IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004001

First-tier Tribunal No: HU/50318/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 August 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

JITTYMOL THOMAS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Stedman, Counsel, instructed by Imperium Chambers
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 22 May 2023

DECISION AND REASONS

1. This appeal comes back before me for the decision to be re-made, following my decision dated 6 March 2003 by which I set aside the First-tier Tribunal's decision to allow the appellant's human rights appeal. It is worth repeating the background facts and circumstances which are set out in my earlier, error of law, decision.

2. The appellant is a citizen of India born in 1994. On 13 May 2021 she made a human rights claim on the basis of family life with a partner. That application was refused in a decision dated 4 January 2022.

3. The appellant appealed that decision and her appeal came before First-tier Tribunal Judge T. Lawrence ("the FtJ") at a hearing on 30 May 2022. In a decision dated 12 July 2022 the FtJ allowed the appeal. Permission to appeal the FtJ's

decision having been granted by a judge of the First-tier Tribunal ("FtT"), the appeal came before me.

4. In my error of law decision I summarised the grounds of appeal. As regards Ground 2, I said this at [6]:

> "Ground 2 takes issue with the FtJ's consideration of GEN.3.2. of Appendix FM of the Rules and the Article 8 assessment. The grounds argue that the FtJ failed to reason what were the exceptional circumstances or the unjustifiably harsh outcome evident in the appeal".

5. At [23]-[29] I said the following:

> "23. However, there is more substance to the respondent's ground 2. Having decided that the appellant was not able to meet the requirements of the Article 8 Rules, in terms of the eligibility requirements, the FtJ was required to consider paragraph GEN.3.2., in particular subparagraph [2] which requires the appellant to establish
>
> 'whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child' etc.
>
> 24. In summary, there is the need for exceptional circumstances which would amount to a breach of Article 8 because of unjustifiably harsh consequences.
>
> 25. The FtJ referred to GEN.3.2. at [13]. However, although there is an assessment of the appellant's and her partner's circumstances, to some degree, the respondent is correct to argue that the FtJ did not actually identify what the unjustifiably harsh consequences of the refusal of leave to remain would be.
>
> 26. The FtJ, very properly, referred to the appellant's partner appeal that took place in March 2020 and which resulted in a grant of leave to him. That decision, by Immigration Judge Scott took into account medical evidence in relation to the appellant's mental state, lack of support on return to India, and the potentially significant consequences for him were he to return alone, leaving behind the support that he has in the UK. Having read Judge Scott's decision, with respect one can readily see why the appellant's partner's appeal was allowed.
>
> 27. The FtJ in the instant appeal recognised at [26] that the situation was now different in that the appellant's partner now has the support of the appellant. He said at [26] that "[t]he situation has now materially changed". The FtJ went on to say this:
>
> "However, in oral evidence, Mr [V] stated that he would not accompany the Appellant to India if she was required to return there, because he has a wider support network in the UK that includes others and that he works and pays taxes in the UK."

> 28. He said that he accepted the statements by Mr V in terms of his intentions and the reasons behind those intentions and he referred again to the decision of Judge Scott that he has no family or friends in India and that he has close friends in the UK.
>
> 29. However, whilst the evidence before the FtJ indicated that the appellant's partner had a preference to remain in the UK, and gave reasons for that preference which the FtJ accepted, that does not of itself mean that the refusal of leave to remain would result in "unjustifiably harsh consequences". The serious consequences for the appellant's partner's return referred to by Judge Scott had the potential to arise in circumstances where he would be returning alone which would not be the case now. In addition, it is difficult to see how the fact that the appellant's partner "works and pays taxes in the UK" could be much of a factor in favour of a conclusion that there would be unjustifiably harsh consequences for the couple's return."

6. Lastly, at [36] I concluded that:

> "the FtJ erred in law in that there was a failure to identify the unjustifiably harsh consequences that are said to arise if the appellant is refused leave to remain, and likewise in terms of the FtJ's assessment and analysis of the effect of the appellant's partner's preference to remain in the UK. Those errors of law are such as to require his decision to be set aside."

7. At the resumed hearing, oral evidence was given by the appellant and her partner. I summarise that oral evidence below.

The oral evidence

8. In examination-in-chief the appellant adopted her witness statement dated 27 May 2022.

9. In cross-examination, when asked about insurmountable obstacles to her and her partner continuing family life in India, and her assertion that returning to India would jeopardise their home even though they are renting a room in a house in the UK, the appellant said that they have been married for over three years. Her partner got leave to remain in May 2020 on human rights grounds. She has not been able to work and, therefore, he is the only one working. During Covid-19 he was furloughed and they struggled to pay the rent. He works in the energy sector and the Russia-Ukraine war meant that he could only do part-time work.

10. As to why her partner could not rent a home in India, she said that he could not go back to India. Her parents do not know about the marriage. They are from different castes and they would not allow the marriage to go on. Her partner has no social ties there and he has mental health issues. In any part of India her parents would find out about them.

11. Her family would find out because it is a big family who live in Kerala. As to why they could not live in another city, the appellant said that her father has 12 siblings and her mother 10 siblings. They are spread across India. Her father is a businessman which also means that he would find out.

12. It would be really hard for her partner to form new social ties in India, for example in terms of the cricket that he is involved in. The unemployment situation in India is really bad. It is true that they are both qualified to degree level.

13. As regards what is said in Dr Bashir's report about her partner's mental health and what treatment he has had since winning his appeal in May 2020, the appellant said that he is taking sertraline 100mg, increased to 150mg recently. After work she talks to him as he is worried about her immigration status. He also has talking therapy. He went to an appointment recently, in April of this year. In two weeks time he has an appointment with a doctor at the medical centre (both of which she named). He is expecting to have an appointment every two weeks.

14. He is working full-time and has been since August 2020. As to whether he has a lot of time off because of illness, he comes home at lunchtime sometimes and then goes back to work. She talks through the situation with him and gives him hope.

15. He would not be able to receive treatment in India because of the cost and people do not take it (mental health) seriously and make jokes about it. Even though they are qualified to degree level they would only earn £200-300 per month each which would put them in a bad financial position.

16. She did understand when she came to the UK as a student that she was expected to return after completing her studies but she met her partner and decided to get married in the UK. As to whether her husband genuinely does have mental health problems or is just saying so in order to remain in the UK, he has tried to harm himself many times and in the night would bang his head on the wall and she has had to stop him. He is the only one working and they are struggling to pay the rent because of the cost-of-living crisis.

17. Kevin Varghese, the appellant's partner, adopted his most recent witness statement in examination-in-chief. In cross-examination he said that he and the appellant could not go back to India because he has been granted leave to remain by the First-tier Tribunal because of his circumstances. He has no social ties in India and her parents do not support their marriage because of the caste system. There would be harsh consequences if he had to return. His parents have passed away and his grandmother who looked after him has also passed away. He has no property or social ties there.

18. He could not get work in India. He could not imagine going back for something that is not there for him. He had been living in the UK for a long time, working and paying taxes since August 2020 when he got leave to remain. The Ukraine war affected the energy sector and he had to work part-time. Going back to India is the last option because of his mental health. When his mother passed away in 2016 he was not able to go back.

19. He approached his GP for the first time in 2019. He has had a talking therapy session and the sertraline has been increased to 150mg. He submitted letters from his GP by email to the psychiatrist. He does not understand why the psychiatrist says that he has had no information from the GP as he was asked for them and sent them, showing what treatment he is getting.

20. The appellant did not give evidence to the First-tier Tribunal in his successful appeal because they were just friends then and not in a relationship. They met in 2017 and go to the same church.

21. The psychiatric report is right to say that he has thoughts of self-harm. He has acted on those thoughts. Before he met his wife he tried to jump in front of a train. Since he won his appeal at the First-tier Tribunal he has had serious depression and thoughts of self-harm.

22. When asked why his wife could not support him with medical treatment in India, he repeated that his wife's family did not support the marriage. As to why he needed the support of her family when they are both qualified to degree level, he said that he receives medication here and the First-tier Tribunal said that he is allowed to stay for 10 years. Mr Varghese denied the suggestion that he was feigning having a mental health problem.

23. In re-examination he said that compared to a year ago his mental health is not good. He thinks so much and feels that things are so pointless. The immigration issue has been going on for so long that it is affecting his work. The therapy group said that he should speak to the crisis team about his needs. There would be no improvement if his problems are not cleared up and there is no light at the end of the tunnel. He has spent so much money and all of a sudden he was unable to work during the pandemic. He has been in the UK since 2013.

24. He has built up social ties here with friends and colleagues and only has memories of India. He does not have money to start over again in India and suicide is his last option.

25. In answer to my questions Mr Varghese said that his job involves helping businesses in the UK to save costs on energy and improve cost efficiency. He earns £27,000 per annum gross. If the appellant had to go back to India they would be separated. They are married now so he could not think about being separated. Her parents do not support the marriage. Her family are very big and influential and they will find out and that would have a very negative impact, making it very hard for them to survive there. As to whether he would allow her to go back alone, he said that he could not allow that. As to what his choice would be if she had to go back, he said that he could not have an answer.

Submissions

26. The following is a summary of the parties' submissions.

27. Mr Melvin relied on the decision letter, his skeleton argument and supplementary skeleton argument. He referred to the findings of the FtT that are preserved as outlined in his skeleton argument. These included that the appellant is unable to meet the requirements of the Immigration Rules.

28. It was submitted that there was a lack of any real medical evidence beyond that of Dr Bashir's report(s). No weight should be attached to those reports bearing in mind that there is no mention of the GP's notes or evidence from the GP. Although Mr Varghese had said that the GP's notes and letters were sent to Dr Bashir, none have been provided.

29. There was no evidence that the appellant's family are influential such that they would not be able to enjoy family life without interference from them, or what

any such interference would be. It may be that there is a difference in castes but there was no evidence that they would not be able to rent a property or enjoy family life, nor evidence of any law preventing them from doing so.

30. There was no evidence of the expense of any medications or of their earning potential. There was little in the way of evidence of any engagement with medical services on the part of Mr Varghese since he won his appeal in 2020, aside from Dr Bashir's report, which he had to pay for privately.

31. The couple could return to India and support each other there, and work and maintain a family life.

32. In his submissions Mr Stedman said that the focus should be solely on the mental health of the appellant's husband. He suffers from chronic depression and anxiety as found by the FtT, although it was accepted that the evidence was not as comprehensive or detailed as one would like. There is, however, evidence from the consultant who knows him well.

33. There was clear and consistent evidence from the appellant and her husband including that the dose of his medication has been increased to 150 mg and that he engages with talking therapies. The evidence is that there has been no improvement in his mental health following the death of his mother in 2016, with the overall pressure of work and having to provide for them both, added to the appellant's uncertain immigration situation.

34. The evidence in 2019 was that he wanted to end his life and he acted on those thoughts. The psychiatric report refers to suicidal thoughts.

35. As to the question of whether he would go back to India with the appellant, his ultimate answer was that he did not know. He was adamant that he could not return but equally said that he could not imagine being separated from his wife. That is the best answer anyone could give.

36. Mr Stedman submitted that the argument is solely in terms of whether there are exceptional circumstances outside the Article 8 Rules, and the weight to be attached to the psychiatric evidence.

37. Mr Varghese had been in the UK for 10 years and the appellant for the best part of 7 years. There is evidence of his social ties here but none in India. If he had to return his ability to live there would be severely compromised, including in terms of the ability to work. He has worked and paid taxes in the UK. He has continually struggled with his mental health.

38. It was submitted that their position was finely balanced in legal terms.

39. I asked whether any submissions were to be made on behalf of the appellant in terms of Article 3 and the risk of suicide. Mr Stedman said that there were no such submissions.

Assessment and conclusions

40. In my error of law decision I gave a direction in relation to submissions as to what findings of fact made by the FtJ could be preserved. In his skeleton argument Mr Melvin suggests that the following findings can be preserved: that the Immigration Rules at E-LTRP.1.2. cannot be met as Mr Varghese is not settled

in the UK, and secondly, that the appellant has been diligent in her compliance with immigration laws. No specific submissions, oral or written, were made on behalf of the appellant in terms of preserved findings.

41. It seems to me that the following findings from the decision by the FtJ, which are not infected by the error of law, can be preserved, including those suggested on behalf of the respondent, with paragraph numbers of the FtJ's decision in square brackets:

- The appellant and her husband married on 13 June 2021 [13].
- The appellant is not able to meet the requirements of paragraph E-LTRP.1.2 [13].
- The appellant has family life in the UK with her husband [14].
- The appellant is able to speak English and is financially independent [18]-[19].
- The relationship between the appellant and her husband was established at a time when their immigration status was precarious but their cohabitation began at a time when the appellant was effectively prevented from leaving the UK because of the Coronavirus pandemic [26].
- The appellant has been diligent in her compliance with immigration laws [26].

42. It is accepted on behalf of the appellant that she is not able to meet the requirements of the Article 8 Immigration Rules necessary for a grant of leave to remain, specifically the eligibility requirement at E-LTRP.1.2, namely that the appellant's partner must be a British Citizen in the UK, present and settled in the UK, or in the UK with refugee leave or as a person with humanitarian protection.

43. Necessarily, therefore, the appellant must establish that paragraph GEN.3.2 applies, namely that there are exceptional circumstances which would render refusal of leave to remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the appellant or her partner.

44. Neither party referred to any authority or any Home Office guidance in relation to the application of GEN.3.2. I have, however, considered the decision of the Supreme Court in *R (on the application of Agyarko and Ikuga v Secretary of State for the Home Department* [2017] UKSC 11, following which paragraph Gen.3.2 was inserted into the Immigration Rules. It is perhaps only necessary for me to quote [60]:

> "It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. 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". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above".

45. An Article 8 proportionality assessment is required. Neither party addressed me on the *Chikwamba* principle (*Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40). Given that Mr Varghese does not have settled status, the *Chikwamba* principle does not seem to me to be relevant in any event.

46. On behalf of the appellant the express focus is on the appellant's partner's mental health. On behalf of the respondent Mr Melvin criticised Dr Bashir's report on the basis that there is no mention of the GP's notes or evidence from the GP, notwithstanding that Mr Varghese said in evidence that he provided a letter or letters from his GP to Dr Bashir. In fact, reading Dr Bashir's report at section 3 it is clear that he did have a letter from Mr Varghese's GP. Section 3 is headed "Documents Review". At paragraphs 3.1 and 3.2 it states:

> "I read a letter from his GP confirming that on 08/01/20 he was reviewed by a GP, and he was advised regarding Newham Talking Therapies and advised to continue his Sertraline medication.
>
> 3.3.Most recently on 9/03/23 he consulted with his GP mentioning that his depression was worse and had occasional thoughts of self-harm but makes no fixed plans as he is supported by his wife. He is in contact with the local psychiatric team via the Crisis line and has another review with them soon. His Sertraline on that day was increased from 100mg daily to 150mg daily to help with his depression. For his financial issues he was signposted to a social prescriber for help and support he could get and was reviewed by him on 06/04/23. Therefore, his medical clinical state has deteriorated."

47. It would have been preferable had Dr Bashir seen the GP's notes and not simply a letter from the GP. Nevertheless, I cannot accede to the submission that I should attach no weight to Dr Bashir's report. Although neither the appellant's nor Mr Varghese's most recent witness statements refer to his mental health at all, their oral evidence was consistent in terms of his receiving medication for depression and that the dose of sertraline has relatively recently been increased to 150mg daily, which is also the information provided to Dr Bashir by the appellant's GP in the letter.

48. I accept, therefore, that Mr Varghese does suffer from moderate to severe depression (Dr Bashir, paragraph 9.2). That he suffers from depression is also a finding made by Immigration Judge Scott following his appeal in March 2020 and there is no basis for coming to a different conclusion.

49. I do not underestimate the difficulties that his depression causes in his and the appellant's daily lives. However, the evidence is that Mr Varghese does manage to hold down full-time employment. When asked, the appellant did not say that he has to take sick leave as a result of his illness, although she did refer to his coming home at lunchtimes sometimes.

50. Although Mr Varghese ultimately said in evidence that he could not have an answer as to what his choice would be if the appellant had to go back to India, earlier he was clear in stating that he could not allow the appellant to go back to India alone. I accept that his evidence revealed that such a decision would involve considerable emotional conflict for him, given the social ties and professional mental health support that he has in the UK. I note that he said in evidence before the FtT at the hearing of the appellant's appeal on 30 May 2022 that he would not accompany the appellant to India if she was required to return there. That is not, I find, the position now, one year on, and in the light of his evidence before me.

51. It is the case that both the appellant and Mr Varghese are educated to degree level. That is relevant to the prospects that they may each have of finding employment on return to India. No background evidence was put before me to suggest that they would not be able to find employment on return to India.

52. Similarly, although the evidence is that the appellant's family would not accept the relationship because they are of different castes, as submitted on behalf of the respondent they would constitute their own family unit on return. There was similarly no evidence to support the suggestion that the appellant's family would in some way interfere with their relationship, and no evidence to support what was said about the reach or influence of the appellant's family.

53. Likewise, nothing was put before me to suggest that Mr Varghese would not be able to obtain medication for his depression in India, even accepting as I do that they would have to pay for it.

54. I do accept that Mr Varghese has social ties in the UK. I also accept the consistent evidence that he now has no social or family ties in India. It is likely to be the case that adjustment to life in India would be difficult for him in particular, given the length of time that he has been in the UK and with the added difficulty of his mental illness. However, he would have the support of the appellant with whom he plainly has a very close and committed relationship.

55. Mr Stedman on behalf of the appellant expressly stated that no submissions were made in relation to any risk of suicide on the part of Mr Varghese. There is reference in Dr Bashir's report to suicidal thoughts and Mr Varghese himself made oblique reference to suicidal thoughts in his oral evidence. However, Dr Bashir referred to the appellant, and his responsibilities as a husband as protective factors for him. Dr Bashir's report does not expressly state that Mr Varghese is at risk of suicide in the event of his remaining in the UK, and a clear opinion on that important issue is to be expected if it were the case. In any event, as I have found, the appellant would be with him because they would return to India together.

56. As part of the proportionality assessment it is argued that there are insurmountable obstacles to family life continuing in India, pursuant to paragraph EX.2 of the Immigration Rules. Assuming that paragraph EX.2 is potentially in scope in the circumstances of this appeal, I am nevertheless not satisfied that it has been established that there are insurmountable obstacles to family life continuing in India, having regard to my findings above, taking into account in particular Mr Varghese's mental health and his lack of social ties in India.

57. For the same reasons, I do not accept that there are very significant obstacles to the appellant's integration in India, from whence she came relatively recently in 2017 on a temporary basis as a student.

58. The appellant came to the UK without any expectation of being permitted to stay permanently. Her relationship with Mr Varghese was established at a time when their immigration status was precarious. The appellant is not able to meet the requirements of the Article 8 Immigration Rules in terms of eligibility. There is plainly a public interest in the maintenance of effective immigration control which I must take into account.

59. The consequences for the appellant and Mr Varghese in the refusal of leave to the appellant are likely to be significant from their point of view in personal terms. However, I am not satisfied that it has been established that those consequences are harsh, still less unjustifiably harsh. In summary, I am not satisfied that there are exceptional circumstances which would render refusal of leave to enter or remain for the appellant a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for her or Mr Varghese, notwithstanding the evidence of his mental health and the other factors to which I have referred.

60. A consideration of section 117B of the Nationality, Immigration and Asylum Act 2002 does not reveal a different outcome.

Decision

61. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appellant's appeal.

A. M. Kopieczek

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14/08/2023