



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04131/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 January 2019

Decision & Reasons Promulgated
On 18 January 2019

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr JATINDER KUMAR
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby, Counsel (instructed by ATM Law)

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by Upper Tribunal Judge McWilliam on 28 November 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Roots in a decision and reasons promulgated on 23 May 2018.

2. The Appellant is a national of India, who had entered the United Kingdom as a Tier 4 (General) Student in 2009. Subsequently his leave to remain was extended but then it was curtailed to 31 August 2014. An appeal was dismissed on 24 June 2016. The Appellant made another application on 7 October 2016 which was refused on 27 February 2017. The Appellant relied on his marriage to a settled British Citizen. The Respondent had raised an allegation of ETS deception.
3. Judge Roots found that the Appellant's family life (which he accepted existed) had been formed when the Appellant's family life was precarious. The Appellant's British Citizen wife could live in India with the Appellant. Some hardship would be involved, but not very serious hardship or insurmountable obstacles. Her children from a previous relationship were now healthy young adults. The Appellant's family in India would provide accommodation and support. There was no clear evidence that the Appellant could meet the Immigration Rules (Appendix FM) if an entry clearance application were made. There were no exceptional circumstances and there was no Article 8 ECHR disproportionality. Hence the appeal was dismissed.
4. Permission to appeal was refused by First-tier Tribunal Judge Lambert on 20 August 2018 but was granted by Upper Tribunal Judge McWilliam because it was considered arguable that the judge had not made a finding on the Chikwamba [2008] UKHL 40 point raised before him.
5. Mr Sowerby for the Appellant relied on the grounds submitted and the grant of permission to appeal. The issue was narrow. The Chikwamba principle had been approved in Agyarko [2017] UKSC 11 but the judge had not dealt with it as he should have done. It was recorded as argued in submissions and there had been evidence that the Appellant's wife earned £24,000 per year. That had been shown sufficiently. The Suitability requirement was not displaced by a short overstay. The judge dismissed the ETS deception allegation. There was no reason why entry clearance would not be granted and no purpose was served by requiring the Appellant to leave the United Kingdom to make it. The appeal should be allowed and the decision remade in the Appellant's favour.
6. Mr Bramble for the Respondent submitted that there was no material error of law in the First-tier Tribunal's determination and the judge's findings had all been open to him. The skeleton argument placed before the judge had made no mention of

Chikwamba. It had been conceded on the Appellant's behalf that there had been overstaying from August 2014. The record of submissions showed that the judge had been aware of the Chikwamba point and had addressed it sufficiently. The appeal should be dismissed.

7. In reply, Mr Sowerby submitted that there had been sufficient evidence of the Appellant's wife's income for the appeal to have been allowed and the appeal should be allowed now.
8. The grant of permission to appeal was in the tribunal's view a generous one which had paid insufficient attention to the text of the careful determination. The submissions advanced on behalf of the Appellant were all fully dealt with and disposed of by the First-tier Tribunal Judge. The tribunal accepts Mr Bramble's submissions.
9. The skeleton argument submitted to Judge Roots made no reference at all to Chikwamba. The copy of the skeleton argument on the appeal file shows that the judge highlighted the extensive "insurmountable obstacles" arguments there set out, five specific points, which the judge rejected on the facts found, directing himself by reference to the discussion of Jeunesse in Agyarko [2017] UKSC 11: see [25] and [42] of the determination.
10. At [15] of the determination the judge noted the discussion of Chikwamba in [57] of Agyarko. That indicated plainly that he was alive to the point, which was submitted as a secondary line of argument. The judge noted at [46] of the determination that he had not been presented with clear evidence or fully developed argument that an entry clearance application from India made by the Appellant would succeed. No evidence was produced at the Upper Tribunal hearing to cast the slightest doubt on the accuracy of that statement. The tribunal accepts its accuracy. The judge's plain view was that the Appellant's admitted overstay, nearly four years or more by the date of the First-tier Tribunal hearing, was a matter of public interest in maintaining immigration control. The Appellant's relationship with his wife began in April 2015, by which time the Appellant had already overstayed by some six months, and should have left the United Kingdom. Requiring the Appellant to seek entry clearance in accordance with the Immigration Rules, Appendix FM, was proportionate given the finding that family life could be continued in India: see [50] of the determination. That was more than sufficient to deal with the secondary line of Chikwamba argument.

11. The First-tier Tribunal Judge produced a thorough, balanced determination, which securely resolved the issues, some of them (the ETS allegation) in the Appellant's favour. The judge gave proper weight to the public interest in immigration control. The tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed

Dated 10 January 2019

Deputy Upper Tribunal Judge Manuell