Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05857/2018
HU/05861/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2019	**On 25 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

AMANDEEP [K] (1)
[S K] (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan of counsel
For the Respondent: Mr Escott a Home Office presenting officer

DECISION AND REASONS

Introduction and background

1. In the present appeal the appellant is the Secretary of State for the Home Department, but I will both refer to her by her designation in the First-tier Tribunal (FTT) as "the respondent". The appellants will also continue to be referred to by their designations before the FTT.

2. The first appellant is an Indian national born on 15 August 1988. She appealed against the respondent's decision to refuse her further leave to remain in the UK under article 8 of the European Convention on Human Rights (ECHR) made on 21 April 2017.

3. The first appellant appealed to the FTT together with her partner at the time, [SK], the second appellant (the second appellant). It is unnecessary to make further reference to him since he has not attempted to appeal to the Upper Tribunal (UT).

4. The first appellant came to the UK as a Tier 4 student on 4 November 2009. In November 2014 she was given further leave to remain based on there being compelling circumstances. On 13 October 2015 she claims to have married the second appellant. However, by the date hearing took place before the FTT (on 25 September 2018) her relationship with the second appellant had come to an end. I was told at the hearing, that there was no contact between the first appellant, her child, a girl by the name of [J] who was born on 26 February 2018, and the second appellant. At the date of the hearing in the FTT, [J] was aged 7 months.

Proceedings before the first-tier Tribunal

5. The appeal came before Judge of the FTT Macdonald (the judge) on 25th of September 2018. Having considered and set out the evidence and submissions by both representatives, the judge concluded that the first appellant had satisfied him that her article 8 private and/or family life in the UK would be unlawfully interfered with by the decision under appeal (to refuse her leave to remain). There was a real risk to her human rights arising from the fact that as a lone female with a young child, she would not, he found, have a family support network, the first appellant would experience difficulty in obtaining a job and looking after a child at the same time. Thus, there were "significant obstacles to the first appellant's return to India" (paragraph 48) and those obstacles had "increased". In the judge's view the "problems that existed in November 2014" (a reference to the grant by the respondent of exceptional leave to remain at that time) "have increased". By the date of the hearing the first appellant had a role as a single mother without family support or friends. The judge described the respondent as having given only cursory consideration to the welfare of the child and although the first appellant had substantial savings (in excess of £ 40,000) this did not "alter the

position as to the lack of support". In the circumstances article 8 would be utilised to afford the appellant an opportunity to remain in the UK.

6. An initial application for permission by the respondent against the FTT's decision was refused but a subsequent appeal to the U T resulted in a grant of permission by Upper Tribunal Judge Hanson on 2nd January 2019. The grant of permission is helpful as it sets out carefully the arguable basis for the current appeal. Judge Hanson pointed out that the high threshold of "a very significant obstacles" had to be satisfied in order for the requirements of paragraph 276 ADE (vi) of the Immigration Rules to be met. Although the appellant had been a victim of domestic violence in 2014, the fear was said to be derived from her former husband's family on return to India, having been disowned by her own family in 2014. In 2017 the appellant circumstances were completely different in that she had a new husband and was pregnant with his child, having been working in the UK after concluding her education. Judge Hanson also thought that the savings she had acquired might be relevant, as they may reduce the obstacles to her safe return to India. By the date of the hearing before the judge her second relationship with the second appellant had also failed. The appellant was found to be credible and there was no evidence to support the respondent's submission that the passage of time had made matters better for the first appellant. However, the question was whether the obstacles were worse in 2017 than they were in 2014 and the judge's decision appeared inadequately reasoned in that regard. The risk identified to the first appellant was from her first husband's family not from any other source. There was insufficient factual basis for the finding that problems which existed in 2014 would still prevail in 2017. It was arguable, at least, that the first appellant would return to India as a single mother, without family support but with an education and savings. In the circumstances the judge's conclusion may have been incorrect. Judge Hanson quoted from **Parveen v the Secretary of State for the Home Department [2018] EWCA Civ 932** where Underhill LJ stated that "very significant" connoted an "elevated threshold" and must be more than mere inconvenience or upheaval. There must be something "of substance". The respondent had to assess the obstacles to integration and ask whether they were "very significant" or not. The current CPIN dated July 2018, in relation to women subject to gender-based violence, states at paragraph 4.8.2 that relocation within India for single women or women with children was difficult because of the need to provide a husband's details or a father's name to access certain government services. However, the key issue is whether they those difficulties were "very significant". There was no country guidance referred to by the judge which tended to support his conclusions. Therefore, all the grounds advanced by the respondent were arguable before the U T.

The hearing before the U T

7. At the hearing, Mr Kotas briefly outlined the background, stating that the original relationship (with Mr Singh) had broken down and the first appellant had begun a relationship with the second appellant. An application for further leave to remain in the UK on the grounds of compelling circumstances was made on 29 April 2014. This resulted in the grant of 30 months leave under the private life rule (paragraph 276 ADE of the Immigration Rules). This must have been on the basis that there were, at that time, "very significant obstacles to the applicant's integration" into the country to which she had to return (India). It was accepted that the first appellant had lived in the UK since 2009 and was enjoying a private and family life with her young child in the UK. In April 2017, when the application which gave rise to the current appeal was made, she was still with the second appellant. It was accepted by the respondent that the appellant had been subjected to violent abuse by her former husband, Mr Singh. However, Mr Kotas submitted that there has been no evidence before the judge to confirm that very significant obstacles still existed to the first appellant's return to India. An elevated threshold had to be met to satisfy the relevant rule. Although she was a single person without family or friends this was not sufficient to render the respondent's decision unlawful. The respondent did not invite the tribunal to go behind the favourable credibility finding. However, the appellant had work experience and had saved money. Therefore, there were good prospects of her successful reintegration into her own country.

8. Mr Chohan, on the other hand, submitted that the single parent returning to India was an even worse position than a single female. He said that the judge had fully considered the submissions made by the respondent at the hearing before the FTT to the effect that the "passage of time had made matters better for the first appellant" (paragraph 44). However, the judge had gone on to find that although the appellant had obtained employment, had a child and saved towards her future, as a single mother with a seven-month-old child and without family support she would "experience difficulty obtaining a job and looking after a child at the same time".

9. At the end of the hearing I reserved my decision as to whether there was an error of law and if so what steps should be taken in relation to it.

Discussion

10. It was acknowledged, in paragraph 9 of the judge's decision, that the first appellant did not qualify under Appendix FM because the second appellant was believed to be in the UK without leave and was neither British nor settled in this country (see paragraphs 8 and 9 of the judge's decision). The appeal therefore proceeded on the basis that the issue to be determined was whether the first

appellant met the requirements for private life within the Immigration Rules. Alternatively, the FTT had to consider whether she ought to be entitled to leave to remain under article 8 of the ECHR.

11. It is noteworthy that the judge misquotes the requirements of paragraph 276 ADE (1) (vi). That paragraph contains the material provision for establishing leave to remain on the grounds of private life, in that he refers repeatedly to "significant obstacles" to the first appellant's return to India, for example, when he quotes the respondent's finding at paragraphs 10, considers the respondent's submissions at paragraph 28 and makes his own findings at paragraph 48 of his decision. In fact, I cannot find a single reference in the decision to the correct test of "very significant obstacles". The judge refers to "considerable difficulties" at paragraph 42 and "difficulty in obtaining a job and looking after her child" in paragraph 47. If the judge was referred to the "very significant obstacles" test he did not refer to it, which gives one less confidence that he actually applied it. It was the duty of the advocates representing the parties to refer the judge to the correct test and, preferably, provide him with a copy of the relevant rule. It is therefore not difficult to see how the judge fell into error in failing to apply the "elevated threshold" required by the Immigration Rules as explained in the case of **Parveen** if, as may well have been the case, he was not reminded what the rule actually said.

12. Secondly, it seems to me to have been incumbent upon the judge, in finding at paragraph 50 that "… the first appellant meets the provisions of paragraph 276 ADE (1) (vi)" to set out what those "very significant obstacles" were. Simply stating (at paragraph 48) that she had "… all the problems that existed in November 2014 plus the difficulties that she will now encounter in her role as a single mother of her child without family support or the support of friends" were not adequate findings that there were in fact "very significant obstacles". The "significant obstacles" identified by the judge may be better characterised as "hardship, difficulty or disruption" rather than the "very significant obstacles" required. Therefore, they do not appear to cross the threshold required by paragraph 276 ADE (1) (vi).

13. The fact that the appellant did not meet the requirements of paragraph 276 ADE (1) (vi) was a very good pointer to the fact that the respondent's decision probably did not breach the UK's obligations under section 6 of the Human Rights Act 1998 in that there was no breach of article 8. There appear to have been no features to this case which would tend to suggest it ought to be decided, exceptionally, outside the requirements of the Immigration Rules.

14. In relation to Mr Chohan's submission that the respondent's decision failed adequately to recognise the rights of the child, [J], this is unlikely to be material to the outcome of this appeal. He correctly pointed out that there is a commitment on the part of the respondent to treat [J]'s welfare as a paramount consideration in

reaching her immigration decision in order to comply with the requirements of section 55 of the Borders, Citizenship and Immigration Act 2009. However, having regard to the young age of [J] and the fact that the child would be returning with her mother to India as part of one family unit, it is difficult to see how the birth of [J] could lead to a different outcome to this appeal. In the circumstances, the fact that in paragraph 49 of his decision the judge only gave the "interests of the child … cursory consideration" does not, I find, give rise to an additional ground of appeal. In any event, this did not appear to form part of the appellant's own case before the FTT, although [J] was only 7 months old at that point, whereas now she is about to celebrate her first birthday. The rights of the child did not have any bearing on the on the outcome to the appeal, therefore.

Conclusions

15. For the reasons given above, I have found a material error of law in the decision of the FTT. In the circumstances it is necessary to set aside the decision of the FTT.

16. I have considered whether it is necessary to hold a further hearing. Mr Chohan suggested that he may wish to obtain expert evidence as to the status of his client as a single female returning to India with a young child. There was no formal application under rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce fresh evidence either before or during the hearing. I note that the representatives were notified on 14 January 2019 that any application to adduce fresh evidence, which was not before the FTT, must be supported by an application indicating the nature of the evidence and explaining why it had not been adduced before the lower tribunal. The UT will regard as a serious matter any failure to comply with rule 15 (2A). In any event, there was no indication of the identity of such an expert, the length of time it would take to obtain such an expert's report or whether funding was available. Parties are to be taken as being ready to proceed with a hearing before the UT. I doubt ultimately will be helpful in resolving the issues in this appeal, in any event. I have also considered whether it is necessary to obtain any updating evidence, for example, in relation to the progress of [J]. However, since that girl is not yet at school and is less than a year old, there is no obvious evidence to be obtained, nor did Mr Chohan identify such evidence. Since there was no identifiable change in circumstances since the hearing before the FTT, which only took place in September 2018, it appears appropriate to re-make this decision based on the evidence and findings of the FTT. This includes, of course, the judge's favourable credibility findings.

17. There is no doubt based upon the CPIN, referred to above, that relocation within India by single women with children is difficult. The respondent has pointed out in her grounds of appeal that the appellant spent the first twenty-one years of her life in India. It seems to be common ground, based on the grant of further leave to remain in 2014, that the appellant now no longer has family to whom she could

turn in India. However, in response to her current application, the respondent did not accept claims that she will be subject to violence and hardship stating that there was "no credible basis" for her claims (see the respondent's refusal letter dated 15 February 2018, and in particular the first paragraph of page 4 of that letter). Given the appellant's cultural, linguistic ties with India, the appellant could be expected to relocate internally to an area well away from her former husband's family. That is undoubtedly going to be challenging but more in the nature of hardship or difficulty than a very significant obstacle in my view. Nevertheless, it was open to the appellant's representatives to file any evidence in opposition to the CPIN report that it saw fit. In the absence of information which contradicts that report, I have concluded that the evidence falls short of showing "very significant obstacles" exist to the appellant's integration into India. I find it impossible to accept the vast populous country such as India there would be no safe place in the appellant could live well away from her former husband's family. As an educated lady, with significant resources, she will be returning to the country of her nationality with significant opportunities, albeit she also now has a young child. The truth is that the source of her fear (her husband's family) which was said to form the basis of her application to the respondent in 2014, is no longer likely to present the same threat to her. The fact that the appellant and her partner are no longer together does not appear relevant.

18. Given that the first appellant almost certainly does not meet the requirements of paragraph 276 ADE (1) (vi) I have considered whether there is any alternative basis under article 8 which would justify overturning the respondent's decision to refuse further leave to remain. No doubt the appellant has formed a private life in the UK but her family life with her daughter can be continued in India, albeit in less happy circumstances than would ideally be the case. There is always a public interest in the proper enforcement of immigration controls, indeed, section 117B of the Nationality, Immigration and Asylum 2002 provides that the maintenance of effective immigration controls "is in the public interest". The public interest must, however, be balanced against the appellant's interest in continuing her private life in the UK where she is well settled.

19. Having considered whether there are any exceptional circumstances for allowing the first appellant to remain in the UK outside the Immigration Rules, I consider the respondent correctly concluded there were no unjustifiably harsh consequences for her or her child. I am satisfied that in so far as it was relevant to do so, the respondent considered that child's best interests lay with continuing to live with her mother in India or in the UK. It was correctly decided that there were no exceptional circumstances to warrant granted leave to remain in the UK outside the requirements of the Immigration Rules.

20. In all the circumstances I have concluded that the respondent's interference with the appellant's protected private and family life is justified by the need for effective immigration control and accordingly the appeal to the FTT under article 8 ought to have failed.

Notice of Decision

As the decision of the FTT contains a material error law the respondent's appeal to the UT is allowed and the decision on human rights grounds is set aside.

I re-make a decision which is to dismiss the appellant's appeal to the FTT.

No anonymity direction is made.

Signed Date 15 February 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

The FTT made no fee award and I have dismissed the appeal. I therefore make no fee award.

Signed Date 15 February 2019

Deputy Upper Tribunal Judge Hanbury