Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30256/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27th August 2014	**On 22nd September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NANCY KANDA

Respondent

Representation:

For the Appellant: Mr M Rana of Counsel
For the Respondent: Mr S Kandola, S.S. Basi & Co Solicitors

DETERMINATION AND REASONS

The Appellant

1. The appellant is a citizen of India born on 1st November 1989 and is the wife of the sponsor Ghurav Sehdev who has indefinite leave to remain in the United Kingdom.

2. She made an application for leave to remain as the partner of her spouse on 12th April 2013 but the application was refused on 2nd July 2013 by the respondent further to E-LTRP.3.1. and E-LTRP.3.3. of Appendix FM of the Immigration Rules. It was noted that she had no children and so did not meet the requirements of EX.1.(a). She had claimed to have a genuine and subsisting relationship with her partner but it was not accepted that there were insurmountable obstacles to her family life with that partner continuing outside the UK further to EX.1.(b) and thus she did not meet the requirements of R-LTRPT.1.1.(d). Her application was refused under D-LTRP.1.3.

3. On 19th May 2014 First-tier Tribunal Judge Oakley allowed the appeal stating at paragraph 8 of the determination that pursuant to Section 85(4) of the Nationality, Immigration and Asylum Act he could take into account circumstances relevant to the substance of the decision including evidence which concerned a matter arising after the date of decision.

4. The judge stated:

> "*15. Applying the relevant law to the established facts it is necessary for me to determine whether or not there is evidence that the Appellant had access to funds in excess of £18,600.*
>
> *16. There had been an explanation given to the Respondent about the Sponsor's lower income earnings in the year to 5 April 2013 due to being away for 5 weeks but what had not also been stated was that the Sponsor had had to take further time off due to illness and although this was not taken in terms of weeks at a time, there were a number of days which the Sponsor estimated at around 3 weeks. I accept that evidence was not before the Respondent at the time the application was submitted but I did not find the evidence that I received from the Sponsor and the Appellant in that respect either incredible or implausible and that does provide an explanation for the shortfall in what has been agreed by all parties that the Sponsor was in receipt of an annual income at the date of the application of £20,500.*
>
> *17. What is also significant is that a P60 to the financial year ending 5 April 2014 has been produced and details of that can be taken in to account by me up to the date of the hearing pursuant to Section 85(iv) and that shows that the Sponsor has an income of £22,000.*
>
> *18. I therefore accept on the basis of that evidence that at the time the application was made the Sponsor did have access to an income of £20,500 but that he did not receive that full income in that tax year for the reasons that are set out above. Furthermore, he has now had access in the further financial year to funds of over £22,000.*"

5. There was an application for permission to appeal made by the respondent on 28th May 2014 on the basis that the Rules of specified evidence were comprehensively set out in Appendix FM-SE to the Immigration Rules and which covered the evidence required and the period and format they should be in. The Tribunal had no regard to

this at paragraphs 15 to 19 and had failed to comply with the Immigration Rules. The Tribunal also had not had appropriate regard to the relevant date. For Appendix FM the significant date is the date of application and the significant evidence is from the specified period before that date. The Tribunal had not addressed the relevant date from prior to the date of application.

6. It was not clear what the sponsor's actual gross income annual was at the date of application although it appeared that the Tribunal accepted that for the relevant period the requisite income could not be demonstrated as it had not been received by the appellant's sponsor. It also followed that the appeal therefore could not be made out.

7. Permission to appeal was granted by First-tier Tribunal Judge Levin on 26th June 2014 who agreed that it was arguable that the judge erred in law by failing to consider Appendix FM-SE and to assess the income with reference to the date of the application but as he took into account the husband's P60 for the following year.

8. Given that the judge's finding that the husband's income was £20,500 was made without reference to or consideration of the specified evidence in Appendix FM and with reference to the husband's P60 for the year following the application both on the grounds and the determination disclosed an arguable error of law.

The Hearing

9. Mr Kandola relied on the grounds of the application for permission to appeal. The judge had found that the appellant had met E-LTRP.3.1. because the sponsor had a salary in excess of £18,600. The P60 showed he only earned £16,010.87. He had two periods of unpaid leave between September to October 2012 and January to February 2013 and this accounted for the drop in income. There was no exception to the minimum within the Rules specified and nothing in the guidance to assist the appellant. The Secretary of State did not accept that the unpaid leave represented a drop.

10. Mr Rana submitted that there was an annual salary letter which should be considered and further that the appellant had unpaid leave. In fact the Secretary of State did not accept that the total leave of eight weeks, that is five weeks' holiday and three weeks being sick, accounted for a drop of £4,000 but in any event the P60 from the following year which was admissible indicated that the appellant's sponsor did earn a salary of £22,000 in the following year.

11. Mr Rana stated that the respondent had not challenged the specifics of the evidence produced under Appendix FM-SE and in fact referred to various pieces of the evidence.

12. He submitted that Article 8 had not been considered by the judge and the appellant was now pregnant.

13. Nancy Kanda, the appellant, was called and confirmed that her baby was due on 15th February 2015. She did not wish to go back because she did not want to leave her husband here and she just wanted to continue life here.

14. She produced her NHS records. These were produced at the hearing and not in compliance with directions.

15. She confirmed that she had entered the UK in 2001 and that her parents and brother still lived in India and she last saw her parents in 2012. She also confirmed that she had previously had medical treatment in India. Although she had leave as a student when she met her husband she had left her studies in 2012.

16. The sponsor, Mr Ghurav Sehdev, attended and gave oral testimony and adopted his statement. He confirmed that he now earned more than £20,000 per annum.

17. The appellant herself confirmed that she had not paid any charges to the hospital for her treatment so far but she might have to pay for prescriptions. She confirmed she had no difficulties at present although she had previously had miscarriages.

18. Mr Kandola submitted that the appellant needed to show exceptional and compelling circumstances which she could not. She simply wanted to be with her husband. Her husband could visit her whilst her application was pending and it would appear from his current income of £22,396.78 per annum that they would have no problems with any future application.

19. Mr Rana submitted that a One-Stop Notice had been served and therefore the appellant should have her application considered at present as a spouse.

20. She had passed the English language test and she should have her case considered on the circumstances as at the hearing.

21. Mr Rana submitted that there were exceptional circumstances as the appellant had previously had miscarriages. The appellant's husband did earn the requisite annual salary. People did fall ill and get sick and this could qualify as an exceptional circumstance. There was no suggestion that the appellant had stayed here beyond her leave and thus she should pay for any medical treatment.

22. I must consider whether there was a burden on the state but the appellant could now be supported by her husband. She had hitherto been a student with Section 3C leave. Mr Kandola submitted that the case of **AS (Afghanistan) and NV (Sri Lanka)** [2010] EWCA Civ 1076 referred to additional grounds other than the same grounds of appeal. This was not an additional ground as the appellant had made an application on the basis that she was a spouse.

Conclusions

23. The narrow issue in this matter is whether the Immigration Rules under E-LTRP.3.1. are inflexible in that the appellant must show (a) a specified gross annual income of at least (i) £18,600.

24. Alternatively the appellant needs to show that paragraph EX.1. applies further to EX.1.(b) whereby

> "*the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.*"

25. Judge Oakley at paragraph 16 stated

> "*I accept that evidence was not before the respondent at the time the application was submitted but I did not find the evidence that I received from the sponsor and the appellant in that respect either incredible or implausible and that does provide an explanation for the shortfall in what has been agreed by all parties that the sponsor was in receipt of an annual income at the date of the application of £20,500.*"

26. The judge had recorded that the appellant's sponsor had gone to India on two occasions in September and October 2012 and again in January and February 2013 and he had taken further time off to assist his wife and this would amount to an additional time of three weeks.

27. The fact is that the evidence was not before the respondent or indeed the judge that the appellant's sponsor was in receipt of £18,600 per annum as at the date of the application. Appendix FM-SE makes reference to wage slips covering a period of six months if an applicant's sponsor has been employed by their current employer for at least six months, and monthly personal bank statements corresponding to the same periods as the wage slips must be produced. There is an argument to the effect that the appellant should be able to demonstrate the receipt of £9,300 in the six months prior to the application. However, this does not diminish the requirement for a specified gross annual income of at least £18,600 and in this particular instance the appellant's sponsor could not show that he earned £9,300 in the six months prior to the application. He could not show it because not only had he been on holiday in the six months immediately preceding the application but he had also taken time off to assist his wife. The judge accepted that the evidence was not before the respondent at the time of the application [16] and also accepted that funds in excess of £18,600 needed to be shown. I find that this was an error of law in his interpretation of the Rules and further in his finding that the date of the hearing was the relevant date. It was the date of the application. I therefore remake the decision.

28. For the reasons given above I do not accept that the sponsor can show that he earned more than £16,010.87 in the relevant year. As indicated in **R(MM (Lebanon)) v SSHD** [2014] EWCA Civ 985 there was a substantial research undertaken in order to

assess the minimum financial requirement for a spouse **MM (Lebanon)** held that the financial requirements in the Immigration rules regarding spouses was lawful. There is a specific exception whereby those with savings can make up any shortfall. The purpose of the Rule is to ensure that the partner is able to maintain and accommodate themselves adequately in the UK without recourse to public funds.

29. An exception under paragraph 3.1.(c) is that the requirements under paragraph EX.1. apply. As such the paragraph applies if EX.1.(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

30. No evidence was presented to me that there was any reason why the family could not relocate to India. I note that the couple married in India and that they both speak Punjabi, English and Hindi. The appellant has family in India who could support them on their return. I accept that the appellant's sponsor has a job here but he was born in India and came to the UK and has been here for twelve years. Even now for the majority of his life he has lived in India.

31. I was presented with medical records to show that the appellant was pregnant but she is in her very early stages of pregnancy and although I accept that she has previously experienced three miscarriages she did confirm that she had accessed and received medical treatment previously in India and there is confirmation within the papers presented at the hearing itself from the NHS that "pregnancy is normal" and that "childbirth is a natural physiological process".

32. I can see that she was at risk of miscarriage but the appellant herself confirmed that to date she had not had any difficulties.

33. I am therefore not persuaded that there are any insurmountable obstacles, having assessed degree of difficulty the couple face rather than the 'surmountability' of the obstacles, to the appellant returning to India to make an application and her husband accompanying her during the process if he so wishes. Alternatively he can keep in contact with her during the process via modern methods.

34. The appellant cannot show that she has lived in the UK for twenty years further to paragraph 276ADE or indeed that a the date of the decision of the Secretary of State that she was pregnant and thus there were insurmountable obstacles to her return.

35. I see no force in the argument that the appellant should be able to succeed on the grounds lodged in respect of a Section 120 notice. Indeed the appellant made the application precisely on the basis of her relationship with her spouse and this ground remains the same.

36. Further to **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC) I am not persuaded that there are any arguably good grounds to consider this matter outside the Immigration Rules.

37. When turning to the principles enunciated **in Razgar v SSHD [2004] UKHL 27** I accept that she has established a family life in the UK with somebody who is a British citizen and that she is currently pregnant.

38. The threshold for establishing that her family life is engaged is low and no doubt engaged but I conclude that the decision to refuse and remove the appellant is in accordance with the law. Under Section 117B of the Nationality Immigration and Asylum Act 2002 it is in the public interest that people who seek to remain in the UK are not a financial burden. The fact is that the appellant has been receiving treatment on the NHS during a period when she was not a student which is the leave she was given to be in the UK. Further she has established her private life at a time when her immigration status was therefore precarious. I can accept that the term precarious has not been defined but she knew when marrying and becoming pregnant that her stay in the UK was only temporary and when she was a student she was expected to leave at the end of her visa.

39. Further to Section 117B(4) little weight should be given to a relationship established when the appellant was in the country unlawfully. The appellant clearly stated that she had stopped studying in 2012 and as I state thus she was not in the UK complying with the conditions of her visa although she entered the UK legally and there has been no curtailment. The appellant stated that she finished being a student when she met her husband which was in August 2012. She was in fact in the UK on the basis of being a student and it appears that this was not the case. I note that the appellant states that she would be seeking work once her status was regularised and that she and her husband had supported themselves without recourse to public funds.

40. Mr Rana's submission effectively was that the appellant could now comply with the Immigration Rules but there was no specific evidence submitted to satisfy even an updated application and it is not clear that the appellant can fulfil the immigration rules. This is not a case as in **Chikwamba v SSHD** [2008] UKHL 40 where there was a suspension of forced returns to Zimbabwe. Nor can it be said that births do not happen on a regular basis in India or that the appellant will not have the support of her family. It may not be reasonable to require the removal of a British citizen from the European Union but this is to be distinguished from the position whereby an independent adult, as in this case, can make an informed decision as to where to establish his family life, **Izuazu (Article 8 - New Rules)** [2013] UKUT 00045 (IAC) The sponsor in this case himself is Indian and used to the language and culture.

41. I am not persuaded that this decision is disproportionate. The appellant has her parents and brother in India and can return there and make an application to join her husband if that is what she wishes to do. As the medical records indicated pregnancy is a natural process and I have taken into account the fact that she is considered to be at risk. On 13th August 2014 the Barking, Havering and Redbridge University Hospitals had undertaken numerous tests but as the appellant had indicated she did not appear to have any particular difficulties with the pregnancy despite the fact that she had had previous miscarriages.

42. Overall I was not persuaded that the appellant's family life would be seriously prejudiced should she be expected to return to India to make an application. I do indeed consider that the balance to be accorded to the Secretary of State's position outweighs that of the prejudice to the appellant.

43. I therefore remake the decision of Judge Oakley and dismiss the appeal both on the Immigration Rules and on human rights grounds.

Signed Date

Deputy Upper Tribunal Judge Rimington