Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14345/2018 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House	**Decision & Reasons Promulgated**
On 22 July 2021	**On 13 August 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

LABH SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Winter, Counsel, instructed by Maguire Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge MacKenzie ("the judge"), promulgated on 18 September 2018. By that decision, the judge dismissed the appellant's appeal against the respondent's decision, dated 27 June 2018, refusing his human rights claim.

2. The appellant's case has been predicated on Article 8 ECHR, specifically that he has established a private life, and, more importantly, a family life with his wife, Mrs S, a British citizen.

The decision of the First-tier Tribunal

3. The judge first considered whether the appellant could satisfy any of the relevant Immigration Rules ("the Rules"), specifically EX.1 of Appendix FM and/or paragraph 276ADE(1)(vi). In respect of the latter, the judge concluded that there were no very significant obstacles to the appellant re-integrating into Indian society, given his particular circumstances. This conclusion has not been challenged on appeal.

4. As to the former, the judge took account of Mrs S' history and current circumstances, including mental health problems and her close relationship with her family. The judge concluded that whilst relocation with the appellant would be difficult, it would not amount to insurmountable obstacles, as that term is defined in EX.2 of Appendix FM.

5. The judge went on to consider Article 8 on a wider basis. He took into account his conclusions in respect of the relevant Rules, the impact on other relevant individuals, and the mandatory considerations under section 117B of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). Ultimately, the judge concluded that the respondent's decision was proportionate and he accordingly dismissed the appeal.

The appellant's initial challenge to the Upper Tribunal

6. The grounds of appeal (which are, as seems to me customary in cases originating in Scotland, admirably clear and concise) assert that the judge failed to take relevant country information into account, or failed to provide adequate reasons in respect of it. This information related to the difficult situation faced by women in India. It is also asserted that the judge failed to approach the proportionality exercise correctly. It is said that he effectively treated his conclusion under the Rules as being determinative of the wider balancing exercise. Further, it is said that the judge was wrong to have concluded that only little weight could be placed on the appellant's private life and that he failed to provide reasons why the appellant was deemed to be a burden on the public purse.

7. Permission to appeal was granted and the appeal was heard by Upper Tribunal Judge Macleman. He concluded that there were no errors of law in the decision of the First-tier Tribunal. He therefore dismissed the appellant's appeal.

8. An application for permission to appeal to the Court of Session was made. A Joint Minute of Agreement was filed with the Court. As a result, the appellant's appeal was allowed and the decision of Judge Macleman set aside.

9. In this way, the appeal came before me for a determination of whether the First-tier Tribunal had erred in law and, if it had, whether its decision should be set aside.

The hearing

10. Mr Winter and Ms Isherwood appeared remotely. There were no technical difficulties.

11. Mr Winter relied on grounds of appeal and made additional concise oral submissions which followed those grounds.

12. Ms Isherwood opposed the appeal, submitting that there had been no misdirection in law and that the judge had dealt adequately with the evidence.

13. At the end of the hearing I reserved my decision.

Conclusions on error of law

14. Whilst the decision of the First-tier Tribunal is not a model of clarity in certain respects, I have concluded that it is not vitiated by errors of law such that I should exercise my discretion under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007. Addressing the pertinent points raised by the parties, and having considered the judge's decision holistically, I give the following reasons for my overall conclusion.

15. The judge correctly directed himself to the relevant Rule, namely EX.1 of Appendix FM. When considered in light of EX.2, it is clear to me that he applied the appropriate test to the evidence, that being whether there were "insurmountable obstacles" to the family life continuing in India.

16. The judge did take account of the country information on the position of women in India (as contained in the respondent's CPIN of July 2018). Whilst I accept that the evidence contained in that document indicates difficulties for certain classes of women in certain circumstances, I am satisfied that the judge considered it in its proper context, namely that Mrs S would be relocating with the appellant. She would not be going there as a single woman or a person without the support of someone who did not have a knowledge of that country and/or the ability to re-establish themselves.

17. Although it did not feature expressly in the grounds of appeal, Mr Winter submitted orally that the judge had failed to give adequate reasons in respect of the medical evidence, in particular reports from Doctors Livingstone and Taylor. I am satisfied that the judge did take this evidence into account and did adequately factor it in to his overall reasoning. For example, at [37] the judge made specific reference to the relevant conclusions of the two Doctors. He placed this evidence in the context of the case as a whole, including the accepted availability of suitable medical treatment in India, the support of the appellant, the fact that Mrs S had been discharged by another psychologist in 2017, and that she would be able to keep in contact with her family in this country through familiar forms of communication and/or visits.

18. All-told, I am satisfied that the judge did not commit any errors of law in respect of his assessment under the Rules.

19. Although not a decisive point in my overall conclusions, I note that there is no challenge to the judge's briefly-expressed finding that Mrs S could remain in the United Kingdom and support an application made by the appellant for entry clearance. Whilst such an application might face obstacles (not least in respect of the financial requirements under the Rules), it cannot be said that this would have been bound to fail: certain public funds can be taken into account and, in any event, Article 8 would have to be considered by an Entry Clearance Officer.

20. I turn to the judge's assessment outside of the context of the Rules.

21. I accept Mr Winter's submission that a conclusion under the Rules is not the end-point of an Article 8 claim. There must be a general proportionality exercise, taking into account all relevant matters, which would normally include those considered under the Rules.

22. I also accept the submission that the proportionality exercise is conceptually different from a consideration of a particular Rule relating to Article 8. In respect of the latter, the task is simply to discern whether the individual satisfies the stated criteria. If they do, that will in effect be determinative of their appeal. In respect of the former, there must be a balancing of the competing factors in any given case and an arrival at a conclusion that the decision under appeal is or is not disproportionate (see, for example, Lal [2019] EWCA Civ 1925; [2020] 1 WLR 858, at paragraph 68).

23. In the present case, the judge has not perhaps expressed his task as clearly as he otherwise might have. He did not, for example, state in terms at the outset that he was moving on to conduct a balancing exercise, having found that the appellant could not satisfy any of the relevant Rules. Having said that, he did refer to the "making of the proportionality balancing exercise" later at [53].

24. The judge did direct himself to Agyarko [2017] UKSC 11; [2017] Imm AR 764, which specifically considers, amongst other matters, the need for an individual to show exceptional circumstances (as that term is properly understood) if they are unable to satisfy a relevant Rule (see, for example, paragraphs 54-60). This provides an indication that the judge did, as a matter of substance, approach his task on a correct footing.

25. It is also the case that an inability to satisfy the Rules will normally be given considerable weight in the overall proportionality exercise. This position supported by Agyarko itself and AQ (Nigeria) [2015] ECWA Civ 250, which the judge expressly referred to at [53]. The judge was not only entitled to have attached at least considerable weight on the appellant's inability to satisfy EX.1 of Appendix FM.

26. At [49], the judge took account of the rights of other individuals affected by the appellant's proposed removal, including Mrs S' mother. Thus, he took account of another relevant factor.

27. The judge was bound to consider the mandatory considerations under section 117B of the 2002 Act and this he did at [51] and [52]. He took account of the strong public interest in maintaining effective immigration control, the absence of evidence to show the appellant's English language ability, and the lack of financial independence. In respect of the last factor, the grounds of appeal have proved to be misconceived. Although the judge did not provide specific reasons for his finding, Mr Winter rightly acknowledged the fact that the appellant was not working and that Mrs S was reliant on public funds. It would follow that the appellant was not financially independent. This factor counted against him in the overall balancing exercise.

28. The judge was entitled to conclude that little weight should be attached to the appellant's private life in the United Kingdom. The appellant had been in this country unlawfully throughout and there were clearly no particularly strong features of the private life which would have remotely suggested any other conclusion.

29. The judge was also entitled to take account of the fact that the appellant's relationship with Mrs S had been established and continued at a time when the former's status was unlawful.

30. Mr Winter made clear in his submissions that an important aspect of the judge's alleged errors was that he had not expressly considered the *same* factors relevant to EX.1 of Appendix FM when undertaking the wider proportionality exercise. On the premise that those factors related almost exclusively to Mrs S' circumstances, it may be said that there is some merit tot his argument. The judge did not in fact state in terms that he was re-assessing all of those factors once again.

31. However, I am considering the judge's decision holistically and on a sensible basis. He was plainly entitled to incorporate his findings under the

Rules into the balancing exercise. Those findings were not in the appellant's favour. In the first instance, I conclude that the judge did, as a matter of substance, place those findings in the balancing exercise (see, for example, [47], [52], [54] and [55]. Those findings, in the combination with the other factors discussed above (and in respect of which there are no errors of law), go to show that the judge's overall conclusion on proportionality is free of error and was open to him.

32. Even if the judge had not specifically placed those factors into the balancing exercise, if I were then to do so, and having regard to all the other matters discussed above, the outcome would plainly have been the same. In other words, it cannot be said that any error by the judge might have made a difference to the outcome. The difficulties which Mrs S would experience by relocating the appellant were, on the judge's findings of fact, not so significant as to have outweighed the cumulative effect of all other factors weighing on the respondent's side of the balance sheet.

33. Therefore, the appellant's appeal to the Upper Tribunal must be dismissed and the judge's decision shall stand.

34. I do want to make clear to the appellant and Mrs S that I appreciate that another judge might have reached the opposite conclusion on the same evidence presented. My task at this stage has been to assess whether or not the judge made errors of law and, even if he did, whether his decision should be set aside.

Anonymity

35. The First-tier Tribunal made no anonymity direction and there is no reason why I should. I make no such direction.

Notice of Decision

36. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

37. The appeal to the Upper Tribunal is dismissed.

38. The decision of the First-tier Tribunal shall stand.

Signed: H Norton-Taylor Date: 27 July 2021

Upper Tribunal Judge Norton-Taylor