



**Upper Tribunal  
(Immigration and Asylum Chamber)**

IA/15609/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham  
On 8<sup>th</sup> March 2017

Decision and Reasons Promulgated

On 6<sup>th</sup> July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

KAMLESHKUMAR MAGANLAL CHAUHAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr N Ahmed (Counsel, instructed by Bhavsar Patel, Solicitors)

For the Respondent: Mr D Mills (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a national of India. He applied for leave to remain which was refused. his appeal was heard by First-tier Tribunal Judge Hollingworth at Nottingham on the 5<sup>th</sup> of May 2016. The appeal was allowed for the reasons given in a decision promulgated on the 17<sup>th</sup> of May 2016 under the provisions of paragraph EX.1 of Appendix FM, the Judge found that there were insurmountable obstacles to the Appellant and his wife continuing their family life in India.
2. The Secretary of State sought permission to appeal on the basis that the Judge had erred and that the facts as found did not justify the conclusion that the provisions of paragraph EX.1 were met. The Sponsor, although now a British citizen, was of Indian origin with her mother and brother still living there. It had not been shown that it would be unreasonable for them to live there. permission was granted and the hearing listed as indicated above.
3. At the hearing the Home Office provided a copy of Agyarko v Secretary of State [2017] UKSC 11 and the Appellant provided a copy of the rule 24 reply. In this decision I will continue to refer to Mr Chauhan as the Appellant to maintain continuity in references to the First-tier

Tribunal decision. The submissions are set out in the Record of Proceedings and referred to where relevant below.

4. Both parties maintained their respective positions. Mr Ahmed for the Appellant submitted that Agyarko could not be used as a precedent for the definition of insurmountable obstacles as that had been a public law challenge and not a challenge to a First-tier Tribunal decision and also relied on the decision in SS (Congo). At the hearing I indicated that I was satisfied that there was an error and reserved the reasons which follow.
5. The Judge's findings are set out at paragraphs 14 to 19 of the decision. The Appellant had entered the UK lawfully and did not establish his relationship on a precarious basis. The Sponsor is not a dual national, she came to the UK when she was 19 and had spent over 22 years in the country. She has a house subject to a mortgage and works but could not service the mortgage if in India. If they lived in India she would need a visa and would be denied her EU rights. The Judge went on to find that the Sponsor was fully integrated into the UK and her ties to India considerably diluted. The factual findings amounted to very significant obstacles.
6. In relation to section 117B of the 2002 Act the term precarious refers to a person's presence being dependent on the grant of further leave in contrast to illegality where there is no leave. The Judge erred in finding that the relationship was established when the Appellant was not in the UK precariously, clearly the Appellant was in the UK precariously as his presence was dependent on the grant of further leave.
7. I do not accept Mr Ahmed's suggestion that the case of Agyarko is not relevant. The fact that it was a different sort of challenge does not affect the basis of the decision which turned on what could amount to insurmountable obstacles as defined in paragraph EX.2 of Appendix FM. Mr Mills referred to paragraph 33 of the decision which cited the Secretary of State's position as set out in the Refusal Letter. The approach was upheld by the Court of Appeal in paragraph 71 where it was decided that there was nothing wrong with the decision of the Secretary of State.
8. In Agyarko the Sponsor had never lived outside the UK let alone in Ghana and was unwilling to move. Those are not insurmountable obstacles. The ordinary incidents of moving, such as finding accommodation and work and establishing a network of friends and support and possibly the absence of family are not by themselves obstacles and neither is the need to learn a new language. These are all obstacles that the Appellant overcome in coming to the UK and the Sponsor would be returning to the country of her birth where she has family.
9. The Sponsor may be unwilling to give up what she has achieved materially in the UK but that is not an obstacle and her Indian heritage would make the process of adapting there considerably easier than the hurdles that would have faced the Sponsor in Agyarko. As it is she has assets that could be used to establish a family life in India and she has skills that could be applied there too in addition to her being able to speak English.
10. While the Judge made findings on the factual circumstances of the Appellant and the Sponsor it cannot be said that their circumstances would see them facing any real obstacles to integration in India let alone anything that could be said to be very significant. It was an error for the Judge to find that they did as the facts did not disclose anything of the sort. In the circumstances the decision will be set aside.
11. I had contemplated remaking the decision but there is another basis on which the Appellant might be entitled to remain based on the length of his lawful residence in the UK. That however is not before the Tribunal as consent has not been given for that to be heard although the facts

could be relevant to an assessment under article 8. In those circumstances the appeal will be remitted to be heard by a Judge other than Judge Hollingworth.

## **CONCLUSIONS**

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision which is remitted to the First-tier Tribunal for rehearing on all issues, not to be heard by First-tier Tribunal Judge Hollingworth.

### **Anonymity**

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

### **Fee Award**

I make no fee award as this will be decided by the First-tier Tribunal at the conclusion of the decision.

Signed: Malcolm F Parkes

Deputy Judge of the Upper Tribunal (IAC)

Dated: 23<sup>rd</sup> March 2017