



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

Appeal Number: IA/25768/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 8 June 2017**

**Decision & Reasons Promulgated
On 23 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SANDEEP KAUR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr M Aslam, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge M R Oliver) allowing an appeal by the applicant against the respondent's decision of 7 July 2015 refusing her application for leave to remain based on her family life with her sponsor. In this decision I will refer to the parties as they were before the First-tier Tribunal, the Secretary of State as the respondent and the applicant as the appellant.

Background

2. The appellant is a citizen of India born on 12 July 1990. She first came to the UK on 20 September 2009 with entry clearance as a Tier 4 Student until 30 January 2012 and her leave was subsequently extended in the same capacity until 31 May 2014.
3. Shortly after her arrival in the UK she met and fell in love with the sponsor, a citizen of Pakistan born on 8 December 1986, and she moved in with him a year later. He had arrived in the UK as a child aged 13 and has remained ever since. He made an application for leave to remain on long residence grounds which was refused by the respondent and a subsequent appeal was dismissed by the First-tier Tribunal. However, that decision was set aside by the Upper Tribunal and in a decision issued on 5 January 2014 the appeal was allowed under the provisions of para 276ADE and the sponsor was then granted 30 months' discretionary leave in the ten-year settlement path.
4. On 26 January 2015 the appellant converted from her Sikh faith to the Islamic faith and married the sponsor in an Islamic ceremony. She applied for further leave to remain on 11 February 2015 and her application was supported by a letter from her solicitor explaining that as she had converted to Islam, her family had completely disowned her and her partner was now her new family. The application was refused for the reasons set out in Annex A of the decision letter of 7 July 2015. The respondent was not satisfied that the appellant could meet the requirements of the Rules for leave to remain as a partner or on private life grounds or that there were any particular circumstances constituting exceptional circumstances warranting a grant of leave to remain outside the Rules.

The Hearing before the First-tier Tribunal

5. Having set out the background to the application and the fact that the appellant and the sponsor had both confirmed the truth of their witness statements, the judge summarised his findings as follows:
 - “9. I am satisfied, because of the evidence of long cohabitation and the joint running of the important matters in their lives, that the appellant meets the definition of partner under Appendix FM and, for the reasons which were accepted in her partner's appeal hearing and affirmed by them both in evidence before me, that it is impractical for them to be returned to Pakistan and that there would be very significant difficulties in their returning together to India. Of the respondent's two decisions, to refuse rather than to adjourn a decision on her application and to resist her application, I am left to wonder which was the more unreasonable.”

The appeal was allowed under the Rules.

The Grounds and Submissions

6. The respondent's grounds of appeal can be summarised as follows. It is argued that the fact that the sponsor had been granted 30 months' leave did not mean that the relationship requirements set out at Appendix FM, E-LTRP.1.2 were met. Assuming that the judge allowed the appeal under Section EX.1, that provision could only be considered if the eligibility requirements were met. Even if the judge had been correct to proceed under para EX.1, it is argued that he had not applied the correct test as impracticability was not the test and no reasons had been given why the couple could not relocate anywhere else in India, which had the second highest population in the world and was one of the largest countries in terms of areas.
7. It is further argued that the Court of Appeal has set a high threshold in Agyarko v Secretary of State for the Home Department [2015] EWCA Civ 440 as to what the test of insurmountable obstacles means. Finally, it is argued that the judge had not considered or applied the guidance set out in R (Chen) v Secretary of State (Appendix FM - Chikwamba - temporary separation - proportionality) (IJR) [2015] UKUT 189 or considered what the Court of Appeal had said about Chikwamba [2008] UKHL 40 in Agyarko.
8. At the hearing before me Mr Avery adopted his grounds submitting that the judge had clearly erred by allowing the appeal under the Rules when it was clear that those requirements could not be met by the appellant. Further, the judge had not given any adequate consideration to article 8. His reference to it being impractical for the parties to return to Pakistan and there being very significant difficulties in their returning to India did not without more provide any adequate explanation to show that there had been a proper consideration of article 8.
9. Mr Aslam did not seek to argue that the appeal could properly be allowed under the Rules but submitted that in the light of the judge's findings about the problems of returning to Pakistan or India, it would have been open to him to find that the refusal of further leave to remain would be in breach of article 8.

The Error of Law

10. I am satisfied that the judge erred in law as set out in the respondent's grounds. As the reasons for refusal make clear, the provisions of E-LTRP.1.2 were not met as the appellant's partner was not a British citizen in the UK nor present and settled in the UK nor in the UK with refugee leave or as a person with humanitarian protection. In these circumstances the appellant could not meet the requirements in section R-LTRP.1.1 and there was no route through to the provisions of para EX.1 but in any event para EX.1(b) relating to a genuine and subsisting relationship with a

partner, makes it clear that this provision only applies where the partner is in the UK and is a British citizen, settled or in the UK with refugee or humanitarian protection leave. The appellant was therefore unable to meet the requirements in Appendix FM for a grant of leave to remain as a partner.

11. The judge did not go on to consider expressly the provisions of article 8. There is no indication of whether or to what extent he sought to carry out a balancing exercise when assessing proportionality. The assessment under article 8 must be carried out in a structured way in accordance with the guidelines set out not only in Razgar [2004] UKHL 27 but also in MM (Lebanon) [2017] UKSC 10. The judge has referred to it being impractical for the parties to return to Pakistan and there being very significant difficulties in returning to India but there has been no further analysis of whether these difficulties amount to insurmountable obstacles in accordance with the guidance now given by the Supreme Court in Agyarko [2017] UKSC 11 or assessment of the public interest considerations set out in statute in paras 117A and B of the Nationality, Immigration and Asylum Act 2002 as amended.
12. In these circumstances the decision of the First-tier Tribunal must be set aside. Both representatives accepted that the proper course was for this appeal to be remitted for a full rehearing by a different judge in the First-tier Tribunal.

Decision

13. The First-tier Tribunal erred in law and the decision is set aside. The appeal is remitted for reconsideration by way of a full rehearing before a different judge. No anonymity direction was made by the First-tier Tribunal.

Signed H J E Latter

Date: 22 June 2017

Deputy Upper Tribunal Judge Latter