



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003810
First-tier Tribunal No:
HU/53782/2021
IA/09867/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PARDEEP KUMAR
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Pipe, counsel instructed by D & A solicitors
For the Respondent: Mr F. Gazge, Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 23 March 2023

DECISION AND REASONS

1. The Appellant is a national of India, born 4 March 1986. He entered the UK with a Tier 4 student visa valid from 1 January 2010 until 7 July 2010 and has remained without leave since the expiry of that visa. He was served with administrative removal papers on 1 July 2018. On 3 February 2020, the Appellant made an application for leave to remain on the basis of marriage to Sandip Kaur, who has indefinite leave to remain in the UK.
2. In a decision dated 13 October 2020, the Respondent refused his application on the basis that: it was not accepted that the eligibility immigration status requirements were satisfied, because the Appellant had not had leave to remain in the UK since his visa expired on 7 July 2010; it was accepted that the Appellant has a genuine and subsisting relationship with the Sponsor but the Respondent did not accept that there were insurmountable obstacles to family life continuing outside the UK. The Respondent did not accept that there would be very significant

obstacles to the Appellant's integration in India, nor that the application disclosed any exceptional circumstances which would result in unjustifiably harsh consequences if the Appellant was refused leave to remain. It was noted that the couple had been undertaking fertility treatment in the UK. The Respondent pointed out that such treatment could continue in India. It was noted that any private life established by the appellant had been done so in the full knowledge that he had been in the UK without leave since July 2010.

3. The Appellant appealed against this decision and his appeal came before First tier Tribunal Judge Hall for hearing on 5 July 2022. In a decision and reasons promulgated on 15 July 2022, the Judge dismissed the appeal. He accepted that article 8 was engaged, with regard to both private and family life [22]; but that the Appellant would not face very significant difficulties if he returned to India nor that there would be very significant obstacles to his integration in India [31]; nor that there would be insurmountable obstacles to family life continuing in India [40]. The Judge further found no exceptional circumstances [42] nor at [44] that the refusal of leave to remain would result in unjustifiably harsh consequences, because the couple could relocate to India, the country of which they are both citizens. At [51] the Judge rejected an argument based on the judgment in *Chikwamba* [2008] UKHL 40 and at [52] he found that the public interest requires an individual with the Appellant's poor immigration history, who has deliberately remained in the UK unlawfully since July 2010, to leave the country and make an application from abroad for entry clearance through the proper channels.
4. An application for permission to appeal to the Upper Tribunal was made on the basis that, the Judge failed to address [85] of the expert psychiatric report as to risk of Sponsor's mental health nor provide adequate reasons for rejecting it and the Judge further failed to attach any weight to the fact that the couple are undergoing IVF and have frozen embryos in the United Kingdom.
5. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Oxlade on 18 August 2022 in the following terms:

"Ground 1, complains that when considering the provisions of EX1(b) the Judge acknowledged [17] that the mental health consequence to the Sponsor of the couple leaving the UK was raised as an argument, but failed to address the opinion evidence [para 85 of the report] referring to the risks to her mental health. Though the Judge refers [37] to this paragraph the Judge has not referred to the prediction of risks to her mental health. This is arguably an error of law to have failed to consider it/to have given adequate reasons why the expert evidence was rejected.

Ground 2 argues that the Judge fails to attach any weight to the fact that the couple are undergoing IVF and have frozen embryo in the UK; however, the obligation rests on the Appellant to adduce evidence to show that these could not be transported to India. Nevertheless, all grounds can be argued.

There is an arguable ground of appeal and so permission is granted on all grounds."

Hearing

6. The appeal came before me for hearing on 23 March 2023. Mr Pipe proceeded to make submissions in line with the grounds of appeal. He drew attention to specific paragraphs of Dr Galappathie's psychiatric report at [20], [32], [33], [46], [61], [69], [73], [75] and [85]. In essence, Dr Galappathie found that the Sponsor had a general anxiety disorder and severe PTSD and that she would still face deterioration in her mental state if she had the support of the Appellant, given her subjective fear of return and the impact of removal from the UK. The background to this was the fact she was subjected to domestic violence by her first husband and then experienced difficulties with her parents due to the fact she had divorced. Mr Pipe submitted that the Judge erred in his assessment of the medical evidence, which showed a very severe situation which refers to a high risk of self-harm and suicide if returned to India. When one considers the psychiatric report, the Judge's finding at [39] insufficiently grapples with the seriousness of the Sponsor's condition, which was not disputed. When one adopts a realistic and practical approach it can be seen that medical evidence demonstrates *prima facie* very serious difficulties and the Judge has not engaged sufficiently with that.
7. In respect of the second ground of appeal, Mr Pipe submitted that, in terms of the couple's attempts to have a child, which has resulted in some embryos being frozen, all would be lost if the Sponsor goes back to India. He submitted that, as evidenced by the psychiatric report, this would clearly have a detrimental impact on the Sponsor's wellbeing; that in any event she is struggling, fearing losing her husband and this should have applied to the consideration of the appeal outside the Rules.
8. In his submissions, Mr Gazge stated that it was apparent from [35]-[39] of the Judge's decision that he considered at the Sponsor's depression, anxiety and PTSD and gave that anxious scrutiny. The Judge found no insurmountable obstacles and found that the Sponsor would continue to have the Appellant's support in India. She is only in receipt of a low dose of anti-depressant medication. He submitted that her issues arose prior to meeting the Appellant. At [34] Mr Gazge submitted that the Judge did take the psychiatric report very seriously and considered it with anxious scrutiny and looked at the Sponsor's mental health in great detail. The Judge has addressed the points and accepted the diagnosis in the psychiatric report and the medication she was taking. At [39] he found there was no mention made in the psychiatric report of the availability of medication in India and the burden of proving that it would not be available in India is on the Appellant. Mr Gazge submitted that the Judge had grappled with all these issues and provided ample reasoning as to why he did not consider this as amounting to insurmountable obstacles.
9. With regard to ground 2, Mr Gazge submitted that, as stated in [39], the burden of proof is upon the Appellant to show that IVF treatment is not available and that the embryos could not be transported to India. He drew

attention to the factual matrix in *Agyarko* [2017] UKSC 11 and submitted that he did not see how this benefited the Appellant's case, given that receipt of IVF treatment is not sufficient to constitute a breach of Article 8.

10. In his reply, Mr Pipe drew attention to [85] of the psychiatric report and Dr Galappathie's finding of severe detrimental impact and the high risk of self harm and suicide. Whilst he accepted that the Judge referred to the psychiatric report, he submitted that it was the Sponsor's condition and distress that is relevant and was not taken into account.
11. I reserved my decision, which I now give with my reasons.

Decision and reasons

12. Mr Pipe's primary submission is that the judge erred in his assessment of the psychiatric evidence set out in the report of Dr Galappathie, a forensic psychiatrist, dated 10.3.22. Dr Galappathie stated as follows at [85]:

"In my opinion, if she was to relocate to India, this would have a severe detrimental impact on her mental state and lead to her suffering from worsening depression, anxiety and PTSD symptoms with a high risk of self-harm and suicide given the high number of risk factors that are present in her case. In my opinion, whether or not the tribunal assess her fears as being objectively well-founded, they are subjectively real and significant and would therefore lead to a deterioration in her mental health. She would be likely to suffer from a deterioration in her depression leading to a worsening low mood, difficulty sleeping, tiredness during the day, loss of interest in activities, poor concentration, memory problems, tearfulness, poor appetite, potential weight loss, worsening anxiety related symptoms, worsening PTSD related symptoms including an increase in her experience of flashbacks and nightmares and a high risk of self-harm and suicide if returned. In my opinion, the deterioration in mental state would still occur if she had the support of Pardeep in India given her subjective fear of being returned and the impact of being removed from her life in the UK where she has lived since 2003."

13. The Judge's assessment of the psychiatric evidence is set out at [34]-[39] of the decision and reasons:

"34. The main issue put forward by the appellant appears to be the sponsor's mental health. Her medical records indicate that she has had treatment by way of antidepressant medication. The only treatment that she is presently prescribed is antidepressant medication in the form of mirtazapine in the form of one 15mg tablet a day which is a low dose, and zopiclone to help her sleep.

35. I accept the diagnosis in the psychiatric report which was prepared following a 90 minute consultation in that the sponsor has severe depression, generalised anxiety disorder and PTSD. The recommendations in the report are that she continue with the antidepressant medication that she currently receives, and she may need psychological therapy in relation

to the PTSD. Her mental health issues appear to have been caused by her first marriage.

36. The recommendation in the psychiatric report is that the sponsor should continue to have stable accommodation and the support of her husband in order to feel safe. She will benefit from the daily emotional support that her husband provides. The report also states that the sponsor is fearful about returning to India because she is a divorcee, and fears she would not be welcomed by her parents and would be persecuted in India. The report at paragraph 85 makes reference to her having lived in the UK since 2003. That is wrong as she has lived in the UK since 2013.

37. Because of the fear that the sponsor expressed to the psychiatrist, the opinion is given that her return to India would have a severe detrimental impact on her mental state. The sponsor expressed no fear of persecution in either her witness statement or oral evidence. She said that she had not been made to feel welcome by her parents when she returned to India in 2015 although she did not return to the UK immediately and spent two weeks with her parents.

38. The only treatment that the sponsor is receiving in the UK for mental health issues is a low dose of antidepressant medication. She has had these mental health issues prior to meeting the appellant. The sponsor has been able to maintain full time work during her time in the UK and was still doing so at the date of hearing.

39. I accept that the appellant and sponsor do not want to live in India. They have made that very clear. I do not accept that the sponsor has any fear of persecution in India. The psychiatrist stated that the sponsor would benefit from having the support of the appellant and stable accommodation. If the couple returned to India, there is no reason why they would not be able to find accommodation, and no reason why she would not have the support of the appellant. No mention is made in the psychiatric report of the availability of treatment for mental health issues in India. The burden of proof is on the appellant, and evidence has not been submitted to demonstrate that any medical treatment required by the sponsor, be it for mental health, or IVF treatment, would not be available in India. I do find it significant that the sponsor is able to maintain full time employment, which involves spending substantial periods of time at work and away from the appellant."

14. I have concluded that the First tier Tribunal Judge erred materially in law in his assessment of the psychiatric evidence. Firstly, despite accepting the psychiatric diagnosis at [35] and at [37] acknowledging that the Sponsor's return to India would have a "severe detrimental impact on her mental state" at no stage does the Judge either acknowledge or engage with the psychiatrist's opinion of the consequences of that diagnosis ie that there

would be a high risk of self-harm and suicide if the Sponsor were to return to India. I find that this clearly constitutes a failure to take account of a material consideration, given that it could, if accepted, found a basis for a finding of insurmountable obstacles to family life in India or exceptional circumstances which constitute unjustifiably harsh consequences for the Sponsor. I note that the Judge found at [39] that the burden of proof was upon the Appellant to demonstrate that medical treatment for the Sponsor's mental health would not be available in India. However, I do not consider that this finding sufficiently addresses the risk of suicide and self-harm, which should have been considered in line with the judgments in *J [2005] EWCA Civ 629* and *Y & Z (Sri Lanka) [2009] EWCA Civ 362*.

15. Secondly, the Judge appears to place weight on the fact that the Sponsor did not express a fear of persecution in her witness statement or oral evidence, but this is, in my view, to misapprehend the Sponsor's account as given to Dr Galappathie, which is that she had a subjective fear of return to India because she was not made welcome by her parents when she visited previously and because of the impact of being removed from her life in the UK. The Sponsor did not say that she feared persecution in India and I find the Judge erred in finding that she did.
16. As to the second ground of appeal, at [28] the judge found that the Appellant and Sponsor have had two rounds of IVF, both unsuccessful and that they have frozen embryos in the fertility clinic in Birmingham Women's hospital. At [39] the Judge held that: "*The burden of proof is on the appellant, and evidence has not been submitted to demonstrate that any medical treatment required by the sponsor, be it for mental health, or IVF treatment, would not be available in India.*" I do not find that the Judge has had no regard to the fact that the couple have undergone IVF. Albeit he did not consider the fate of the frozen embryos if both the Sponsor and Appellant leave the UK, this does not amount to a failure to take account of a material consideration, given that, as the Judge correctly states, it was incumbent upon the Appellant to show that he and his wife would not be able to transfer the frozen embryos to India or otherwise undertake IVF there and there does not appear to have been evidence on those issues before the First tier Tribunal.
17. However, for the reasons set out in [15] and [16] above, I set the decision of the First tier Tribunal Judge aside. In terms of disposal, if an error of law were to be found, Mr Pipe asked me to re-make the decision, whereas Mr Gazge requested a remittal to the First tier Tribunal. Given that evidence as to the current state of the Sponsor's mental health and whether this could be alleviated by treatment in India is key to a proper determination of the issues in the appeal [15. above refers] I have concluded that there should be a further hearing to consider the issues in light of that evidence.

Decision

18. The appeal is allowed to the extent that it is remitted for a hearing *de novo* before the First tier Tribunal.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
(Immigration & Asylum Chamber)