Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11643/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 1st August 2019	**On 20th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

GURPAL [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. A. Pipe (Counsel)
For the Respondent: Miss H. Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Butler, promulgated on 13th November 2018, following a hearing at Nottingham on 25th October 2018. In the decision, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 9th April 1971. He appealed against the decision of the Respondent dated 15th May 2018, refusing his application on human rights grounds, to remain in the UK.

The Appellant's Claim

3. The essence of the Appellant's claim is that, although he came to the UK on a visit visa in 2014 which was valid until 2015, and thereafter overstayed, the purpose of his visit was to see his partner, [BK], whom he subsequently married in a religious ceremony on 18th November 2015. He did not leave the UK in accordance with the terms of his visa. The reason for this was the medical condition of his partner who suffers from a number of medical conditions. The Appellant has wished to support her in this country.

The Judge's Findings

4. The judge set out the Appellant's evidence. He observed how it was that the Appellant's wife had "some significant medical issues which affect her digestive process and give her back pain". She had repeated absences from work and has not returned to work since December 2016. She suffers from achalasia, which prevents food passing through her oesophagus smoothly. She has fibromyalgia. This gives her severe back pain. She has had a number of surgical interventions and investigations. These are evidenced in 80 pages of correspondence and appointment letters which start on page 77 of the Appellant's bundle (see paragraph 31 of the decision).

5. The judge accepted that:_

> "It is perhaps unsurprising that she claims to have symptoms of depression as a result of her many physical ailments. The doctors at pages 152 and 157 show her receiving treatment in hospital dermatology and dietetics clinics in 2018 …" (paragraph 32).

6. The Appellant's claim, however, was that he gave his wife 24 hour care. The judge observed that "there was no detail as to what care had to be given, if at all, during the night. More significantly, there is no medical opinion that such care is necessary" (see paragraph 33).

7. The judge went on to dismiss the appeal.

Grounds of Application

8. The grounds of application state that the judge had erred in law in the following material respects. First, he had concluded that he was "unconvinced of" (paragraph 43) the need of the Appellant's partner to receive 24/7 care. However, the focus of the judge of the need for 24/7 care from the Appellant has led him to fail to consider the emotional bond between the Appellant and his partner, because it is this which goes to the question of "insurmountable obstacles" which has to be determined under the Immigration Rules.

9. Second, the judge had made a material misdirection in law (at paragraph 40) in concluding that "I do not find that there are exceptional circumstances warranting consideration of Article 8 outside the Rules" because in associating the judge imposed an unlawful gateway threshold upon the consideration of Article 8. This was a human rights appeal. The reference to "exceptional circumstances" meant that the judge's "**Razgar**" assessment was flawed (at paragraphs 42 to 43).

10. Third, the judge made an irrational finding in considering the Appellant's wife's fitness to travel to India, when concluding that the Appellant's GP was not a person who had evidenced his professional background by way of documentary evidence, and it was not clear what qualifications he had to make the kind of assessment that he had made, when suggesting that the Appellant was not fit to travel to India.

11. Fourth, the judge had failed to consider the argument based upon **Chikwamba [2008] UKHL 40**, which had been expressly put to the judge (see paragraph 14 of Counsel's skeleton argument before the judge below).

12. Finally, the judge did not consider the impact, in terms of the consideration of "insurmountable obstacles", upon the Appellant's partner, of the Appellant being removed, because this went to the proportionality assessment directly, outside of the Immigration Rules.

13. On 28th January 2019 permission to appeal was granted by the Tribunal.

Submissions

14. At the hearing before me on 1st August 2019, Mr. Pipe relied upon the grounds of application. He submitted that the judge had accepted that the relationship between the Appellant and his wife was a "genuine and subsisting" relationship. Therefore, the key question here was whether there were "insurmountable obstacles" to the Appellant and his wife relocating to India. The fact, which has not been questioned by the judge, was that the Appellant suffered from numerous, multiple, and complicated medical conditions. These had been set out, and expressly referred to by the judge, from page 77 of the Appellant's bundle onwards.

15. In particular, there was a letter from the Appellant's GP, Dr. Alex Kupfer, dated 24th September 2018, which sets out under a single column, both the medical condition of the Appellant's wife, and the medications that she was taking. It then referred to the fact that the Appellant's wife, [BK], was a person who "suffers from chronic pain in shoulders, hips and back. She has a tight chest, breathing and swallowing symptoms/problems. She struggles to find adequate pain relief. She gets severe symptoms every day". It refers to how [BK] has had to leave her job due to her medical conditions and that "her physical health problems exacerbate her mental health and she suffers from depression every day".

16. Indeed, it says that "[BK] struggles to stand for more than twenty minutes and walking is difficult for her at all times. She is currently not able to travel to India". Mr. Pipe submitted that rather focus upon the legal test of "insurmountable obstacles", the judge had focused upon the need for 24 hour care for the Appellant's wife. It was unnecessary, however, to go this far. If the Appellant's wife suffered from the conditions that had been set out in the numerous medical reports, then the "insurmountable obstacle" test had been satisfied, quite simply, because the Appellant was to be required to return to India, together with his wife, and if she was unable to travel, as the medical reports indicated, then there were insurmountable obstacles to this particular relocation taking place.

17. Finally, Mr. Pipe referred to the fact that there had been today a Rule 15(2A) application before this Tribunal. There was new evidence which had not been available previously, that was overwhelmingly important to the remaking of the decision, should this Tribunal get to that stage. This included a letter of 10th July 2019 from Dr. Kupfer, who states that, "I can say with certainty, that the stress of Gurpal's leave to stay hearing is already having a negative effect on [BK]'s health and that should he be required to leave it would have a significant negative effect on [BK]'s health".

18. Mr. Pipe submitted that even if the Appellant were required to return to India alone, it was plain from this that the impact upon his wife would be very considerable. This is because, as Dr. Kupfer makes clear, "her partner, Gurpal [S], is her carer and a great support for [BK]".

19. Second, there was another letter dated 14th March 2019 from a specialist dietician, from the Nottingham NHS Treatment Centre, which makes it clear that:-

> "even liquids can be a problem for her [referring to the Appellant's wife]. There is a discomfort on her righthand side and she describes her abdomen as feeling hard there. She has identified many things which do not suit her IBS and has cut them out of her diet for the most part".

This evidence, submitted Mr. Pipe, was not inconsistent, but entirely in conformity, with the evidence previously before this Tribunal, in the decision made by Judge Butler on 13th November 2018.

20. For her part, Miss Aboni submitted that the judge did not engage in any error of law. He directed himself appropriately. All the medical evidence was properly taken into account. This was clear from paragraph 31 onwards, where the conditions that the Appellant's wife suffers from are set out. Thereafter, adequate consideration is given to the test of "insurmountable obstacles". If it was said that the Appellant could not fly, this evidence only came from Dr. Kupfer, the Appellant's GP. It was not clear why other specialists had not given that evidence. Moreover, the suggestion that the Appellant's wife needed 24 hour care was one which

had not been made out in the medical evidence. There was accordingly no error.

21. In reply, Mr. Pipe submitted that Dr. Kupfer was an NHS certified general practitioner for the Appellant. It was not necessary for him to demonstrate any further expertise. Some matters, such as the ability to be able to fly, or to relocate, are matters that do not require a specialist to report upon. After all, the Appellant could only go to so many different medical practitioners to get evidence. The evidence was what it was and it was not such that it had been impugned in any way.

22. There had been multiple letters speaking to multiple medical complications that the Appellant's wife suffered from. None of these had been contested. If the general practitioner's letter had been divorced from these other letters from medical practitioners that may have been an entirely different matter. As it was, it was in tandem with the prognosis from the other practitioners. He asked me to make a finding of an error of law and to remake the decision in the Appellant's favour.

Error of Law

23. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I set aside the decision. My reasons are as follows.

24. First, the judge's rejection of the evidence from the Appellant's GP, Dr. Kupfer, in the letter dated 24th September 2018 (at page 77 of the bundle), stating she is currently not able to travel to India" could not have been rejected on the basis that "There is no indication as to Dr. Kupfer's qualifications to make such a statement, on whether [BK] may be able to travel at a later date or whether such a journey could be made in stages" (paragraph 35). There are two reasons for this. First, Dr. Kupfer was a medical practitioner under the NHS who could make such a prognosis. In his report of 24th September 2018 (at page 77), he sets out the condition, and the medication, of the Appellant's wife. His conclusion that "[BK] struggles to stand for more than twenty minutes and walking is difficult for her at all times", is one that then leads to the statement that "she is not able to travel to India". It is not clear why the second statement would not follow the first statement if [BK] cannot stand for more than twenty minutes and has difficulty in walking. In addition, the judge refers to the difficulties that [BK] has in breathing and swallowing symptoms and the fact that she has "severe symptoms every day". Second, the reference to the ability to travel at a later date or travel in stages is speculative, as the finding has to be made, in a human rights appeal, on the day of the hearing. It is conjectural to say that someone may or may not be able to travel at a later date. What is not conjectural is the GP's firm statement that the wife of the Appellant "is not able to travel to India".

25. Second, the judge had to consider the question of whether there were "insurmountable obstacles". Proper consideration was given to the

Supreme Court decision in **Agyarko [2017] UKSC 11** by the judge. It was unnecessary, however, to consider whether the Appellant could only satisfy this test on the basis of showing where the Appellant's wife would need 24/7 care. Ultimately, this is how the judge approached the matter when looking at the issue of proportionality. The judge observed that:-

> "I would remain unconvinced of the need for him to provide 24/7 care to his partner and bear in mind his apparent lack of financial means, other costs to the taxpayer in terms of healthcare and benefits and the fact that, on a balance of probabilities, he had no good reason to overstay at the end of his visit visa …" (paragraph 43).

Remaking the Decision

26. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

27. First, the condition of the Appellant's wife was fully and properly set out by the judge (at paragraph 31) where the judge observed that "The first issue, therefore, is whether there are insurmountable obstacles to family life continuing outside the UK". Here the judge looked at [BK]'s "significant medical issues which affect her digestive process and give her back pain". This was to such an extent that the Appellant's wife had been "dismissed from her employment in December 2016 due to her repeated absence from work and has not worked since". The judge referred to the Appellant's wife's condition "which prevents food passing through her oesophagus smoothly". Indeed, the judge recognised that the impact of the physical ailments suffered by the Appellant's wife were such that it had led to "symptoms of depression" (paragraph 32).

28. Second, there is evidence from Dr. Kupfer that "[BK] struggles to stand for more than twenty minutes and walking is difficult for her at all times. She currently is not able to travel to India" (page 77). This has been further strengthened by evidence, which I admit under the Rule 15(2A) application today, in a letter dated 10th July 2019, describing how the Appellant's wife is suffering from "severe achalasia" which affects her swallowing, such that she "continues to need hospital investigations and treatment", such that it is "affecting her ability to walk", means that "she lives with chronic, daily pain". It is specific in its statement that, "her partner, Gurpal [S], is her carer and a great support for [BK]". The letter further makes it clear that the Appellant's "leave to stay hearing" is having a negative impact on his wife's health and that "should he be required to leave it would have a significant negative affect on [BK]'s health". If against this background, the scriptures of the Supreme Court in **Agyarko [2017] UKSC 11**, are applied, it is plain that the Supreme Court made it clear that "the Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality".

29. The Supreme Court went on to say that:-

> "On the contrary, she has defined the word 'exceptional', as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate" (paragraph 60).

30. Applying this test, I conclude that it would be unjustifiably harsh to expect the Appellant to return to India, given the fact that he is a carer for his wife and that she suffers in the manner that has been described in the medical reports. I come to this conclusion notwithstanding Section 117B which expresses the public interest in immigration control. This is because ultimately the question is whether the refusal is proportionate in the particular case, and balancing the strength of the public interest in the removal of this Appellant, against the impact on his family life, I conclude that the decision would not be proportionate.

Notice of Decision

31. This appeal is allowed.

32. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 17th August 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 17th August 2019