Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02653/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On 4th July 2019

Decision & Reasons Promulgated
On 18th July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS AVTAR [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Martin (Counsel)
For the Respondent: Miss H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Hawden-Beal, promulgated on 6th July 2018, following a hearing on 28th June 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a citizen of India, born on 15th May 1955, and is a female. She is the spouse of a Mr [AS], who is an Indian citizen, with indefinite leave to remain in the UK. She applied for leave to remain on the basis of her dependency and relationship with her sponsoring husband. The application was refused on 14th December 2017 because the Respondent was not satisfied that the Appellant met the suitability and eligibility requirements of the Rules, in that the Appellant had fraudulently obtained a false TOEIC certificate, and displayed a flagrant disregard of the public interest.

The Appellant's Claim

3. The Appellant's claim is that she came to the UK in 2008. She made her application in 2012 to remain here. She knew the Respondent needed an English language certificate. She was not aware that she could not pay to avoid taking the test. Someone advised her. She obtained a certificate. She was now remorseful and apologised for this. She was not aware of the system in this country. She did not think to ask a solicitor. She was not educated.

The Judge's Findings

4. The judge observed how the Appellant's sponsoring husband was 75 years old and she herself was 63 years old. They both had medical issues. They cannot return to India because they have no accommodation or employment such that they could support themselves. This was the case on behalf of the Appellant, as put before the judge. The Respondent did not have regard to the medical evidence even though it was put before the Secretary of State. There was no mention of this evidence under the section on insurmountable obstacles. There had also been no proper consideration of the Appellant and her husband's circumstances as a senior couple. Family life could not continue out of the UK and therefore there were insurmountable obstacles under EX.1. Such circumstances existed because if the Appellant had to go back to India, the Sponsor could not support her application to return because he is a pensioner and would not have the finances to be able to bring her back. That would mean that the family would be separated permanently, which in itself was disproportionate. It was, therefore, contended on her behalf that the appeal should be allowed on the basis that there were insurmountable obstacles and the Appellant's removal would be disproportionate (see paragraphs 13 to 15 of the determination).

5. The judge, against the background of the evidence before her, proceeded to apply the well-established case law in relation to private and family life, drawing attention to **Razgar [2004] UKHL 27** and **Hesham Ali [2016] UKSC 60**. The judge took full account of the fact that the Appellant had admitted that she had engaged in fraudulent activity as far as the obtaining of a TOEIC certificate was concerned (see paragraphs 23 to 26). The judge also considered whether, the fact that she was 63 years of age, not educated, and had followed the advice of those who had tended it to her, meant that it would be undesirable to remove her (paragraph 26). In this

respect, the judge concluded that it was not desirable to allow the Appellant to remain (paragraph 27).

6. However, the Respondent Secretary of State had "completely disregarded" the medical evidence that had been put in on her behalf (paragraph 27). Consideration was given to the fact that both the Appellant and her sponsoring husband regularly returned to India for two weeks' holidays and stayed there (paragraph 28). However, visiting a country for three weeks was not the same as living there, even though the judge was not satisfied that the Sponsor's ill health was as bad as they would have the judge believe (paragraph 29). The Appellant also had a son in India (paragraph 30). The judge concluded that there was no evidence before the Tribunal of any insurmountable obstacles to family life between the Appellant and her husband continuing outside the UK in India (paragraph 30).

7. The judge then went on to consider the fact that the decision may be disproportionate in other respects. The sponsoring husband was in receipt of a private pension of £140 per week, plus pension credit of some £33 per week, which equated to an annual income of just over £8,000. However, he had to show an income of £18,600. However, he had to show an income of £18,600, "which he will never be able to do which, in turn means that the Appellant if she goes back to India will never be able to join him here in the UK on a permanent basis". That being so, the appeal was allowed.

Grounds of Application

8. The grounds of application state that the judge erred in law in a number of respects. First, the judge had found that there were no insurmountable obstacles to family life continuing in India. Yet the appeal had then been allowed. Second, the judge had concluded (at paragraph 36) that the Sponsor's financial ability to support an entry clearance application was an exceptional circumstance, but it is not easy to see why this is so. Consideration had to be given to the public interest and the Appellant had no right to remain in the UK and did not speak English. Her circumstances were not so exceptional that her appeal should be allowed. Third, her family life "was created at a time when the Appellant was aware that her stay in the UK was precarious …".

9. On 3rd August 2018, permission to appeal was granted on the basis that the judge failed to give adequate reasons for allowing the appeal on Article 8 grounds.

Submissions

10. At the hearing before me on 4th July 2019, the Appellant was represented by Mr R Martin of Counsel. He handed up the decision in **TZ (Pakistan) [2018] EWCA Civ 1109**, which the judge had relied upon (at paragraph 13). Mr Martin submitted that,

> "The consideration of Article 8 outside the Rules is a proportionality evaluation i.e. a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for their circumstance will affect the

weight to be given to the public interest in his or her removal and the weight to be given to family and/or private life …" (paragraph 28).

11. Mr Martin submitted that this is exactly how the judge had proceeded. She had balanced out the various public interest factors. She had come to the view as to which factors weighed heavily. In this respect, she had concluded that although there was no initial insurmountable obstacles to family life continuing in India as a factual matter, the circumstances of this couple were that the Appellant's sponsoring husband only had income that amounted to £8,000, and could not show the £18,600 needed to sponsor her return back to the UK. That being so, the judge had concluded that "he will never be able" to sponsor her and she "will never be able to join him here in the UK on a permanent basis" (paragraph 35). That was an important observation given that the Appellant and the Sponsor had a genuine and subsisting relationship. Moreover, the Grounds of Appeal were entirely wrong in submitting that their relationship was formed at a time when immigration status was precarious, because it was a longstanding relationship that had arisen in India, prior to the couple's arrival in the UK. That too was an important factor. The judge had looked at everything carefully in the round and concluded in a manner that was open to her.

12. For her part, Miss Aboni submitted that the judge had erred in two respects. First, the judge had already found that there were no insurmountable obstacles to family life continuing in India. The Appellant could not satisfy the English language requirements and therefore the public interest condition was not satisfied. The judge had in terms concluded that, "I find that the decision to refuse her application for further leave to remain to be justified" (paragraph 33). Second, in allowing the appeal under Article 8, the judge had failed to give proper regard to Section 117B and the fact that the Secretary of State had a constitution of responsibility to maintain immigration control and that this was an important factor in immigration decisions.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, it is well-established that the threshold for demonstrating that the decision reached is "perverse" is a high one, and all too often, as Lord Justice Brooke made clear in **R (Iran) [1985]**, practitioners use the term loosely when there is no perversity in the decision below. This is a case where the judge has indeed considered every single aspect of the claim before her in a thoughtful and deliberate manner. In fact, throughout the bulk of the determination, the judge veers firmly in favour of the Secretary of State, and the public interest in immigration control, even observing that there were no insurmountable obstacles to family life continuing in India.

14. Second, however, having looked at the position following the Appellant's removal to India, the judge had concluded that the sponsoring husband's inability to show an income of £18,600, would mean that they would be separated "on a permanent basis"

and that under Article 8 this would be a disproportionate outcome for a couple who are aged 75 years and 63 years. Indeed, the judge at this stage comes to the conclusion that, "The Appellant cannot meet the requirements of the Immigration Rules but the consequences of not being able to do so will be unjustifiably harsh for the Sponsor" (paragraph 36). That is a conclusion that the judge was entitled to come to.

15. In fact, if regard is had to **Agyarko [2017] UKSC 1**, there the Supreme Court explained that the Secretary of State "has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature", but that had on the contrary, "defined the word 'exceptional', as already explained, as meaning circumstances in which refusal would result in unjustifiable harsh consequences for the individual such that the refusal of the application would not be proportionate" (see paragraph 60).

16. That is, indeed, precisely how the judge came to the conclusion that the Appellant would succeed under freestanding Article 8 jurisprudence. The judge was entitled to come to that conclusion. There is no error of law in the decision.

Notice of Decision

17. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

18. No anonymity direction is made.

19. The appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 12th July 2019