



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

Appeal Number: UI-2022-003424
HU/56660/2021; IA/15624/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 15 September 2022**

**Decision & Reasons Promulgated
On 30 November 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**BALVIR SINGH GILL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Swain, Counsel, instructed by Eagles Solicitors
For the Respondent: Ms A Everett, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India. His date of birth is 28 March 1973.
2. On 14 July 2022, the First-tier Tribunal granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Malcolm) to dismiss his appeal against the decisions of the SSHD to refuse his application under Appendix EU of the Immigration Rules (IR) and the decision to refuse his application on human rights grounds.

3. The Appellant's is that he entered the UK illegally on 12 May 1999. He was detained on 18 January 2020. On 20 January 2020 he made an application for leave to remain (LTR) on human rights grounds which was refused on the 20 November 2020. He made an application under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on 16 December 2020 which was refused on 28 February 2021. On 3 June 2021 he made an application under the EU Settlement Scheme (EUSS). This application was refused on 10 September 2021. On 21 September 2021 he applied for LTR as a spouse. This application was refused on 19 October 2021. The two latter decisions of the SSHD are the decisions which were the subject of the appeal before Judge Malcolm. The First-tier Tribunal dismissed appeals against both decisions.

The decision of the First-tier Tribunal

4. At the hearing before Judge Malcolm the judge heard evidence from the Appellant, his wife (Harjinder Kaur), friend (Sukhjinder Singh) and the Appellant's cousin (Gurwinder Singh). The judge made findings at [92] - [130]. The judge noted that it was accepted by the Appellant that he had entered the UK illegally and that he had never had lawful leave to remain. His wife is an Italian national who came to the UK in January 2019 and since that date they had lived together. It was also accepted that he and his wife had a religious marriage ceremony in 2015.
5. In relation to the EUSS decision, the judge noted that the application was refused by the SSHD because the Appellant did not have relevant documents and that this was accepted by the Appellant's representative (see [95]). The judge at [96] recorded that it was accepted that the Appellant and his wife were in a durable relationship and that in the decision which was made in response to the Appellant's application on 16 December 2020 under the 2016 Regulations, which was refused on 28 February 2021, the SSHD should have issued a relevant document to the Appellant.
6. The judge noted that there was no right of appeal against the decision on 28 February 2021 however, the Appellant did not seek to judicially review it. The judge stated as follows:-
 - "98. If I am correctly understanding the argument which has been put forward the submission is that the decision under the EUSS Scheme is in breach of the Withdrawal Agreement, this relies on the failure of the respondent to consider the issue of the durable relationship when dealing with the December 2020 application, I do not consider this is a matter which I can deal with in the context of the current appeal.
 99. In the decision under appeal under the EUSS Scheme, I consider that the appellant does not meet the requirements and do not consider that it is appropriate to give further consideration to whether there has been a breach of the Withdrawal Agreement given that the argument in support of this relies on a prior decision which was made in February 2021 on the application

made in December 2020. Whilst there was no right of appeal, the appellant did not take the opportunity to seek Judicial Review of this decision.”

7. The judge considered the Appellant’s appeal under Article 8 ECHR against the decision of 19 October 2021. The judge engaged with the argument advanced by Mr Slatter in his skeleton argument (see [100]) that the Appellant had lived in the UK since 12 May 1999. The judge stated as follows:-

“101. Although the appellant claims to have been in the UK since 1999, in the absence of supporting evidence, I am not satisfied that the appellant has been resident in the UK for a period in excess of 20 years. I have taken into account the evidence and information presented, however I do not accept from the available information and evidence that the appellant has been resident in the UK since 12th May 1999.”

8. The judge recorded the Home Presenting Officer’s submissions in respect of the appeal on human rights grounds against the decision of 21 October 2021. The judge recorded that the Home Office Presenting Officer submitted that there were credibility issues. The judge made a note of those at [56]. He recorded that the HOPO submitted that it was not credible that the Appellant and the Sponsor had difficulties on return to India because the Appellant’s mother did not like the Appellant’s wife, an issue that had not been raised in their witness statements. The HOPO queried the difficulties that the Appellant would face on return to India and whether they would meet the high threshold of very significant obstacles. The HOPO submitted that the evidence relating to the Appellant’s mother was a fabrication and that there was no evidence to support that the Appellant would be living in poverty. The HOPO submitted that the Appellant could work in India and even if the evidence relating to the Appellant’s mother was correct, it would not present an obstacle. It was submitted that the Appellant did not meet the IR and that there would be no unjustifiably harsh consequences.

9. The judge recorded Mr Slatter’s submissions, including the following:-

“71. Whilst the position is accepted that the appellant was unable to provide the required documents, he pointed out that what is significant is that the respondent did not engage with this issue properly when the application was made in December 2020 and did not give consideration to the durable relationship. The decision of February 2021 simply was a refusal, the decision which did not give proper consideration to this matter and was refused without a right of appeal.

...

78. The issue of credibility raised by Mr Graham is based on the evidence given by the appellant and his wife concerning the appellant’s mother. Whilst he accepted that this information should have been in the statements, this does not mean that the information is not true.

...

84. On the question of whether the appellant has been in the UK for twenty years, no issue has been taken with the evidence of the witness who confirmed that he had known the appellant in the UK since 2003.
85. Mr Slatter suggested it is more likely than not that the appellant has been in the UK since May 1999.
86. An explanation has been given as to why he was undocumented prior to 2009. He also highlighted the information set out in his Skeleton Argument at paragraph 3.2.2 and submitted that the evidence provided does discharge the burden of proof.
87. He accepted that there is more difficulty in considering the issue of very significant obstacles.
88. The appellant left India in 1996. This he submitted is consistent with the passport provided by the appellant."

10. The judge stated the following:-

"94. Whilst the appellant claims to have been in the UK since 1999, he has been unable to provide evidence to support this, the only documentary evidence is from 2009 although I did note the evidence of the witness stating that he first met the appellant in the UK in 2003.

...

"101. Although the appellant claims to have been in the UK since 1999, in the absence of supporting evidence, I am not satisfied that the appellant has been resident in the UK for a period in excess of 20 years. I have taken into account the evidence and information presented, however I do not accept from the available information and evidence that the appellant has been resident in the UK since 12th May 1999.

...

"104. I find that the appellant has not lived continuously in the UK for at least 20 years and accordingly sub-Paragraph (iii) does not apply nor do Sub-Paragraphs (iv) and (v).

...

"107. The appellant has spent the majority of his life in India. By his own evidence he has family members in India albeit, the appellant's evidence is that there would be difficulty in family members supporting him.

108. Both the appellant and his wife also introduced evidence of difficulties which the appellant and his wife have with the appellant's mother in that his mother does not approve of his wife.

109. I have some reservations on the evidence given as to the difficult relationship between the appellant's mother and his wife, even if I were to accept that such difficulties do exist, I can see no reason why this would pose a major difficulty for the appellant and his

wife if they required to return to India. The appellant has made a life for himself in the UK, his wife has been living with him since 2019.

110. The appellant has adapted to living in the UK. He stressed on more than one occasion his inability to return to life in India stating that he was not familiar with the system. He has however been able to make a life for himself in the UK. Whilst I accept there maybe some difficulties (and indeed possibly also family difficulties) I do not consider that such difficulties as the appellant could encounter would meet the test of very significant obstacles.
 111. I consider it reasonable to assess that he is familiar with the lifestyle and customs of his home country. By his own evidence, he has family members in India, his evidence being however that if he were required to return this would cause difficulties for his family both at home and in India as at present he and his wife send financial support to his family in India.
 112. Whilst the appellant gave evidence that he considered that it would be difficult to obtain employment in India I considered that his evidence on this was somewhat vague and evasive. Whilst there may be some difficulty in obtaining employment, the appellant has indicated a willingness to work in the UK and presumably could also work in India. I consider it reasonable to assess that he should be able to reestablish himself and reintegrate into life in India.
 113. Accordingly, I do not consider that such difficulties as the appellant could encounter would meet the test of very significant obstacles.
 114. I find that the appellant does not meet the requirements of the Immigration rules. I require to consider if there is anything which has not already been adequately considered in the context of the Immigration Rules which could lead to a successful Article 8 claim.”
11. The judge set out Article 8 of the ECHR at [115] and the relevant questions with reference to R v Razgar v SSHD 2004 UKHL 27 at [116]. The judge set out s.117B of part 5A of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) in the same paragraph before identifying the issue as that of proportionality and reaching conclusions at [118]. The judge at [120] recorded that Mr Slatter indicated that no great reliance was being placed on paragraph EX.1. In any event he went on to consider insurmountable obstacles to family life, finding that the evidence did not support that there would be insurmountable obstacles to family life continuing outside the UK.
 12. At [121] the judge took into account that the Appellant’s wife had not lived in India for a number of years, however, he said that it was
“reasonable to assume that she, like the appellant, would be familiar with the lifestyle and culture of her home country and that such difficulties as could be encountered in potentially finding employment are not likely to meet the test of insurmountable obstacles.”

13. The judge said that if the Appellant's wife chose to return to India with him, she has family there and it could be "assumed" that they could help them if necessary. The judge took into account that the Appellant had not had lawful leave in the UK.
14. At [124] the judge stated that if the Appellant is required to leave the UK, to make an application for entry clearance and his wife chose to stay here, then this would inevitably mean that the parties would be separated. However, the judge went on to find as follows:-
 - "125. It is clear however that following their marriage in 2015, with the exception of a period of two months around the time of the marriage, the parties did not live together until 2019 and whilst both have stressed their reliance on each other, it is also clear that the appellant's wife since 2011 was aware of the appellant's immigration status and that both parties clearly have been aware that the appellant did not have lawful leave to remain in the UK.
 126. Mr Slatter submitted that it is clear that entry clearance would be granted and therefore reliance has been placed on the case of **Chikwamba**.
 127. In carrying out the required proportionality exercise and taking account the case of **Chikwamba** I am not satisfied that the public interest in the appellant's removal is outweighed.
 128. I also do not consider that the available evidence supports a finding that the decision to remove the appellant would result in unjustifiably harsh consequences for either the appellant or his wife. I have also taken into account the status of the appellant's wife.
 129. I have given careful consideration to all of the available information and evidence and in carrying out the necessary balancing exercise, I do not find that the appellant's circumstances outweigh public interest considerations nor do I consider that the evidence as presented allows me to find that there are exceptional circumstances which would render refusal a breach of Article 8 of ECHR because it would result in unjustifiably harsh for the appellant or his wife."
15. I heard submissions from the representatives. Ms Everett relied on a Rule 24 Response and Mr Swain relied on the grounds drafted by Mr Slatter who appeared before the First-tier Tribunal.

The Grounds of Appeal

Ground 1

16. The lengthy grounds of appeal assert, insofar as the decision under the IR with reference to Appendix EU, is concerned that the judge's decision not to engage with the ground of appeal provided in Regulation 8(2)(a) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Exit Regulations") of whether the decision breaches any right that the Appellant has by virtue of the Withdrawal Agreement was perverse and

unlawful. The Tribunal was required to determine the ground of appeal under Regulation 8(2). The Appellant relied on Article 18.1 (o) of the Withdrawal Agreement in the context of the appeal against the decision that was the subject of the appeal. Article 18.1 (o) reads as follows:-

“the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;”

17. The thrust of the Appellant’s argument before the First-tier Tribunal was that the Appellant’s earlier application under the 2016 Regulations was not properly considered in that the SSHD failed to consider whether the Appellant was a durable partner and to afford him a right of appeal under the EEA Regulations. Insofar as it was lawful for the SSHD to require the Appellant to have a relevant document, the SSHD could have helped him prove his eligibility by treating him as if he one as a result of her own errors when considering his previous application.
18. In respect of the EUSS matter, Mr Swain accepted before me that Celik (EU exit; marriage; human rights [2022] UKUT 00220 presented him with difficulties. Nonetheless he proceeded to make submissions relying on Mr Slatter’s skeleton argument.
19. The decision of the First-tier Tribunal and the Grounds of Appeal were drafted before the decision of the Upper Tribunal Celik (EU exit, marriage, human rights) [2022] UKAIT 00220 in which the Upper Tribunal decided as follows:-
 - “(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P’s entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
 - (2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens’ Rights) (EU Exit) Regulations 2020 (“the 2020 Regulations”). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
 - (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.”
20. In this case the Appellant had no substantive right because his entry and residence had not been facilitated before 11pm GMT time on 31st December 2020 and neither had he applied for such facilitation before that

time. As the Appellant in Celik could not invoke the concept of proportionality in Article 18.1(r) of the WA or the principle of fairness, this Appellant could not rely on Article 18.1(o) of the WA. The appeal could not succeed under the IR with reference to Appendix EU. In my view Mr Slatter was seeking to appeal the earlier decision under the 2016 Regulations; despite there being no jurisdiction for the Tribunal to consider this.

21. There is no material error. The appeal could not succeed under the IR with reference to Appendix EU.

Ground 2

22. The second ground of appeal concerned paragraph 276ADE(1)(iii) of the IR and asserted that the judge gave inadequate reasons for the finding at [101] that the requirement (that the Appellant has lived continuously in the UK for at least 20 years) was not met. The judge recorded at [94] the evidence of Gurwinder Singh who stated that he had met the Appellant in March 2003. The judge noted at [88] of the decision that the Appellant's previous passport was issued in 1996 and it was renewed in 1997 and 1998 by the Indian Embassy in Rome. This was consistent with the Appellant's account but the judge failed to record the submission set out in the Appellant's skeleton argument (at [3.2.2]) concerning the date and method of entry to the UK and that it was consistent with the previous applications. The judge did not make adverse credibility findings relating to the evidence of Appellant or his witness and it was erroneous therefore for the judge to conclude that the evidence was insufficient to discharge the burden of proof.
23. The ground does not identify an error of law. The judge was entitled to find that the evidence was insufficient to discharge the burden of proof. A proper reading of the judge's findings discloses that he did not find the Appellant's evidence credible on the issue of how long he had been in the United Kingdom because of the lack of corroboration. There was, by any account, an absence of supporting evidence. Whilst there is no specific finding in relation to the evidence of the Appellant's witness, Sukhjinder Singh. His evidence was of limited value. He stated he had known the Appellant since 2003. Whilst his evidence was that he "recalls the appellant telling him that he first came to the UK in 1999" and that "so far as he is aware in the time that he has known the appellant he has not left the UK". This evidence taken at its highest is limited in its support that the Appellant had been in the United Kingdom for a continuous period of twenty years. Whether the witness was telling the truth or not, was not determinative of the issue. What is clear from the decision is that the judge did not find that evidence of the Appellant on this issue credible, taking into account all the evidence including that of the witness. This was a conclusion he was entitled to reach.

Ground 3

24. The third ground of appeal is that the judge erred in relation to EX.1(b) read with EX.2. of Appendix FM to the IR (insurmountable obstacles to family life). It is asserted that the judge's conclusions do not take into account that the Appellant's wife suffered domestic abuse in India and that she was a divorcee who was not accepted by the Appellant's family. She had left India in 2005 and had spent the following ten years in Italy. The ground asserts that there was a misdirection because the judge engaged with EX.1(b) after her finding that the Appellant did not meet the requirements of the IR. Mr Swain relied on this ground in submissions. He submitted that the judge did not adequately consider the Appellant returning to India to make an application for entry clearance. He did not take into consider that the Appellant's wife was a victim of domestic violence. Mr Swain initially stated that the Appellant's wife had been granted leave on the basis that she was the victim of domestic abuse, however, he later accepted that this was not the case.
25. A proper reading of the decision discloses that the judge took into account the Appellant's wife's evidence concerning why she did not wish to live in India. While the judge did not specifically refer to her evidence that she had suffered domestic abuse, it would be wrong to say that this was a major feature of the Appellant's case. There is brief mention of it in his wife's witness statement. It is clear from the findings of the judge that there were credibility issues arising from the evidence of the Appellant and his wife concerning their reasons for not being able to return to India. In any event, the ground ignores Mr Slatter's submissions recorded by the judge at [87] and [120].
26. Ground 3 asserts that the judge failed to make a finding on whether the Appellant was likely to be granted entry clearance with the reference to Younas (Section 117B(6)(b); Chikwamba; Zambrano [2020] UKUT 00129. Looking at the judge's decision, he recorded that the Chikwamba point (Chikwamba v SSHD [2008] UKHL 40 was said by Mr Slatter to be his strongest and that there was no real dispute about whether the Appellant would on an application for entry clearance meet the IR.
27. I accept that the decision would have been clearer had the judge first considered the IR, then substantive Article 8 outside of the Rules and finally if necessary procedural Article 8. However, the decision must be considered as a whole. There is no material error arising because it is clear to the reader that the judge dismissed the appeal on substantive Article 8 grounds taking into account the evidence and properly applying s117B of the 2002 Act. The judge considered the SSHD's decision proportionate notwithstanding that the Appellant may meet the IR for entry clearance. He considered the proportionality of the decision on the basis that the Appellant and his wife could both return to and live in India. He factored into the assessment of proportionality, as a matter that may reduce the weight to attach to the public interest, the unchallenged evidence that the Appellant would meet the IR should he make an application for entry clearance. In so far as the substantive Article 8

decision is concerned, I do not find that the grounds identify a material error.

28. The judge was entitled to conclude that the Appellant's wife could return with him to India. Contrary to the grounds of appeal, the judge did not accept the Appellant's evidence nor that of his wife about the length of time he had been here or the circumstances on return to India. The findings are grounded in the evidence and adequately reasoned.

29. The Appellant's appeal is dismissed.

No anonymity direction is made.

Signed *Joanna McWilliam*

Date 27 October 2022

Upper Tribunal Judge McWilliam