



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001807
First-tier Tribunal Nos: HU/60585/2022
LH/00829/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MOHAMMED IMTIYAZ UDDIN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Maqsood, Counsel, instructed by Reza Solicitors Ltd
For the Respondent: Mr. S. Walker, Senior Home Office Presenting Officer

Heard at Field House on 10 October 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Murray (the "Judge"), dated 20 April 2023, in which she dismissed the Appellant's appeal against the Respondent's decision to grant leave to remain on human rights grounds. The Appellant is national of India who applied for leave on the basis of his family life with his partner, a British citizen.
2. Permission to appeal was granted by First-tier Tribunal Judge Mulready in a decision dated 5 June 2023 as follows:
 - "3. The Judge's reasoning as to whether there are insurmountable obstacles to family life together continuing in India is focused on whether there are insurmountable obstacles to the Appellant's wife moving with him to India. The Judge concludes that whilst it may

be inconvenient for the Appellant's wife to go with him, and she may not want to, this does not amount to insurmountable obstacles. The Judge does not address the question of whether the Appellant's wife will indeed go with him, despite appearing to accept her evidence that if the Appellant had to go to India, she would be lost without him. Nor does the Judge address the effect on their family life of the Appellant's wife staying in the UK and his being removed to India. This is arguably an error of law material to the outcome of the appeal, and so permission to appeal is granted".

3. The Respondent provided a Rule 24 Response in which she opposed the appeal.

The Hearing

4. The Appellant and Sponsor attended the hearing.
5. I heard submissions from Mr. Maqsood, followed by short submissions from Mr. Walker in which he conceded that the decision involved the making of a material error of law. He submitted that the Rule 24 Response had taken a "broad brush" approach and on closer examination he conceded that the Judge had fallen into error in her failure to consider the impact on the Appellant and Sponsor of the insurmountable obstacles that would amount to permanent separation. He submitted that she had erred in failing to consider the impact of permanent separation, and that this went both to the consideration of whether there were insurmountable obstacles under paragraph EX.1(b) as well as to the consideration of Article 8 outside the Rules. He conceded that the appeal should be remitted to the First-tier Tribunal to be reheard afresh.
6. I record that I was surprised at the extent of the concession. However, in the circumstances, I was not prepared to go behind it. I set the decision aside.

Error of Law

7. As was submitted by Mr. Maqsood, the factual premise of the appeal was that the Sponsor would remain in the United Kingdom and would not go to India due to the factors which, it was submitted, amounted to insurmountable obstacles. He submitted that there was a two stage assessment to be carried out under paragraph EX.1.(b) which included both a hypothetical assessment of the Sponsor accompanying the Appellant to India and an assessment of what would actually happen. He submitted that it was incumbent on the Judge to consider that in this case there would be a permanent rupture of family life. The Appellant would not be afforded an exemption from the financial requirements of the immigration rules were he to apply for entry clearance as the Sponsor was only in receipt of ESA, and not in receipt of PIP. The Sponsor would not be able to sponsor the Appellant for the foreseeable future and therefore there would effectively be a permanent separation of the Appellant and Sponsor. He submitted that the Judge had not considered this permanent interference in the proportionality assessment.
8. There was some blurring in the submissions of the Judge's consideration under paragraph EX.1(b) and Article 8 outside the rules, although as I have set out above, it was conceded that the Judge had erred in her approach to both of these.
9. The Judge considers insurmountable obstacles at [21] and [22]. Her focus is on the Sponsor, whether she would be able to move to India, and whether there would be insurmountable obstacles to family life in India. She does not consider whether there would be a permanent separation of the Appellant and Sponsor. Paragraph EX.1(b) and EX.2 provide:

“EX.1(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen [.....] and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”

10. It was submitted that the Judge should have considered the fact that the Sponsor had stated that she had no intention of going to India, and the extent to which this therefore amounted to an insurmountable obstacle to family life continuing in India. I do not accept this. This would negate the need for any consideration of the likely circumstances of an appellant and sponsor were they to move to the country of origin of the appellant, as a sponsor could state that he or she had no intention of leaving the United Kingdom and argue that therefore paragraph EX.1(b) was met. Under paragraph EX.1(b) and EX.2 what is required is an assessment of the likely circumstances for an appellant and his sponsor were they to return to an appellant’s country of origin, and whether those circumstances amount to “insurmountable obstacles to family life continuing outside the UK”. There are situations where circumstances in the United Kingdom could amount to an insurmountable obstacle, for example, a sponsor having caring responsibilities of his or her own in the United Kingdom, but there was no evidence of such circumstances here. It was simply the fact of the Sponsor being unwilling to go to India.
11. It was submitted that the Judge had failed to consider the circumstances of the Sponsor cumulatively, and Mr. Walker conceded that the Judge’s consideration of paragraph EX.1(b) was inadequate. I have recorded that I was surprised by this concession, but in all the circumstances I am not prepared to go behind it.
12. In relation to the wider consideration of Article 8 outside the immigration rules, I find that the Judge did not consider the effect on the Sponsor of the Appellant going to India and leaving her in the United Kingdom. It was submitted at the hearing that the Respondent had considered whether the Carer’s Concession applied to the Appellant in her decision. Although she had considered that it did not apply, it indicated that the Respondent was aware of the level of support given by the Appellant to the Sponsor. It was submitted that the evidence showed that the Appellant provided essential emotional support to the Sponsor and that she was dependent on him. Given that the evidence was that the Sponsor would remain in the United Kingdom, I find that the Judge should have considered the effect on the Sponsor, and on their family life, were the Appellant to leave.
13. The Judge correctly found that the Chikwamba principle did not apply given that the Appellant’s application for entry clearance would not be successful as he would not meet the financial requirements. In these circumstances, a fuller assessment of the proportionality of permanent separation, given the factual matrix that the Sponsor would not go to India, needed to be carried out.
14. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade, I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”

15. With reference to the exceptions in 7(2)(a) and 7(2)(b), and given the Respondent’s concession, there are no findings that can be preserved. Therefore the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

16. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
17. The appeal is remitted to the First-tier Tribunal to be reheard afresh with no findings preserved.
18. The appeal is not to be listed before Judge Murray.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 October 2023