IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10423/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 7th September 2021	**On the 19th October 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SEHAJPREET SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Richardson, instructed by Asher & Tomar Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India. He appealed to a Judge of the First-tier Tribunal against a decision of the Secretary of State of 31 May 2019 refusing to grant him leave to remain in the United Kingdom on human rights grounds as the unmarried partner of a British citizen, with reference to Appendix FM of the Immigration Rules and Article 8 of the European Convention on Human Rights.

2. The appellant's appeal to the First-tier Tribunal was dismissed, but subsequently in a decision promulgated on 23 March 2021 Upper Tribunal

Judge Allen found errors of law in the judge's decision and directed that it be remade, with the judge's findings on the evidence preserved.

3. The error of law decision is appended to this decision and as a consequence, it is not necessary to set out the detailed background to the case. It is important, however, to note that there was no challenge to the judge's credibility findings either as regards the account given by the couple of their relationship and their lives together or the negative findings about the appellant's claim to be at risk from family members in India. As can be seen from paragraphs 23 and 24 of the error of law decision, there was a concern that the judge had not clarified and explained how she reconciled on the one hand her finding on the one hand that it would be unreasonable for the appellant's partner to follow him to India and on the other hand that there were no insurmountable obstacles to her doing so. As a consequence, there was a failure to consider matters cumulatively with respect to the evaluation of Article 8 outside the Rules.

4. We did not hear further oral evidence from the appellant or his partner, but a further witness statement from the appellant's partner was adduced, which was not challenged by Mr Tufan and which we therefore accept.

5. In his submissions Mr Richardson argued that based on the preserved findings the removal or departure of the appellant would disproportionately interfere with his family life with his partner. It remained the case that it was conceded that he could not satisfy the requirements of the Immigration Rules. The requirement of living together for two years as a partner was not met at the time of application, though the couple had now been living together for some two and a half years. Also, any application under the Immigration Rules could not succeed as his partner's income was well short of the minimum income requirement. As regards EX.1, even if the two years were satisfied, he lacked immigration status and had done so at the time of the application. The only way in which it could be argued that the Immigration Rules were satisfied was by recourse to GEN.3.2 and the exceptional circumstances criterion. It was therefore necessary for the appellant to show that his removal would be disproportionate and that there was an exceptional case for that purpose.

6. The issue of insurmountable obstacles as considered in Agyarko [2017] UKSC 11 as well as within the Rules was an important aspect of the balancing exercise. The decision in GM (Sri Lanka) [2019] EWCA Civ 1630 strongly supported the argument that a finding of a lack of insurmountable obstacles was not determinative of proportionality but was a factor and perhaps the starting point. As the case was argued outside the Rules, references to insurmountable obstacles were relevant to proportionality generally, in particular the difficulties of relocation to India, but it was a matter of considering the factors cumulatively as had been held in Lal [2019] EWCA Civ 1925.

7. The first cumulative factor relied on was that the appellant had been absent from India for nine and a half years, since 2012, and that was significant with regard to slotting back into life in India and also because

he would be of less assistance to his partner if she returned with him. They would not have a running start if return was made to India and he would have no inside knowledge or connections, and that was significant.

8. Also, he had only been 17 when he came to the United Kingdom, so he had never lived in India as an adult independently. This was relevant, given the difficulties of relocation. The judge had noted and accepted the evidence as to the hostility of the appellant's parents to the appellant and the relationship. It seemed he had been rejected by them since 2015 and there was no evidence of any improvement. This was of relevance to proportionality as return would be less pleasant when it was to hostility and an absence of parental support and therefore no family to assist with the transition to life in India, which would therefore be harder.

9. As a new point, Mr Richardson also argued that though there was no expert report on Indian law, it would not be straightforward for the appellant's partner, who was not married to him, to accompany him to India and being in an interfaith relationship and a "sinful" relationship was an issue also.

10 Also, with regard to the interfaith relationship, as a Sikh and a Muslim respectively both practised their religions, as was referred to in the refusal letter. The judge had referred to this at paragraphs 30, 35 and 38 in particular. So on relocation together cumulatively the appellant's partner would be subjected to discrimination and abuse and would have an understandable reluctance to relocate with him in those circumstances.

11. Also, she had her own family in the United Kingdom and in particular her mother and half-siblings. As the judge noted at paragraph 41 of her decision, the appellant's partner would have no family support network in India. She had only been 21 at the time of the earlier hearing and was now 23 and no longer a student but she was yet to make her own way and was still dependent on her mother. It was arguable that she and her mother had family life and it would clearly be difficult for her to leave her mother and that was a further cumulative factor and, as again noted by the judge at paragraph 41 of her decision, the appellant's partner had no real experience of making her way in the world. She was a British citizen, having been born in the United Kingdom and of Pakistani background, and her only experience of Indian culture was via the appellant. She was a Muslim woman with Western values and no experience of coping without her mother and the appellant was not likely to be of much help, with the best will in the world. She had completed her LPC and was about to embark on a career as a solicitor in the United Kingdom, having recently been offered an interview for a training contract which would all be set back if she left the United Kingdom and all the above difficulties including financial ones.

12. With regard to the issue of the appellant returning on his own and seeking entry clearance, it would not be simple for him to do so and apply to return as a partner. Although the definition of partner was now met, the

problem was the minimum income threshold. Six months' salary could not be acquired for at least six months inevitably, so there would be separation for a minimum of six months. One had to consider the real world situation as to why she had not been able to obtain a training contract earlier, given the pandemic. They would be separated for at least six months. The judge had found at paragraph 52 of her decision that any length of separation would likely cause the couple some distress as they clearly would choose not to be separated, even temporarily. That was still the case. It was highly undesirable and detrimental to the relationship and posed a difficult choice for her and neither outcome was palatable.

13. In his submissions Mr Tufan agreed that the issue was essentially one of proportionality. It was clear from Agyarko that there had to be unjustifiably harsh consequences and that was a hard test. He did not accept that on the basis of considering the relevant factors cumulatively the threshold was reached. With regard to the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002, the appellant had no leave in the United Kingdom and had lived here illegally for a period. Little weight therefore should be attached to his private life or, in light of what was said in Rajendran [2016] UKUT 138 (IAC), family life also. Paragraph 57 of Agyarko was to similar effect. A very strong, compelling claim was required. Little weight was to be attached to private or family life when, as was the case here, the person was in the United Kingdom unlawfully.

14. As to whether family life could continue in India, the appellant's partner was quite highly educated and there was no reason why she could not pursue a career in India. There were not very significant obstacles to integration therefore. The point was taken that if the application were made now the partner definition was met, but a high test was set by EX.1 and EX.2. It could be taken into account with regard to proportionality.

15. Also, with regard to their different faiths, there had been reference made to discrimination in India and it did happen all over the world and was not sufficient to be persecution and no protection claim had been made. India was a cosmopolitan country.

16. An entry clearance application at the moment would be unsuccessful, not least because of the financial requirements, but that could not assist the appellant and it would be a curious argument to say that he should succeed because he could not satisfy the Immigration Rules. In any event, within six months the financial requirements could be met and reference was made to paragraph 69 in Younas [2020] UKUT 129 (IAC) where at paragraph 70 it was said that the appellant will be able to re-enter the United Kingdom within four to nine months of removal and that defeated the Chikwamba [2008] UKHL 40 argument.

17. Mr Tufan accepted that Mr Richardson had not conceded that it was only a period of six months but that it was a minimum, that it could be that she might not be successful in the training contract application but even if she

did succeed it should be questioned why the appellant should succeed in his appeal when he could not meet the requirements of the Rules. There were not unjustifiably harsh consequences on the facts of the case.

18. By way of reply, Mr Richardson argued that six months was the earliest date in which an application could be made and it could be a great deal longer and the decision could take quite a while.

19. With regard to section 117B, financial independence was achieved via family support and the guidance in Rhuppiah [2018] UKSC 58 was of relevance here. English was spoken. The little weight element was problematic for the appellant but it had to be read in the context of a system as read in Agyarko that if family life could not be carried on elsewhere a person could succeed in an appeal and it could not be right that family life entered into when a person was not present lawfully in the United Kingdom would always obtain no more than little weight if it could not be carried on elsewhere and it would still be possible to succeed. There would be a degree of hardship to both the appellant and his partner if he could not stay in the United Kingdom and that was relevant in contrast to the weight of the need to maintain immigration control on the other side of the balance and the financial elements but there would be family help and the lack of finance was likely to be short-lived.

20. We reserved our decision.

Discussion

21. As is common ground, the essential issue before us is whether the appellant can show that his removal or departure from the United Kingdom would be disproportionate, which under GEN.3.2 of Appendix FM entails showing that there would be exceptional circumstances justifying a grant of leave. As was said in Agyarko, quoting from Jeunesse (2015) 60 EHRR 17, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8. We agree with the submission made on behalf of the appellant that it is necessary to consider the matters relied on cumulatively as well as individually assessing them.

22. Mr Richardson pointed first to the fact that the appellant's partner has close family ties to the United Kingdom, in particular to her mother and her stepbrothers. She is a British citizen and has lived in the United Kingdom for her entire life. She has now completed the LPC course and has an offer of an interview with a view to a training contract, and that interview is due to take place later this month. There is a further point that the couple are in an interfaith relationship and the judge found it to be likely that the appellant's partner would encounter incidents of hostility and societal discrimination for the reason of being a Muslim woman in a relationship with a Hindu man. Further, she has no knowledge or experience of India, having been born in the United Kingdom and having

lived here all her life, and is only 23 years old and would not have a family support network in India.

23. The first of these was accepted by the judge. The appellant's partner has a close bond with her mother, upon whom she remains financially dependent and has, as the judge put it, as yet no real experience of making her own way in the world. Though her education has now come to an end, she appears to be well on the way towards securing a training contract, having already secured an interview for a contract, but it remains the case that she has no experience of life away from her home or away from the United Kingdom.

24. The judge noted the difficulties that would attach to the fact of the interfaith relationship of the couple and the discrimination and hostility that the appellant's partner might experience. Contrary to what was argued by Mr Tufan, discrimination can amount to persecution though this is not a protection claim, but it is a relevant factor to place into the balance that life would be relatively uncomfortable, at least for a time, for the appellant's partner in India. She has no knowledge or experience of that country. In addition, as Mr Richardson pointed out, the appellant has been away from India for nine years, having left there when he was 17, and has no supportive family to return to since his family, as the judge accepted, rejected him for reasons of his interfaith relationship. There would therefore be no family support for either of them from anybody in India.

25. We note also the more recent point referred to by Mr Richardson that the fact that the couple are not married might be an adverse factor and it is a point that needs to be taken into account in the cumulative evaluation of the circumstances of the case.

26. It is the case, however, that whether the consequences of the appellant's removal would be unjustifiably harsh, is a significant factor to be taken into account as said in Agyarko. It is necessary to bear in mind what is said at paragraph 117B of the 2002 Act, in particular that little weight can be attached to a private life in circumstances where a relationship is formed or a private life is established at a time when the person is in the United Kingdom unlawfully, as is the case here. It appears that there is financial independence through the appellant's partner's family, and English is spoken. It is clear from the authorities however that these are neutral factors (Rhuppiah at [57]).

27. There is also to be considered the question of first whether the couple can be expected to maintain their relationship in India or alternatively whether the appellant can be expected to return while his sponsor obtains employment and achieves an earning level which is such that would enable her to meet the sponsorship requirements, the two years' cohabitation requirement having now been satisfied.

28. In this regard, we do not consider that the high threshold identified in Agyarko is met in respect of the couple living together in India. We bear in mind, both individually and cumulatively, the various points in this regard on which Mr Richardson addressed us. But it does not seem to us that either individually or cumulatively do they amount to matters of such weight as to comprise unjustifiably harsh consequences. While we accept that if she were to relocate to India, the appellant's partner would not be able to pursue her chosen career as a solicitor in this jurisdiction, she is clearly intelligent and we see no reason why with his support and bearing in mind that he spent most of his formative years in India, she would not be able to obtain employment and, particularly in a city, bearing in mind the evidence that the discrimination issues are less acute in cities, settle down with him and make a life there. No doubt there would be difficulties in her being separated from her mother and other family members and having to make her way in a country with which she is entirely unfamiliar, having never lived away from her family before and never having lived outside the United Kingdom before. But the threshold is a high one, and in our view it is not crossed in this case.

29. Nor do we consider that the threshold is crossed were the appellant to return to India and await the outcome of his partner's applications for a training contract and achieving the necessary earnings level to enable the requirements of the Immigration Rules to be met. There would be a period of separation for at least six months and we can anticipate that it might be for at least twice that amount of time, depending upon when she is successful in obtaining a contract and the level of earnings and the point at which a decision on an application is made. But again, we remind ourselves that the threshold is a high one, and in our view, even on this alternative basis it is not met. Accordingly, factoring all these points together and bearing in mind the guidance in section 117B of the 2002 Act, we consider that the claim is not made out.

30. The appeal is therefore dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 9 September 2021
Upper Tribunal Judge Allen