Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03586/2020 (R)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2021	**On 1 June 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant/Secretary of State: Mr A Tan, Home Office Presenting Officer
For the Respondent: Ms E Barton, Counsel, instructed by Strand Solicitors

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. I shall refer to the Respondent as the Appellant as he was known before the First-tier Tribunal.

2. The Appellant is a citizen of India. His date of birth is 22 October 1992. The judge did not make a direction to anonymise the Appellant. However, he anonymised the Appellant, referring to her as 'P.' In the light of the evidence of P's health condition, I anonymise the Appellant to protect P's identity.

3. On 31 December 2020 the Secretary of State was granted permission by First-tier Tribunal Judge Parkes to appeal against the decision of Judge of the First-tier Tribunal Shergill (promulgated on 17 November 2020) to allow the Appellant's appeal against the decision of the Secretary of State (dated 19 February 2020) to refuse the Appellant's application for leave to remain on human rights grounds (on the basis of family life with his partner, P). The matter came before me to determine whether Judge Shergill made an error of law.

4. The Appellant came to the UK on 20 September 2014 having been granted entry clearance as a student. He made an application on human rights grounds which was refused and certified as clearly unfounded on 21 January 2019. On 6 August 2019 he made another application to remain here under Article 8. This application was refused under paragraph 353 of the Immigration Rules on 5 November 2019. As a result of a pre-action protocol letter the Secretary of State agreed to reconsider the application.

The Decision of the First-tier Tribunal

5. The matter started by way of a remote hearing however, the judge said at paragraph 4 that there were problems with the Respondent being able to connect to the hearing. The judge said that he decided to deal with the case in "a pragmatic way" and had the clerk email a memo from him to the Appellant's solicitor copied to the Respondent. It read as follows:

> "The tribunal has been informed that there are widespread IT issues preventing the HO from being able to access emails, files and CVP (phone and video). I understand there is no timetable for this to be resolved.
>
> Even prior to being notified of this, I had considered this case was suitable for submissions only. The HO have accepted the genuineness of the relationship, yet the various additional witness evidence only speak to these issues. I would not have anticipated much if any cross examination of those witnesses.
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> The appellant and his partner set out a fairly clear set of reasons why they would face problems if the appellant was to return. There is nothing new in any of this that has not been set out on the refusal and/or skeleton.
>
> The pivotal evidence is the doctor's letter. That is a matter I will need to take account of whether I consider it amounts to insurmountable obstacles (over and above that has already been pleaded about the problems she will face as not being from India etc).

The case law is Agyarko and more recently Lal [2019] EWCA Civ 1925. The case really boils down to whether the evidence before me satisfies the second formulation of those obstacles in Lal that "could be overcome but to do so would entail very serious hardship to one or both of them".

Even a generous view taken that the problems claimed amount to insurmountable obstacles is not the end of the matter as section 117B bites. There are factors I would have to consider whether any permanent rupture in family life, which is effectively what appears may happen, is proportionate. That is confirmed in case law that a person's immigration status may "greatly affect the weight to be given to their right to respect for family life" (para 48 of Lal, and paras 47-55). As I understand it the appellant has overstayed by 3 years but there is nothing else of adverse immigration interest?

In the alternative, my usual approach would be to consider why the appellant cannot return temporarily and make an out of country application (i.e., Chikwamba, Chen case law). That is where the medical letter comes in – as do factors that the [partner] earns over the £18,600 threshold and there is nothing else substantive pleaded in the refusal about the public interest which would suggest the application would not succeed. That leaves the tribunal to consider why is it in the public interest to require the appellant to leave, to make an application on the face of it likely to succeed but would leave the partner in a stressful situation. That also seems to engage GEN3.2 exceptional circs – and I have previously held that exceptional circs can lead to a different outcome to insurmountable obstacles on the same facts. Obviously, I have not made up my mind on matters, but I am scoping out what I see as a relatively narrow legal/evidential set of issues for me to consider.

In considering these matters, I see no reason why the case cannot be concluded with 48 hours being given to the HO to produce any brief written submissions if they wish to make any, and the appellant's reps being given a further 48 hours to do the same. I can then consider matters on the papers.

The appellant's rep will be invited to address the tribunal."

6. The Appellant's representative, Ms Barton was recorded by the judge as having agreed with the suggestion save for the concern that the Respondent might have wanted to cross-examine the witnesses. As a result, the judge sent directions to the parties which she set out at paragraph 5 of the decision:

> "1. In exercise of its case management functions the tribunal asked the clerk to send a preliminary view of the key issues in the case setting out why the case was suitable for written submissions only. As this was a possible option, it was considered in the interests of justice to attempt to proceed rather than adjourn.
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> 2. The HOPO had not responded to the email or been able to join the CVP hearing and it is noted in lieu of a written record of proceedings that Ms Barton was amenable to the tribunal's proposed approach. Her only concern was that if the HOPO had wanted to ask questions of the intended witnesses it leaves the door open to an appeal. I indicated I thought given

> the skeleton and contents of the statements that little if any cross-examination was likely, but it was appropriate to obtain the respondent's input into that (an informal approach via the clerk phoning before we convened had been deemed inappropriate by the tribunal).
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> 3. The case was therefore reserved on the basis that it can be considered on the available evidence with any written submissions as per my email save that the respondent may request a resumed hearing before me if there are important issues that require cross-examination.
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> The Following Directions are made: -
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> 1. The respondent is to notify the tribunal and appellant's solicitors by email/fax if they object to the case being considered on the papers within 48 hours of service of these directions.
> 2. If that is the case, then the respondent is to list which witnesses are required for cross-examination and a resumed/part-heard hearing will be listed before Judge Shergill on the next available date.
> 3. Alternatively, if the respondent is content to proceed on the papers and make written submissions then these should be served within 48 hours of service of these directions.
> 4. The solicitors are to file any rebuttal/further submissions within 48 hours of receipt of the document listed at para 4 above. The case will then proceed to be decided on the papers.
> 5. The tribunal may issue further directions if required."

7. The judge said that the directions were emailed on 2 November 2020 and as there was no response from the Secretary of State by the end of that week further directions were made that the solicitor should make further representations by 10 November 2020. The judge recorded that there was no communication from either party and therefore he proceeded to determine the appeal on the documents before him.

8. The judge made findings at paragraphs 8 to 17. The judge found that there would not be "very significant obstacles" to the Appellant returning to India. The judge said that the Appellant has a "poor immigration history" (see paragraph 9). The judge said that the Appellant's "entire family life and private life (apart from one year) has been established whilst he has been here unlawfully and as such little weight is attached to it."

9. The judge stated:-

> "The public interest weighs against his private life claims and in favour of the legitimate aim of the economic interests of the United Kingdom through maintaining effective immigration control. I am not satisfied that there is any unlawful or disproportionate interference with the Appellant's private life whatsoever if he was to be removed from the United Kingdom."

10. The judge at paragraph 10 said that he accepted that the Appellant was in a genuine relationship and that they could rely on Appendix FM in a future application. He

said the "question really boils down to where the public interest lies as a result" (see paragraph 10).

11. At paragraph 11 the judge said as follows:

> "11. I do not consider it is controversial to conclude P would face very serious hardship if she was required to move to India. As a British citizen, and a white woman she is likely to face a culture shock in reformulating her life out there. This is portrayed in a bleak way of the couple living in the home village and the traditional nature of that lifestyle. However, India is a vibrant, multi-cultural country with various large metropolitan areas the couple could move to. I see no reason why they could not reformulate their lives together and become self-sufficient. There is no persuasive evidence of probative value as to why P could not find work as a foreigner. Her main issue is her mental health. However, I note she holds down a full-time job here. The doctor is concerned with her reformulating her life in India, which would be alien to her. However, he has failed to explain whether her mental health problems could be managed (including the suicidal thoughts) in a way similar to an Article 3 claim. By that I mean, managed through medication here and abroad in order to alleviate her situation. I also note on the one hand P has strained family connections and relies on the appellant, yet she has some contact with them too. The evidence is equivocal and portrayed in bleak terms in my view. In my assessment, people adapt to finalised decisions more than being left in limbo. There is no evidence of probative weight as to the impact of a finalised decision for the appellant to leave the country and what the impact on P would be if she was to actually go with him or how she would manage. I was concerned how much of the claims of difficulties to be overcome were anything more that a worst-case scenario envisaged by the protagonists. P cannot have expected that the appellant would have been permitted to stay from the outset of their relationship, so some form of temporary or permanent return is likely to have at least been at the back of their minds. Ultimately, P may leave with him or may remain here and try to get him to come back. A future out of country application is the most likely scenario and as such there is not likely to be a permanent rupture.
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> 12. Even taking the case at its highest, the impact on P rupturing the relationship with the appellant has to be considered in light of the statutory framework. Paragraphs 47 onwards of *Lal* confirms the jurisprudence in this area of someone who has had no lawful status. I take a dim view of the immigration history of an appellant who has overstayed a visa and not made any attempt at regularising his position for a number of years. I was not satisfied that he had a good reason why he was unable to navigate the immigration system to regularise his position, or return to India, rather than overstay and start a relationship. Something he should have done before 2018. I note that a person's immigration status may "greatly affect the weight to be given to their right to respect for family life" (para 48 of *Lal*). The duration of the relationship is relatively short, albeit they have now recently married. It was established at a time when the appellant was here unlawfully. I am not satisfied P is an innocent victim in any of this. It is therefore entirely justifiable on public interest grounds that little weight is given to the relationship. Section 117B(4)(b) applies and I attach little

weight to the family life rights of the appellant or P (para 55 of Lal). This is not an exceptional case requiring an article 8 grant of leave save for my observations below (para 47). Those are my conclusions under insurmountable obstacles and the relevant case law there."

He then stated as follows:-

"13. On the face of it the appellant falls under the *Chen, Dulagan,* and *Chikwamba* line of authorities i.e. that he should be expected to return and make an out of country application. I found there was no persuasive evidence as to why he could not go back to his family or rent accommodation. He could be expected to leave the UK and comply with the rules like everyone else for entry clearance."

14. However, there is an aspect of 'exceptionality' to this case. I note P has depression and "frequent suicidal thoughts". She has had a difficult childhood and was a looked-after child early on and then in later adolescence. She has some contact with others but the GP is of the view that "her only real support" is her husband. I note she works in a clerical role earning over the £18,600 threshold. Whilst ordinarily the appellant might be required to leave the country to make an out of country application, I note the following. The application is likely to succeed given the content of the refusal not taking great issue with any aspect. I take a different, 'dim view' of the immigration history than the respondent, but I note the respondent's policy would not treat the immigration history in the same way as my 'dim view' on an out of country application. I also note there is the context of a global pandemic and the appellant's potential return to country with a raging COVID-19 crisis; but that aside, there will be ongoing uncertainty and a lack of finality to the immigration status. I accept this may exacerbate P's mental health problems. It is somewhat churlish to put P through that anguish only for the appellant to jump through formality hoops with a likelihood of being permitted to return to the UK as a spouse.

15. I accept P's situation is unusual and the impact on her is significant looking at the history of what she has been through in her past, and her likely emotional dependence on the appellant as a result. In the context of a *Chikwamba* type case, I accept this amounts to exceptional circumstances. Those exceptional circumstances arise because refusing the appellant leave to remain would result in unjustifiably harsh consequences for P because it is likely to lead to adverse mental health issues, in particular suicidal thoughts. She is likely to be faced with isolation and significant disruption to her emotional well-being when looking at all of the evidence in the round and taking into account the medical evidence and her past history. It is disproportionate to put her through that turmoil and separation, even short-lived, just to await an out of country application that has all the hallmarks of being allowed."

The grounds of appeal

12. The grounds assert that the judge makes contradictory findings. He dismisses the Appellant's private life claims and finds that there are no insurmountable obstacles

to family life continuing in India. Moreover, he finds that there is nothing exceptional about the case. Yet he then finds that there are exceptional circumstances and applies Chikwamba. The First-tier Tribunal has misinterpreted Chikwamba v SSHD [2008] UKHL 40. It is not necessarily the case that the Appellant would satisfy the requirements for entry clearance. In any event there are no "exceptional Article 8 grounds". The case of Chikwamba is distinguishable. There are no exceptional Article 8 grounds that would make it disproportionate for the Appellant to return and apply for entry clearance. In Chikwamba there was a risk to the individual which is not the case here. The judge had found that the couple can maintain a life in India.

13. The parties made submission. Mr Tan relied on the grounds of appeal. Ms Barton relied on her skeleton argument.

14. There is no cross challenge by the Appellant in respect of any of the findings of fact. Neither party raised an issue in respect of the procedure adopted by the judge determining the appeal.

The Appellant's skeleton argument

15. It is accepted by the Appellant that the wording used by the judge "may be seen as clumsy and could be seen as somewhat contradictory", however, the FTTJ has not erred. He found an aspect of "exceptionality" and said that the case is unusual. Having regard to Chikwamba he accepted that the case amounts to exceptional circumstances. Failure to consider Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 does not amount to an error of law. Each case turns on its facts. The judge was entitled to conclude on the evidence that the Appellant would on an application for entry clearance be able to satisfy the Rules. While the judge does not find anything exceptional, he then considered P's circumstances. He concluded that the appeal should be allowed under GEN.3.2 (2) because there would be unjustifiably harsh consequences for her. He said that if he is wrong about that, the decision breaches her rights under Article 8. The judge properly considered the public interest considerations.

Error of law

16. The judge found that there are not very significant obstacles to integration (paragraph 276ADE (1) (vi)). He found that there are not insurmountable obstacles to family life continuing in India (EX.1. Appendix FM). He concluded that little weight should be attached to the family life as between the Appellant and his partner. Finally, he found that this is not an exceptional case requiring the grant of leave under Article 8. There is no cross challenge to any of these findings. He does not meet the requirements of the Rules and he finds that there is no reason to allow the appeal outside of the Rules. Properly understood the judge found that the decision to refuse the Appellant leave does not breach the Appellant's substantive rights under Article 8.

17. However, he then went onto consider whether it would be proportionate to expect the Appellant to return to India to make an application for entry clearance. This is totally at odds with the finding that the decision does not breach the Appellant's rights under Article 8. Having dismissed the appeal on Article 8 substantive grounds, an appeal cannot succeed on procedural grounds. His conclusions are contradictory and perverse. It is difficult to understand how the substantive decision does not breach the Appellant's rights under Article 8, but to require the Appellant to make an application for entry clearance would. This is a clear material error of law.

18. I set aside the decision of the judge to allow the appeal on Article 8 procedural grounds.

Conclusions

19. The judge made clear findings that the decision does not interfere with the Appellant's Article 8 rights. He does not meet the Rules and the decision to refuse to grant him leave does not otherwise breach his rights under Article 8. The appeal therefore should have been dismissed at this stage. In the absence of a cross challenge, I remake the appeal and dismiss it on substantive Article 8 grounds.

Notice of Decision

The Appellant's appeal is dismissed under Article 8.

Signed *Joanna McWilliam* Date 12 May 2021

Upper Tribunal Judge McWilliam

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