IAC-FH-AR-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06427/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 16 October 2015	**On 27 November 2015**
Prepared 20 October 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR HARMANJEET SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr B Bedford, Counsel instructed by Farani Javid Taylor Solicitors LLP
For the Respondent:	Mr N Smart, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a national of India applied for leave to remain as a dependant spouse of Ms B M Bhakta a British national and the Respondent refused his application for leave to remain and made removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006 on 21 January 2014.

2. The appeal against that decision came before First-tier Tribunal Judge I F Taylor (the judge) who on 6 August 2014 dismissed the appeal based on the Immigration Rules and under Article 8 ECHR.

3. Permission to appeal that decision was sought on 12 August 2014 and permission to appeal was given by First-tier Tribunal Judge Gibb on 27 August 2014.

4. The error of law hearing was considered by Deputy Upper Tribunal Judge Robertson (the DUTJ) where, Mr Bedford, referred to as Mr Beckett, did not pursue the issue of whether the Judge had made a decision on the income requirements which paragraphs 4 to 11 of the grounds settled by Mr Iqbal dated 12 August 2014. Rather Mr Bedford proceeded in relation to ground 2 paragraphs 12 to 17 (not 2 as referred to in paragraph 2 of the error of law decision). The DUTJ then recited at paragraphs 3 to 9 of her decision the arguments that were canvassed by the parties. The DUTJ at paragraph 18 considered the need for exceptional circumstances or circumstances that demonstrate that removal would be unjustifiably harsh, were matters that the Judge had not borne in mind. So that it was not clear on what basis the Judge had decided that there were compelling circumstances not sufficiently covered by the Immigration Rules so as to move on with an Article 8 assessment outside of the Rules. Secondly it appeared that the DUTJ concluded that a relevant consideration in the Article 8 assessment was whether or not the parties could meet, even if not as required under the provisions of the Immigration Rules, the necessary financial thresholds by reference to specified evidence. The DUTJ therefore posed the following questions for a resumed hearing:

   (1) were there insurmountable obstacles to family life with the Appellant's partner continuing outside of the UK; and

   (2) were there compelling reasons for the grant of leave outside of the Immigration Rules and that the focus in the proportionality assessment would include Section 117A to Section 117D of the NIAA 2002 so even if not under the financial provisions and requirements of Appendix FM that nevertheless the threshold of £18,600 could be met.

5. The DUTJ found that the Original Tribunal decision could not stand but that the First-tier Tribunal Judge's findings of fact at paragraphs 8 to 20 of his decision were preserved as a starting point for the resumed hearing. These were:-

   "8. In this case the burden of proof is upon the appellant on the balance of probabilities and as this is an "in country" appeal I am entitled to take into account evidence up to and including the date of hearing if it is appropriate to do so.

   9. One of the issues in the refusal letter was that the appellant did not submit an original IELTS certificate. The appellant's case is that he submitted this document on the 17 January some four days before the respondent's decision. Whilst Mr Bramall was not prepared to formally concede this issue, he asked no questions and made no submissions about it and thus I find that an original IELTS certificate was submitted.

10. In the appellant's application which is dated 16 October 2013 but was not sent to the respondent until the 21 November 2013 he relies entirely upon the income of his wife. The appellant's wife has a history of working in various retail outlets and most recently she has been employed by Primark Stores earning a current gross annual salary of £9023.57. This clearly falls some way short of the minimum requirement of £18,600 but the appellant's form states that it is anticipated that a further £9576.43 will be available from what is described as prospective income. This includes self-employment as a beautician which according to the sponsor's tax return for the year 2014 commenced on the 1 December 2013 which is after the date of the appellant's application. There is a third claimed source of income from a company called Carewatch but the only evidence in relation to this is a contract of employment which does not indicate whether any employment has taken place or any income has been received.

11. The principal difficulty with the above is that the Immigration Rules, and in particular Appendix FM, do not permit any form of prospective income. Furthermore, in order to establish a certain level of income a number of specified documents are required and in the circumstances of this case they are particularly lacking with regard to the sponsor's claimed self-employment and employment with Carewatch.

12. Mr Iqbal on behalf of the appellant whilst not conceding that the appellant could not succeed under Appendix FM stated that he was making no submissions with regard to Appendix FM and relied upon Article 8 outside of the Immigration Rules. However, in the closing submissions of Mr Iqbal he accepted that there was a lack of specified evidence which meant that the appellant could not meet the Immigration Rules although he did submit that in substance and reality the joint income of the appellant and his wife amounted to about £1000 short of the minimum income requirement of £18,600. It was also conceded that the appellant could not succeed on private life grounds under the Immigration Rules and in particular with regard to Paragraph 276 ADE.

13. For all the reasons given above I am satisfied that the appellant cannot meet the requirements of the Immigration Rules with regard to family life or private life.

14. At the commencement of the hearing Mr Iqbal stated he had been handed some P60s by the appellant which related to his employment with Astrad Limited who operate concessions on behalf of McDonalds, the fast food operatives. There is an undated letter from somebody who identifies himself as Richard stating that the appellant worked for McDonalds approximately 20 hours per week. Subsequently in evidence the appellant was to say that he worked for McDonalds between 20 November 2010 and September 2013. This is somewhat curious because the appellant does not mention any employment with McDonalds or anyone else in his application form nor does it feature in his witness statement or that of his wife. In any event, the necessary specified evidence has not been submitted and even if I were to take the appellant's income for the financial year between 2012 and 2013 at face value which is apparently £8571 in combination with his sponsor's salaried income the necessary threshold of £18,600 would still not be achieved.

15. In evidence the appellant adopted his witness statement dated the 16 June 2014. He set out the details of his relationship with Ms Bhakta namely that they met on line in April 2013, a relationship developed shortly thereafter and they married

on the 19 September 2013 and now reside at the home of her parents in Leicester. The appellant also states in his witness statement that his original IELTS certificate was sent to the Home Office on 17 January 2014 which has not been challenged by Mr Bramall. At paragraph 15 of his witness statement the appellant states, "it would understandably, be very difficult for Bhavini to leave the United Kingdom to live with me in India. She is a British citizen who has been living in the UK since birth. Her life is well established in the UK. She has a job here and all of her immediate family are living in the United Kingdom. It would be too difficult for her to uproot herself and leave her surroundings.

16. In evidence, the appellant states that his wife was born in India and came to the United Kingdom when she was 15 or 16 years of age.

17. The appellant stated he had family in India comprising of his mother and father and a brother who was working in Dubai. He stated that his wife had visited India three years ago and that both English and Hindi were spoken at home. He stated that his wife doesn't have any family in India. He stated that both himself and his wife were very close to his wife's parents and that they would not be able to live without her. He stated that he had not discussed with his wife the possibility of relocating to India.

18. His wife, Ms Bhakta, gave evidence and she also stated that she was born in India and came to the United Kingdom when she was about 15 or 16 although in her witness statement she stated that she had been living in the United Kingdom since birth. She stated that she had a job in the United Kingdom and many close friends and that she was very close to her mother as her only daughter and that she was also close to her father. She stated that she has been to India twice before on holiday some three or four years ago and also two years ago and on each occasion she spent two or three weeks there in a hotel. She said most of her relatives were in the United Kingdom although a maternal uncle lived in India but that her cousins have all moved away elsewhere. She stated that she spoke English at home although she could also understand Guajarati and Hindi. She stated that her family were from Gujarat. She also accepted that when she married the appellant she realised that his visa was about to expire.

19. It was submitted by Mr Bramall that the appellant could not meet the Immigration Rules which I accept. He also submitted that following the case of **Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC)** that in order to go beyond the Immigration Rules there needs to be arguably good grounds amounting to compelling circumstances not sufficiently recognised under them.

20. Mr Iqbal submitted that the marriage was a genuine one which is not in dispute. He further submitted relying on the case of **R (On the application of) Nagre v SSHD [2013] EWCH 720 (Admin)** and other cases that the ordinary five step approach set out in **Razgar** should be followed in this case. He also submitted that the substance and reality of the case was that the appellant together with his wife were only about £1000 short of the minimum income requirement of £18,600 and that it was highly unlikely that they would be a burden on the state."

6. At the hearing the directions having been given for the service of documents the Appellant's representatives served a supplementary bundle less than the seven days directed by the DUTJ. There was no explanation for the late service nor apology

given by the Appellant's representatives Farani Javid Taylor Solicitors. It was left to Mr Bedford to present it. In addition a supplementary chart was provided showing the Sponsor's income from three sources. First, a healthcare job between 5 September 2014 and 28 August 2015; Secondly, income from Primark showing with reference to the supplementary bundles earnings between 5 September and 10 July 2015 and in the supplementary bundle page 25 earnings between August 2015 and October 2015; and, Thirdly from Heena Art third job which essentially is doing skin decoration for various religious festivals earnings through self-assessment between 4 August 2014 and 14 July 2015 in what is essentially a seasonal activity.

7. Mr Smart objected to the late production of the material not least because he had had no time himself to prepare that material. I considered the matter including the lack of explanation as to why representatives had failed to provide it in proper time and the fact that the Appellant was paying for the representation for Mr Bedford to attend the hearing. Mr Smart was unable to respond without having an opportunity to read and consider the documents and to know the relevance of the additional material.

8. I decided therefore that a break would be taken to enable Mr Smart to assess the evidence and if he wished to renew an application for an adjournment to make it after he had had an opportunity to see the papers. A break was therefore taken between 10.40 and 11.15 following Mr Bedford having given a brief résumé of the matters to which the documents related. Following the break Mr Smart did not renew the application to exclude the material or for an adjournment in order to prepare a fuller response and or prepare cross-examination.

9. Mr Smart at the hearing for the first time produced visa processing times from New Delhi in respect of settlement visa applications. The visa information related to all decisions made up to July 2015 but the information does not tell one how many applications were actually made. Nevertheless the processing time for applications was as follows: 3% decided within ten days, 4% 15 days, 58% by 30 days, 90% by 60 days and 100% by 90 days. Those days are working days and exclude weekends and public holidays. Thus whilst rather simply it might originally have appeared that 90 days was less than three months it is of course a longer period; taking into account weekends and public holidays. It was also not entirely clear whether India has fallen under the requirements that applications for settlement are considered in the UK or Abu Dhabi rather than at the post where the application was made. Mr Smart relied upon the visa information essentially to argue that an application could be made out of country and any period of separation was unlikely to be significantly long, thus for example 60 days to process an application amounts to twelve working weeks, 90 days approximately eighteen working weeks and 120 days 24 working weeks. Whilst Mr Bedford did not formally to some extent seek to object to the information provided from the UK Government website be addressed. Ultimately I decided I would consider the information for what it was worth and the submissions on the weight to be given to the evidence. Mr Bedford's criticisms were really that the information was too generalised to be reliable as to how long the process would take from application to decision. He also indicated that of course if there was an adverse

decision there would necessarily be the additional time for the purposes of an appeal out of country.

10. It was difficult to see on what basis an Article 8 claim could be made in any event. The position was that the Sponsor met the Appellant after internet contact led to the development of a relationship in May 2013 and their religious marriage took place on 19 September 2013. The Appellant lived with his wife's family and apart from the fact that he has grown up in the United Kingdom it was said his wife could not return to India because she is a British national, living in the United Kingdom for many years and the Sponsor is rooted in the United Kingdom where she worked.

11. The basis of the Appellant therefore seeking to remain in the United Kingdom was driven around the fact that the Sponsor was employed in three jobs and plainly is a person of good character and extremely hardworking. Her three jobs are such that she could not get the leave needed to return to India with the Appellant and would not be able to arrange holiday with all three employers to enable her to do so at the same time.

12. In addition the Sponsor did not wish to leave her parents in the United Kingdom and go to a country she is not familiar with. She did not wish to be separated from the Appellant. The Sponsor's father confirmed he and his wife get on well with the Appellant, have a close relationship with him, that he was perfect for the Sponsor, the Sponsor and the Appellant enjoy a strong and loving relationship and have made plans for their future together. He described the thought of the Appellant being required to return to his country of origin as very upsetting as the Appellant was well established in the United Kingdom with the Sponsor. His opinion was that there would be adverse affects on the Sponsor for it would be "... too difficult to uproot herself from the UK where she has been living from birth, and moving to a country where she has no home, job or family". The Appellant's mother-in-law, the mother of the Sponsor, in not necessarily exactly the same words said as her husband, about the Appellant and Sponsor and their life together in the United Kingdom.

13. The oral evidence at the hearing did not materially add to the written evidence relating to the Article 8 issues.

14. In essence neither the Appellant nor the Sponsor wished to be parted. It appeared to me that the Sponsor would not willingly return to India with the Appellant but would visit if circumstances required by taking holiday.

15. It seemed to me that there was a point when the Appellant's immigration status did become precarious: After 23 November 2013 when his Tier 4 leave to remain expired.

16. I apply the cases of Agyarko [2015] EWCA Civ 440 particularly [21, 22, 25]. It is clear that the Court of Appeal recognised that there may be occasions where insurmountable obstacles are not invariably a necessary precondition to the finding of a breach of Article 8. But it is possible that the case may be found to be exceptional for the purposes of the relevant test under Article 8, in relation to precarious family

life, even where there are no insurmountable obstacles to continuing life overseas. As the relevance of insurmountable obstacles continued to be a consideration then it was a matter what weight should be given to it on the factual basis of the claim overall.

17. I found the case of Hayat [2012] EWCA Civ 1054 at paragraph 50 Lord Justice Elias pointed out by reference to certain factual matters in the particular case it was relevant to the consideration of whether it was legitimate to require an applicant to make his application from the home country: first, whether persons were only permitted in the UK temporarily and therefore had no legitimate expectation of a right to remain. Secondly, whether the family life can continue in the home country if one partner would for obvious reasons not wish to return and thirdly the length of any period of separation. In this case I find the likelihood was that an application properly prepared and documented meeting the specified requirements could reasonably be expected to be met within 30 days (six working weeks) or 60 days (twelve working weeks). I see no reason to assume the worse that the additional 10% should be likely to occur unless the overall time was 90 days or eighteen working weeks.

18. Even if I was wrong about that it did not seem to me the length of time was of such significance as to militate against return or to render the Respondent's decision disproportionate. Ultimately there was very little to show what would be hardship or harshness to their marital relationship arising from a relatively short separation. Accordingly in connection with the questions raised by the DUTJ. I have considered whether there are insurmountable obstacles for the Sponsor and for the reasons above concluded there were not. Further I did not find there were the kind of compelling circumstances necessary to engage the provision under Article 8 ECHR outside the Immigration Rules.

19. If I was wrong in that conclusion, I find as a fact the Appellant's life in the United Kingdom engaged Article 8 private/family life rights. I find that his removal would have significant consequences and that the sponsor, although she does not wish to do so, could relocate with the appellant and maintain their private/family life in India: the preserved findings of fact set out above. If I was wrong and it was not reasonable for the Sponsor to relocate then the effect of separation would be significant even if relatively short-lived and Article 8(1) rights engaged.

20. I find the respondent's decision was lawful and served Article 8(2) purposes.

21. I take into account Sections 117A-C of the IANA 2002 and have considered the time the Appellant has lived and worked in the UK as well as his English language skills and the marriage to the Sponsor took place when the Appellant's status in the UK ws not settled but not truly precarious. I find the public interest should be given significant weight when in the balance with the Appellant's and Sponsor's personal interests. I take into account that if the sponsor were to remove to India during the appellant's absence they would not have the necessary finances to return under the Immigration Rules.

22. I find the Respondent's decision was proportionate and the Appellant should make an out of country application for leave to enter for the purposes of settlement.

NOTICE OF DECISION

The appeal under the Immigration Rules is dismissed.

The appeal with reference to Article 8 ECHR is dismissed

ANONYMITY

No anonymity order was requested nor is one required.

Signed Date 24 November 2015

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

The appeal has been lost accordingly no fee award is appropriate.

Signed Date 24 November 2015

Deputy Upper Tribunal Judge Davey

P.S. I regret the delay in promulgation which is due to the file being mislocated.