Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07952/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th January 2019	**On 7th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PUSHPINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel instructed by Douglass Simon Solicitors
For the Respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of India, born on 5 November 1957. He applied for leave to remain in the UK as the partner of Ms Liza D'Silva, a British citizen. This application was refused in a decision dated 5 July 2017, on the basis that the evidence was not sufficient to prove that the Appellant and Ms D'Silva had cohabited for two years prior to the date of application and since their religious marriage on 21 October 2015 and that given his

divorce to his first wife was not yet finalised, this cast doubt on the genuineness and subsistence of the relationship.

2. It was considered that there were no insurmountable obstacles to family life continuing abroad because there was evidence that Ms D'Silva's medical conditions could be treated in India. It was also found there were no exceptional circumstances for a grant of leave outside the Rules as Ms D'Silva's daughter was now an adult and there was insufficient evidence of a particular dependency between them.

3. The Appellant appealed against this decision and his appeal came before Judge of the First-tier Tribunal Rastogi for hearing on 11 June 2018. In a decision and reasons dated 28 June 2018, the judge dismissed the appeal, finding at [34] that the requirements of EX1(b) and EX2 were not met and there were no exceptional circumstances justifying the grant of leave outside the Rules.

4. Permission to appeal was sought, in time, to the Upper Tribunal. The renewed grounds of appeal made three points. Firstly, that the judge erred in her approach to the evaluation of insurmountable obstacles to family life within the meaning of EX1(b) and EX2 of Appendix FM, given that whilst private medical treatment for Ms D'Silva may be available in major cities, given the parties' limited means and difficulties due to their ages in finding employment in India it would entail very serious hardship. They would not be able to afford the medication and they would be likely to be unemployable. It was submitted the judge failed to make adequate findings of fact in this respect, particularly given that the Appellant's partner is a British citizen.

5. Secondly, in failing to find that there was family life between the Appellant's partner and her daughter, given the evidence of continued dependence for practical, financial and emotional support in the context of the history of the mother/daughter relationship, which clearly met the tests set out in the judgments in Gurung [2013] EWCA Civ 8 and Ghising [2012] UKUT 00160 (IAC).

6. Thirdly, having at [24] and [44] found that the Appellant's partner could not meet the minimum income requirement, his income having in fact gone down, in finding at [49] that it will be proportionate for the Appellant to leave the UK on the basis there would be only a temporary separation between him and his partner. This was an erroneous approach, given that the issue of exceptional circumstances under GEN 3.22 fell to be determined on the basis of a permanent separation should the Appellant's partner choose to remain in the UK, but the judge had failed to appreciate this distinction and thus failed to properly direct herself and lawfully conduct the applicable balancing exercise.

7. Permission to appeal was granted by Upper Tribunal Judge Chalkley in a decision dated 3 December 2018, with reference to the third ground of

appeal, but permission to appeal was granted on the basis that all grounds could be argued.

Hearing

8. At the hearing before the Upper Tribunal, Mr Slatter for the Appellant sought to rely on the grounds of appeal. He submitted in relation to the evaluation of insurmountable obstacles that no adequate findings of fact or reasons had been given. The Appellant's partner is in receipt of a quantity of medication for different problems to do with her health, including glaucoma, arthralgia of multiple joints, fibroids, depression, type 2 diabetes.

9. In respect of the second ground of appeal, Mr Slatter sought to rely on [46] of Gurung [2013] EWCA Civ 8 and [56] of Ghising [2012] UKUT 00160 (IAC) where the court found that the test as set out in Kugathas [2003] EWCA Civ 31 was too restrictive. On the facts of this case, the Appellant's partner's daughter had come to the UK at the age of 13 having been previously separated from her mother. Both she and her mother gave evidence before the Tribunal as to the dependency between them. Even though the Appellant's partner's daughter is now 27, she is still very reliant on her mother and they have lived together since she arrived in the UK at the age of 13.

10. Mr Slatter submitted there was clearly evidence capable of satisfying family life. He further submitted the judge had erred in that GEN 3.22 and the test of unjustifiably harsh consequences makes clear that that has to be considered not only as to the effect on the Appellant or a partner, but also on other family members and the judge needed to have considered the impact on the Appellant's partner's daughter when considering the appeal outside the Rules. He submitted that this is clear from Agyarko [2017] UKSC 11 at [45] which provides:

> "*By virtue of EX1(b) insurmountable obstacles are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly interpreting the expression in the same sense as in the Strasbourg case law leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK which could not be overcome or would entail very serious hardship. Even in the case where such difficulties do not exist however leave to remain can nevertheless be granted outside the Rules in exceptional circumstances in accordance with the instructions. That is to say in circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be appropriate*".

11. It was thirdly submitted that the judge's findings were inconsistent, in that at [49] the judge found that removal would be proportionate:

> "*Having considered all relevant factors I do not find there to be any circumstances which are capable of amounting to unjustifiably harsh consequences for either the Appellant or Ms D'Silva. I have considered whether their temporary separation so the Appellant can apply for entry clearance of itself is a disproportionate breach of their right to respect for their family life but I do not find it to be so*".

12. However the judge found at [44] and [47]:

> *"44. The Appellant does not claim to be personally self-sufficient. In light of my findings at 24 above, I do not find him to be sufficiently supported by Ms D'Silva as her earnings are not sufficient to meet the minimum income requirement in the Rules …*
>
> *47. As for the possibility of the Appellant returning to India to make an application for entry clearance either with or without Ms D'Silva, this was not a particular feature of the Appellant's case but, in any event, I have had regard to the judgment of Lord Reed at 51 of Agyarko in which he said that if the applicant was certain to be granted leave to enter, there may be no public interest in their removal. That is not the case here in light of my findings on the MIR."*

13. Mr Slatter submitted that this internal inconsistency materially impacted on the balancing exercise and rendered the judge's assessment of proportionality unsafe.

14. In her submissions, Ms Kenny submitted that the Appellant's partner and her daughter had been separated previously and that the only point was that they were living under the same roof, which does not, in itself, show a relationship going beyond normal emotional ties and the circumstances were no different from that of many young adults who lived at home.

15. In relation to the decisions in Ghising [2012] UKUT 00160 (IAC) and Gurung [2013] EWCA Civ 8, she submitted that this was in a specific context of Gurkha cases and thus did not apply. In any event, she submitted that the Appellant is the carer for his partner, not her daughter and it was surprising that the daughter was not taking a more substantial role in caring for her mother if they have such a close relationship.

16. In relation to whether there were insurmountable obstacles to family life in India, Ms Kenny submitted that the Appellant has 30 years' experience as a garment maker in India; that any British citizen who moved abroad would lose access to his or her GP and A and E, the judge had considered the fact that the Appellant's partner was receiving medical treatment and had made findings open to her on the evidence.

17. In respect of the third ground of appeal, she submitted that this was not material as the appeal would still fall for refusal based on the other grounds and thus there was no material error.

18. In reply, Mr Slatter submitted that Ms Kenny had been silent on whether the judge's legal correction in respect of Kugathas [2003] EWCA Civ 31 was correct but had instead focused on whether the evidence was capable of meeting that test. He reiterated that the judge's finding was contrary to the judgment in Ghising [2012] UKUT 00160 (IAC) at [61]. He submitted that the Appellant's partner's daughter is married but in the process of getting divorced. She had always lived with her mother since arriving in the UK aged 14. It is significant that she lost her other parent and the period when she was separated from her mother made their relationship stronger. He did not think it was right to suggest that most young adults or 27 year olds live at home with their mothers. He submitted it was a material error in that had the judge properly directed herself she might have reached a different conclusion.

Findings and Reasons

19. I find a material error of law in the decision of First-tier Tribunal Judge Rastogi for the reasons set out in the grounds of appeal. In particular, that having found that the Appellant was unable to meet the minimum income requirement of the Rules at [44] and [47], the judge's conclusion at [49] that their temporary separation would not be a disproportionate breach of their family life is inconsistent with that previous finding, given it is clear that the Appellant cannot meet the Rules and thus any separation would not be temporary, but would in effect be permanent and sever the family life that has been built up between the Appellant and his partner.

20. Notably and contrary to the Respondent's refusal, the judge found that the Appellant did satisfy the test as a partner within paragraph GEN 1.2 at the date of the hearing, that the relationship was genuine and subsisting, the Appellant was able to meet all of the suitability requirements and thus the issues were considerably narrowed.

21. I further find that the judge erred at [36] in finding that essentially the Appellant and his partner could relocate to India and that the loss of medication would not be an insurmountable obstacle as the Appellant is not likely to be employable in light of his age and there was insufficient evidence, in light of her medical issues, that his partner would be either.

22. I find that the judge fell into error in that she has failed to take account of a material consideration and that is the respective ages of the Appellant and his partner. The Appellant was 60 years of age at the time of the hearing before the judge. Whilst his partner is younger as in she is 49 years of age, it was not disputed that she has a number of medical complaints and I find those are material considerations which were not factored in by the judge in her assessment of whether there were insurmountable obstacles to her relocating to India.

23. I further find that the manner in which the judge dealt with the relationship between the Appellant's partner and her daughter fails to engage with the jurisprudence as a whole, i.e. not just Kugathas [2003] EWCA Civ 31 but Ghising [2012] UKUT 00160 (IAC) and Gurung [2013] EWCA Civ 8 nor takes account of the elements of dependency between them.

24. For these reasons I set the decision of First-tier Tribunal Judge Rastogi aside and I remit the appeal for a hearing *de novo* before the First-tier Tribunal sitting at Hatton Cross.

Signed Rebecca Chapman Date 4 February 2019

Deputy Upper Tribunal Judge Chapman