply to make an application for leave that is bound to succeed (*Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40)
6. Permission to appeal was granted by the Upper Tribunal on the first ground on 7 March 2022. Further arguments on the other two grounds were not excluded by the judge granting permission.

7. On 5 April 2022 the respondent sent a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In effect, she agreed with the first ground of appeal.
8. When the case came before us Mr Clarke and Mr Dingley informed us that, while the Rule 24 notice had not been passed to Mr Dingley ahead of the hearing, they were both ready to proceed with a re-making hearing, it being agreed that the first ground was made out, that the FtT had accordingly erred in law and that the decision was to be set aside and re-made. We therefore proceeded to the re-hearing.

The re-hearing

9. The appellant gave evidence, adopting his statement of 13 April 2021 and was cross examined.
10. He states that after appealing the respondent's refusal for leave made in October 2009 he was unable to make any further application because he had been "*found to [have] breached immigration rules by using deception and/or false representation*". He met his wife in December 2011, became good friends who share hobbies, friends, social values and a devoted Christian faith. They started a relationship in March 2019 and moved in together in April 2019. They married in February 2020. His wife is now a British Citizen.
11. His evidence is that after living in the UK for over 14 years all his social, cultural and economic commitments are in the UK and he considers the UK his home. He and his wife regularly attend Cultural Centres and take part in activities. He has several UK-based friends and has a strong bond and relationship with local families as he is an active member of the local community. Similarly, his wife has established a private life through her work, friends and church.
12. Neither he nor his wife have anywhere to live in India and his wife has never lived in India. The appellant states that it would be really difficult for him to find a job in India where he would fit in. He has no social network there and diminishing ties, with no relative or family member in India to support him financially and no friends in a position to support him
13. In cross examination he stated that his parents had taken a loan out to fund his studies in the UK and that he no longer has regular contact with them. He has lost contact with them because he has not paid the money back. He is aware of his family in India's current living arrangements because he contacted his sister after the last Tribunal hearing. His father is retired with no income. It would be difficult but not impossible for his family to put him up for a short time. His wife's family live in India in a one-bedroom house. He is not sure they could assist him financially in the short term as he has not asked them, having never met them.

14. He did not complete his MBA studies and did not return to India because he “*wanted to do something here in the UK*”. He wanted to start his own business. He is a graduate in business (gained in India) and has gained qualifications in the UK in bar management, food safety and has done a personal licence course relating to holding an alcohol licence.
15. He agreed that he could use his degree in commerce to obtain employment were he to return to India, albeit there have been some years passed since he obtained that qualification. He has not looked into the cost of accommodation in India and has not approached any potential employers in India.
16. The appellant’s wife gave evidence, adopting her statement of 13 April 2021 and being cross-examined. Her witness statement adopts her husband’s as a true account. She has lived in the UK for 14 years and is now a British Citizen. Her account of how they met and how their relationship grew mirrors his account and she describes how she considers herself to be the most fortunate person in this world to have him in her life. She works as a care worker as a team leader and also works in different care homes when they need extra support. She has worked hard to further her career.
17. If the appellant were removed to India she is certain that it would be really difficult for both of them to find jobs and fit in and would cause irreparable damage to their family life in the UK. There is a lack of opportunities in India and they have a deficiency of social networking and no private life in India, along with diminishing ties there.
18. In cross examination she told us that she has a masters degree in HR management and a masters degree in commerce. She was aware of her husband’s immigration status by the point their relationship started. Her parents are not financially stable to assist on return to India. She has made inquiries into rent and work opportunities in India but agreed that was not in evidence. She would be able to get a job in India but she did not know how long it would take to find one.
19. She has a mortgage in the UK and has built her life and career here. She is no longer an Indian citizen and needs a visa to go to India.
20. The other documentary evidence relates to issues that were live in front of the FtT but are not under consideration by us. The genuineness of the relationship between the appellant and his wife is not disputed.
21. Mr Dingley began his submissions by outlining a shift in the appellant’s case. He accepted that the appellant’s case cannot succeed under the Immigration Rules. He invited us to consider the appellant’s case in line with the approach taken in *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129 (IAC) from [92].

22. *Younas* considers how the assessment of the public interest and proportionality of removing an appellant may be approached in circumstances where the appellant will be granted entry clearance to re-enter the UK within several months of their removal ('the Chikwamba principle').
23. The first question for us to consider is whether temporary removal from the UK would interfere with the appellant's family life to engage art 8(1). The appellant and his wife have a long-standing relationship and have been married for some time.
24. The second question is whether entry clearance would be granted. The burden is on the appellant to prove this on the balance of probabilities. Mr Dingley submits that the appellant satisfies the Immigration Rules, save for his immigration status.
25. Third, Mr Dingley submits that it would not be in the public interest to require the appellant to leave the UK in order to make the application as this would take up to 16 weeks and would cost money. The appellant does not have good contact with family in India and he would be separated from his wife.
26. Fourth, whether the interference with the appellant's and his wife's private and family life represented by him temporarily leaving the UK would be proportionate. Mr Dingley submits that it would be disproportionate.
27. Mr Dingley submits that the appellant speaks English and has the financial support of his wife, so he would not be a burden to the state if he were to not be employed for a short time.
28. In relation to considerations under s117A-D of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), Mr Dingley submits that the appellant has been in the UK for some time and has made efforts to regularise his immigration position. He submits that we should also take into account that the appellant's wife is a British Citizen who would require a visa to enter India. However, this is not a case where the couple would be returning to India, rather the question is whether it is proportionate for the appellant to return in order to make an application for leave to enter the UK.
29. For the respondent, Mr Clarke addressed us first on the evidence relating to accommodation and employment opportunities in India. He submitted that there is no evidence before us of what enquiries have been made of employment opportunities for the appellant in India. Both the appellant and his wife are educated to degree level and the appellant's wife works in the UK.
30. Further, both the appellant and his wife have family in India. Mr Clarke submitted that there are tensions in the evidence on whether the appellant has contact with his family and that this tension shows an

attempt by the appellant to distance himself from the potential safety blanket he has in India.

31. The Supreme Court in *R (Agyarko) v The Secretary of State for the Home Department* [2017] UKSC 11 found that whilst the entitlement of a British Citizen (such as the appellant's wife) to live in the UK is an important right, it does not entitle them to insist that their non-national partner should live in the UK, when that partner may lawfully be refused leave to enter or remain [68]. The respondent is entitled to create rules designed to protect the borders of the UK.
32. With regards to the question of the appellant's wife entering India, there is no expert evidence on whether (or why) there would be a bar on her entering India with a visa. The question of whether there would be difficulties is a matter of Indian law on which we would need to have received expert evidence before we could be asked to rely on how foreign law operates.
33. Turning to submissions on the test outside the rules, Mr Clarke submitted that there would be no unjustifiably harsh consequences were the appellant to be removed to India. The *Chikwamba* principle is not to be seen as a determining factor, rather it is a feature to be taken into consideration (*Hayat (nature of Chikwamba principle) Pakistan* [2011] UKUT 00444 (IAC) at [23-34]). It does not automatically trump anything on the state's side, such as poor immigration history. In the current case the appellant has a poor immigration history. He had been implicated in fraud as part of his previous immigration appeal and he did not leave the UK when he lost that appeal. He has been in the UK unlawfully as a result. Mr Clarke submitted that the appellant fails to meet the test as set out in *Younas* and that the factors in s117B of the 2002 Act should be dealt with by giving little weight to the appellant's private life (of which there is no evidence save for attending some courses) and treating his ability to speak English as weighing neutrally.

Analysis and findings

34. Mr Dingley conceded that the appellant could not meet the requirements of the Immigration Rules. That is clearly the case and we consider that the evidence demonstrates that there would be no insurmountable obstacles to family life continuing outside the UK.
35. The evidence relating to the ability (or otherwise) of the appellant to find accommodation and employment were he to be returned to India is relatively limited. He agreed in cross examination that there is no evidence of having approached any companies with a view to seeing what work might be available to him, nor is there evidence of him researching the cost of accommodation were he to be returned. His evidence was that his parents live with his brother and his family and that they would be able to put him up for a short time, although this would be difficult. The appellant is a university graduate and has gained some further training in

the hospitality sector whilst in the UK. We find that the evidence does not demonstrate that he would be unable to find employment in a reasonable time period if returned to India. Further, the evidence shows that he would have the ability to stay with family on return while he makes an application for leave to enter the UK and while he finds employment to support himself.

36. The appellant's position is that his wife would need a visa to enter India as she is a British Citizen and is no longer a citizen of India. Although this might be their understanding, whether she would be allowed to enter India is a matter of Indian law. We agree that without more authoritative evidence on the question, there is an insufficient evidential basis for us to conclude the appellant has proved his position on this aspect of his case.
37. Whilst we conclude that removal to India would present some disruption, this would not amount to "insurmountable obstacles" within the meaning of section EX of Appendix FM to the Immigration Rules. The requirements of the rules are therefore not met.
38. We go on to consider Article 8 outside the rules in line with *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, including application of the test in *Chikwamba*, and the approach taken in *Younas*.
39. We accept that the appellant has a family life in the UK consisting of his marriage to his wife and their life together. Equally, she has a family life with the appellant. In terms of the appellant's private life, we agree with the submissions of the respondent that the evidence of the appellant's private life is limited and, aside from his relationship with his wife, lies primarily in his previously undertaking courses to prepare him for employment.
40. We are satisfied that if the appellant were to be removed from the UK (even temporarily) his removal would interfere with the family life that we have found to exist. The appellant and his wife would be able to maintain contact with each other, but this would not remove the interference which is sufficient to engage their Article 8(1) rights. It has not been suggested that the appellant's removal would be otherwise than in accordance with the law and we find that it would be in accordance with the law and Immigration Rules.
41. Turning to proportionality, we consider the question of the appellant being required to return to India and make an entry application from there in accordance with the Immigration Rules. We have regard to Mr Dingley's reliance upon *Chikwamba* in that respect. As to whether an application for entry clearance from abroad would be granted, we find that, whilst the relevant immigration rule requires the appellant to not be in the UK in breach of immigration laws (Appendix FM para E-LTRP.2.), if he were to leave the UK to make the application, he would no longer be in the UK in breach of immigration laws. With allegations of dishonest conduct now spent, it seems to us that the appellant would more likely than not satisfy

the requirements of the Immigration Rules if applying from India. Of course, this would be a matter for the respondent to consider afresh, should an application be made from outside the UK.

42. In relation to whether there is a public interest in the appellant being required to leave the UK to make the application, we take into account his poor immigration history. He entered the UK on a student visa but has been found to have used a false document in support of a previous application and has been in the UK without leave since February 2009. In our view this is a significant amount of time, and the public's trust in the effectiveness of immigration control would be undermined if a person is able to ignore the requirement to have leave to be in the UK. This is not minimised by our finding that he is likely to be granted leave to enter once returned to India. We assess that the maintenance of effective immigration controls is a strong public interest factor.
43. In the appellant's favour when assessing proportionality is the relationship he has formed with his wife, who is a British Citizen. The relationship is given little weight when it was at a point that the appellant was in the UK unlawfully (section 117B(4) of the 2002 Act). The appellant's wife (she told us) was aware of his immigration status by the time their relationship developed beyond a friendship. We keep in mind that she would likely remain in the UK (due to work commitments) if he were to be removed to India and to make an application for leave to enter the UK, which increases the impact on family life that the appellant's removal would have.
44. We find there is very little evidence of him having a private life in the UK and this little evidence can itself carry no more than little weight given it was established when his immigration status was (at best) precarious (section 117(5) of the 2002 Act). The weight it does carry is in the appellant's favour.
45. The appellant speaks English and we consider this to carry a neutral weight, as does the fact that his wife's financial support makes him financially independent (section 117B(2) and (3) of the 2002 Act).
46. In our analysis, the appellant would have accommodation (with his brother's family and his parents) available to him for a while on return. The balance of the evidence is that he would be in a position to obtain employment, given his education and training.
47. Against the factors in the appellant's favour we weigh the maintenance of effective immigration control as being in the public interest (section 117B(1) of the 2002 Act). As discussed above, we assess that the public interest in the maintenance of effective immigration control is strong in this case.
48. We balance the factors in favour of the appellant's case and those against it. We conclude that requiring the appellant to leave the country

to make an application for leave to enter is both necessary in a democratic society and proportionate.

Decision

49. The decision of the First-tier Tribunal is set aside for material error of law.
50. The decision in the appeal is remade as follows: the appeal is dismissed on human rights grounds.
51. There is no order for anonymity.

Signed D Cotton

17 August 2022

Deputy Upper Tribunal Judge Cotton