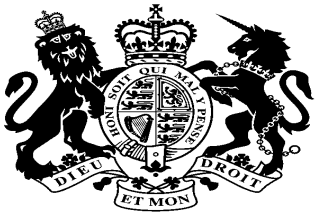

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03655/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 23 July 2015	**On 29 July 2015**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YUDVHIR SINGH
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Smart a Senior Home Office Presenting Officer
For the Respondent: Mr David of Counsel

DECISION AND REASONS

1. This appeal is against the decision promulgated on 16 September 2014 of First-tier Tribunal Judge Phull which allowed the respondent's appeal under the provisions of Appendix FM of the Immigration Rules and a second stage Article 8 ECHR assessment.

2. The applicant at this hearing is the Secretary of State. For the sake of consistency with the decision in the First-tier Tribunal we shall refer to her as the respondent and to Mr Singh as the appellant.

Background

3. The appellant, a citizen of India, came to the UK in 2006 with leave until 6 March 2007. He became an overstayer thereafter and so has been in the UK almost entirely unlawfully.

4. On 16 March 2013 he was arrested by police for traffic offences and when arrested gave a false name. On 26 March 2013 he applied for leave to remain on the basis of a relationship with a British citizen, Salochana Devi, whom he had met in 2011. Subsequent to the application he married Ms Devi on 14 June 2013.

5. The respondent refused the appellant's application for leave to remain and notified him on 6 November 2013 that he had to leave the United Kingdom.

6. The appeal before Judge Phull was allowed under the provisions of Appendix FM, specifically paragraph EX.1., and a second stage Article 8 ECHR assessment. In summary it was found that the appellant's wife had a prolapsed disc which restricted her daily movement. She found it difficult to bend, push, pull or lift. She was having medication, physiotherapy and spinal rehabilitation. She needed to remain in the UK to continue with her treatment, particularly as she had become pregnant against medical advice. The appellant provided daily support which she could not manage without. Adjustments had been made for her on her return to work. Those matters made it unreasonable for her to go to India with the appellant.

7. First-tier Tribunal Judge Lambert granted permission to appeal on the basis that it was arguable that the Judge had;

   (1) Incorrectly applied EX.1. of the Immigration Rules,
   (2) Failed to identify circumstances justifying a freestanding consideration pursuant to Article 8, and
   (3) Failed to consider s117A of the Nationality Immigration and Asylum Act 2002 ("the 2002 act").

Error of law

Ground 1

8. Mr Smart accepted that the circumstances of the appellant and his wife fell to be considered under paragraph EX.1. where the First-tier Tribunal had found them to be in a genuine and subsisting relationship.

9. It was the respondent's position, however, that an error of law remained as the First-tier Tribunal did not apply the correct test set out in EX.1..

10. EX.1. states;

> "This paragraph applies if…(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."

11. We were in agreement with Mr Smart as nowhere in the decision does the Judge apply the test of "insurmountable obstacles". She uses only a test of "reasonable" or "reasonableness" in paragraphs 12, 20, and 21. The test of "insurmountable obstacles" sets a higher threshold than mere "reasonableness" as explained in EX.2. which states that;

> "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."

12. We were therefore satisfied that the Judge did materially err in law in failing to apply the test of "insurmountable obstacles" from paragraph EX.1. of the Immigration Rules.

Ground 2

13. The respondent also maintained that the First-tier Tribunal had not shown how there were exceptional circumstances outside the matters that fell to be decided under the Immigration Rules such that the second stage Article 8 assessment was required. As in MM and Others v Secretary of State for the Home Department [2014] EWCA Civ 985, if the relevant rule does not provide a complete code, then the Article 8 proportionality exercise should be undertaken. There will generally be no or only a relatively small gap between the new rules and the requirements of Article 8 in individual cases, including those involving sponsors who are British citizens located in the United Kingdom.

14. The position was further clarified in Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387. We also noted the comments of the Court of Appeal in that case at paragraph 31 that a "strict test of exceptionality will apply" in a second stage proportionality assessment if the appellant's situation is "precarious", as here.

15. Where the First-tier Tribunal did not apply the correct formulation of the Immigration Rules, it appeared to us that the decision to proceed to a second stage assessment also had to be unsustainable. In essence, there was no reliable

decision under the Immigration Rules to take into account when considering the need for a second stage. We found that to be material where the matters relied upon when finding in favour of the appellant in the proportionality assessment did not appear to us to go beyond those provided for in an assessment of "insurmountable obstacles" under paragraph EX.1..

16. We were satisfied that this matter also amounted to a material error of law such that the second stage Article 8 assessment could not stand.

Ground 3

17. The respondent also argued that the First-tier Tribunal failed to apply in substance the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002.

18. The Judge here stated at paragraph 25 that she did have regard to s117A which incorporates s117B. She recognised that the appellant had been in the UK as an overstayer, stating at paragraph 29 that "the appellant overstayed and only sought to regularise his status on arrest."

19. Nowhere in the second stage Article 8 assessment, however, is there any consideration of s117B (4) which states;

> "Little weight should be given to … (b) a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully."

20. To our minds, this was clearly a material consideration which was omitted from the Article 8 assessment which centred on the appellant's family life with his wife and it could not be said that the outcome would have been the same had it been weighed appropriately. We were satisfied that this failure amounted to a material error of in law.

21. We announced our decision that we were satisfied that the Judge had made the material errors of law identified above each of which required us to set the decision aside. We decided that it was appropriate for us to remake the decision.

Remaking the decision

22. It was submitted by Mr Smart that on the facts as found there were no insurmountable obstacles to the appellant leaving the UK and his wife accompanying him, either whilst he applied for entry clearance or establishing a family life together there on a more permanent basis.

23. Mr Smart maintained that it had not been shown that entry clearance would take an unreasonable amount of time. If the appellant's wife wanted to join him in India either permanently or whilst he sought entry clearance, there was no

evidence she could not receive appropriate medical treatment there. There would be difficulties for her in adapting to India and being away from her family in the UK but these could not be said to be insurmountable obstacles. Where that was so and the appellant had to show exceptional circumstances to succeed, the second stage Article 8 consideration had to fail.

24. We were told by Mr David that, unfortunately, since the hearing before the First-tier Tribunal, the appellant's wife had miscarried. He submitted that she required the appellant's emotional support at this difficult time. Her ongoing medical condition was such that she required his support. She had little family in India. His recollection was that she had aunts and cousins there but her work and immediate family were in the UK. A 10 hour flight to India would not be good for her back. She could obtain free health care in the UK but would have to pay in India. She did not know if her job would be kept open if she went to India. She would lose her job and house. That would not be just a case of hardship. Whilst it was acknowledged that the appellant had a precarious immigration status, this case was exceptional.

25. In light of Mr David's recollection we checked the notes of evidence from the previous hearing. These disclose that the appellant said that his parents, two brothers, and five sisters live in India. He is in contact with his parents by phone once a month or after 2 or 3 months depending on when he gets chance. He does not have contact with his siblings. His wife said that her mother's sisters lived in India. Her mother, brother and sister live here. Her father has passed away.

26. In our judgement there would be no insurmountable obstacles to the appellant and his wife exercising their family life in India while he applies for entry clearance or on a more extended basis. There is no cogent evidence she would lose her job or be unable to take a leave of absence from work if she accompanied him to seek entry clearance. There is no medical evidence to support the assertion that she would be unable to fly or that with appropriate precautions the discomfort of flying could not be ameliorated. She has family there namely her aunts and all of the appellant's family to assist her and has visited the country in the past. The appellant's family could assist with housing, maintenance and financially. The appellant could be expected to look for work albeit we accepted it would be harder for Ms Devi to find work in India and that she would have to give up her career in the UK were she to go to India permanently.

27. It was not suggested that Ms Devi could not access appropriate medical treatment in India and we did not find that fact that she would very likely have to pay was a matter amounting to a very significant difficulty given the family support available. In our view, given the degree of the wife's health and family support available both from the UK and in India, we did not find that the couple had shown that there would be "very serious hardship". We did not find that the provisions of paragraph EX.1. were met, therefore.

28. We also did not find that there were compelling reasons that could lead to a decision in the appellant's favour outside the provisions of Appendix FM. The factors to be considered in any Article 8 proportionality assessment are essentially those already addressed under paragraph EX.1.. In addition, the appellant's family life with his wife could only attract little weight in that assessment following s117B (4) of the Nationality, Immigration and Asylum Act 2002. The appellant's private life also cannot assist him greatly where it was established whilst he was here unlawfully. It was our view that even were such an assessment to be required, it had to fail.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

We set aside the decision.

We dismiss the appeal on all grounds.

Signed:
Deputy Upper Tribunal Judge Saffer
28 July 2015