



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20509/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24th July 2018

Decision and Reasons Promulgated
On 5th September 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mrs Jayamul Abraham Peadikachiral
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms Praisoody, instructed by Ash Norton Solicitors.

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant sought permission to appeal a decision of First-tier Tribunal N M Paul dismissing her appeal against the Secretary of State's refusal, under the Immigration Rules (E-LTRP), of further leave to remain in the United Kingdom as a partner of a person present and settled. The appellant is a citizen of India born on 13 May 1966 and last entered the United Kingdom in August 2002, on a visa valid for one year as a domestic worker. On expiry of that visa she has stayed without leave.

2. The appellant maintained that she had same-sex relationship since March 2007. Her partner, with whom she has not lived, is a single mother of two adult twin daughters.
3. In a determination dated 19th January 2018 Judge of the First Tier Tribunal Paul dismissed the appellant's appeal on all grounds.

Application for Permission to Appeal

4. The application for permission set out the following grounds:
 - (i) the judge erred in law in relying on a general assertion for dismissing the appellant's relationship. His reasoning was clouded when considering why it was a secret from the daughters and in finding that there was no relationship because they did not live together. The test was that they intended to live together as a couple permanently in the UK.
 - (ii) the judge failed to appreciate the decision was fettered by an inflexible policy and the discretion vested in the respondent should be exercised differently because the appellant had satisfied the relationship requirements
 - (iii) the judge had not doubted the parties' homosexuality other than the duration of the relationship and that homosexuality was illegal in India and therefore there were obstacles to reintegration into India further to Paragraph 276ADE
 - (iv) the judge failed to consider the appellant had satisfied the requirements of article 8 and had failed to apply the principles of **Huang**. The appellant was in her 50s and had been living in the UK continuously since 2002.
 - (v) the judge was wrong in stating at paragraph 21 that Section 117 required him to give less weight to the relationship, because it did not require the judge to ignore the fact that the rights of her and her partner regarding their sexuality would not be accepted in India.
 - (vi) The decision was not in line with **Chikwamba v SSHD [2008] UKHL 40** nor **Beoku Betts**
 - (vii) the judge was wrong not even to mention the exceptionality in the case before dismissing it and the judge was wrong to ignore the exceptional circumstances of the appellant's sexuality when considering the penalties under the law in India to which she would have to return.

The grounds asserted that the appellant had proven her case and the judge legally erred in not allowing the appeal.

5. At the hearing, Miss Praisoody submitted that the judge had ignored the totality of the evidence and given insufficient analysis to Section 117. On one hand the judge referred to the partners being respectable ladies but then proceeded to make an adverse credibility finding against them.
6. Miss Isherwood responded that the appellant had remained in United Kingdom without regularising her immigration status. It did not follow that because the judge

found the appellant respectable, he had to believe her account or accept the evidence which he found “very vague”. This was a relationship which had been established whilst the appellant was in the United Kingdom with precarious status and the burden rested with the appellant to demonstrate insurmountable obstacles to her return to India.

7. Miss Praisoody accepted that there was no evidence put forward as to the circumstances that the appellant would face in India, which the judge needed to factor into an assessment on return.

Conclusions

8. The judge identified the relevant facts and the oral evidence with care in the decision as follows. The appellant is an Indian national born on 13th May 1966. At paragraph 3 he recorded that the appellant entered the United Kingdom as a domestic servant of Kuwaiti nationals in 2002 and that her visa expired in 2003. She did submit an application for leave to remain but that was refused in February 2006. Subsequently the appellant remained without further leave and claimed to have developed a relationship with her said partner who offered her financial and emotional support. The appellant stated that she would face severe hardship and insurmountable obstacles should she be returned to India. She met her partner in 2007 [6]. As a result, her family in India had shunned her. The relationship with her partner was kept secret from her partner’s twin girls because they would be embarrassed. Because the news of their relationship had been leaked in India, they were embarrassed, and she feared they would be threatened with physical harm, and thus they were reluctant to display their true feelings and come out as being in a lesbian relationship.
9. The partner gave evidence and confirmed their relationship was a romantic one but because of her concerns for her daughter’s welfare she had not any stage indicated the nature of their relationship. This was despite the fact that the children were at university, would be alive to the nature of the relationship and would be fully alive to the diverse nature of the community in the UK [10]. The partner stated she was waiting for them to leave home and become fully independent before revealing the relationship.
10. Another witness also provided a letter but not a witness statement. They saw each other occasionally and he stated the appellant and partner were waiting for the children to ‘fly the nest’ before establishing relationship
11. I note the judge recorded [13] that, at the outset, the appellant’s representative indicated that the appeal could not succeed under appendix FM or paragraph 276 ADE because the appellant could not meet suitability requirements having been in the UK without leave for a number of years. Miss Praisoody, however, denied that this was the case. I do note that the decision found that the appellant had met the suitability requirements.

12. The key to this appeal, however, is the judge's findings regarding the relationship. The judge rightly identified that this was a human rights appeal and his considerations were subject to Section 117B of the Nationality Immigration and Asylum Act 2002.
13. The judge at paragraph 17 found 'the appellant "came across as a perfectly pleasant and respectable woman"'. That does not suggest that the judge was obliged to accept the appellant's evidence and rather indicates that he was open to accepting the appellant and her claimed partner and the oral evidence being given. He noted that she had "struggled to make a life for herself following the termination of her employment as a domestic worker". The judge found, however, by contrast, the explanation of how she supported herself was "very vague", and it was open to him to find that this undermined her account of her circumstances [17].
14. On a careful reading of the decision, the judge gave a series of reasons for rejecting the relationship between the appellant her partner not least that "the original letter of representations [2nd March 2016 which accompanied the application on article 8 grounds] made no reference to it being a same sex relationship in the 'lesbian' sense". That was a critical finding in respect of the relationship and one on which the judge was entitled to rely. The appellant's explanation that she did not include it in her application because she wanted to keep it confidential, the judge, understandably, found very curious given that it was central, or as the judge put it, 'at the very heart of her application for leave to remain in the UK'. Indeed, the letter of her said partner, which supported the application and appeal, stated that the appellant was 'like a sister to me'. The test of whether they intended to live together was undermined by the finding that the relationship was not genuine.
15. The judge also clearly took into account the partner's explanation for not being more forthright about her new romantic relationship and did not accept, and the judge was entitled to reject that explanation, that if the parties had known each other for the number of years claimed, it would be incredible that the children would have no indication of the closeness of their relationship and that the community at large would not have come to accept and tolerate that relationship.
16. The judge added as a further reason that the parties did not live together and his conclusion that the parties had become close because of the circumstances in which they found themselves as mature women living independent lives in London was a conclusion that he was entitled to make. The judge clearly gave adequate, if brief reasoning. Reading the decision as a whole it is clear why the judge refused the appeal.
17. The relationship was at the heart of the appeal and the finding on that strikes down the essence of the grounds for permission to appeal. The judge rejected the fact that the appellant and her partner were in an intimate relationship. As such was open to him to reject the contention that the appellant could succeed under Appendix FM and to factor that into the findings in relation to article 8 which is what was done. That was central to any finding in respect of the Immigration Rules regardless of the difference over the representations of counsel before the tribunal.

18. Having rejected, on what I found to be sound reasons, the romantic relationship of the appellant and her claimed partner, the judge was left with the private life to assess which is what he did under paragraph 276ADE. As Miss Praisoody, confirmed the appellant had not been in the United Kingdom for 20 years, and no evidence was submitted to the judge as to the circumstances on return. The test in relation to very significant obstacles is an exacting test and reliance on mere assertion as to the difficulties on return has been found by the courts to be insufficient. As explained in R (Kaur) [2018] EWCA Civ 1423 at [56]

'The matters put forward certainly provided good reasons why both would much prefer to continue their family life in this country; but they did not come close to establishing any insurmountable obstacle in paragraph EX.1(b).'

And At [64]

'Moreover, the no ties test is an exacting one. Its application does not simply involve a balancing of the respective ties to this country and to India, which is a matter for consideration outside the Rules if at all. The question is whether Mrs Kaur has no ties to India, and that question cannot be answered merely by pointing to the fact that her immediate family are all now in this country'

19. It is for the appellant to establish and demonstrate the insurmountable obstacles which are said to await her on return. Having refused to accept the lesbian relationship there is no reason why the appellant could not return to her family in India but even if she had to return independently she had pinned her case for insurmountable obstacles on a lesbian relationship which was not accepted by the judge.
20. He was obliged to consider Section 117 and the analysis made was open to him. The appellant had been an overstayer since 2003. The judge rightly recorded at paragraph 16, that little weight should be afforded to private and/or family life entered when a person is in the country unlawfully which is precisely what the appellant did. Section 117B (5) states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. Indeed, the appellant had remained unlawfully in the United Kingdom since the expiry of her visa in 2003.
21. As the judge set out in paragraph 21, section 117B affirms that the maintenance of effective immigration control is in the public interest and further at section 117B (3), it is in the public interest and in particular the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent. The judge found that her evidence of her economic circumstances, (as to how she supported herself) was vague. For the reasons given he clearly gave little weight to her private life following the mandatory statutory considerations.
22. The judge did conduct a balancing exercise and applied the test of proportionality finding that there was insufficient evidence to show any real risk to the appellant if she returned to India 'in article 3 sense'. There was no indication that the appellant had made any claim for asylum.

23. The judge found that the appellant had previously lived in Mumbai and there was no requirement that she should return to Kerala. He made a reference to no exceptional circumstances but this is an effect shorthand for any compelling circumstances or unjustifiably harsh consequences of the removal as held in **R (Agyarko) v SSHD** [2017] UKSC 11. On the evidence that was placed before the judge, he could have come to no other conclusion. The judge rejected the assertions regarding the relationship and thus the 'sexuality' considerations have no bearing. The claim was centred on the relationship with one particular individual not on the appellant's sexuality per se and I repeat there was no asylum claim.
24. I find that the grounds are simply a disagreement with the findings of the judge, which though brief, are adequate in the circumstances Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)

'Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.'

25. The reasoning as can be seen from above was not 'clouded' and was based on cogent and sound analysis. There was no accepted relationship and thus no 'discretion vested' to exercise differently, if that is what is meant in the application of article 8. The judge applied the **Huang** test of proportionality. The ratio of **Chikwamba** does not assist this appellant. There is not merely a procedural requirement insisting on the appellant leaving the United Kingdom. As set out the **Chikwamba** principle requires a fact-specific assessment in each case and will only apply in a very clear case, and even then, will not necessarily result in a grant of leave to remain. The facts of this case differ starkly from the **Chikwamba** case not least that there is no child, no asylum claim, and no very significant obstacle to return. Nor, on the basis that no relationship was found for the purposes of article 8, can **Beoku-Betts** be engaged. The appellant and her said partner may be friends but **Beoku-Betts** enjoined the authorities to take into account the effect of proposed removal upon all the members of his 'family unit'. The appellant and her partner were found not to have a relationship and not to live together. Even if this principle were extended to encompass a private life it could not without more be said to be a factor, in this instance, which would undermine the decision of Judge Paul. The judge was not obliged to accept the appellant's evidence and found against her for sustainable reasons. As such his decision will stand.
26. I find no material error of law and the decision of the First-tier Tribunal Judge will stand.

Signed *Helen Rimington*

Date 25th August 2018

Upper Tribunal Judge Rimington