IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: IA/06589/2015

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23rd April 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Gurdeep Kaur
(NO ANONYMITY DIRECTION MADE)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Raza, Counsel instructed by Charles Simmons Immigration Solicitor
For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 26 February 2024

DECISION AND REASONS

Introduction

1. This appeal has been remitted from the Court of Appeal: *Kaur v SSHD* [2023] EWCA Civ 1351. In paragraph 32 of *Kaur* the scope of the remittal is explained as follows:

> "The article 8 claim should be remitted to the UT for a fresh determination. It is remitted on the basis that (a) the deception claim has been resolved against the appellant for the reasons given by UTJ Gleeson and (b) the factual issue of the alleged social difficulties based upon the families' disapproval of the marriage has been resolved against the appellant."

2. The case has a long history which is summarised in paragraphs 5 -7 of *Kaur*. It is not necessary to set the history out in this decision.

3. The appeal is brought under section 82(1)(b) (refusal of human rights claim) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") on the ground that

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the respondent's decision to refuse the appellant leave on the basis of her private and family life in the UK is unlawful under section 6 of the Human Rights Act 1998 because it violates Article 8 ECHR.

4. It is common ground that the appellant is not entitled to leave under either the family life or private life route to leave under the Immigration Rules. It is also common ground that she has a private and family life in the UK that engages article 8 ECHR. The issue in dispute is whether refusing the appellant leave would result in unjustifiably harsh consequences for her and/or her family, such that it would be disproportionate under article 8 ECHR. This requires a balancing exercise weighing all relevant factors (to which in principle there is no limit), including those specified in Part 5A of the 2002 Act.

The undisputed factual background

5. The appellant is a citizen of India, born in March 1984, who is married to (and in a longstanding genuine and subsisting relationship with) a British citizen. She has spent a large part of her (adult) life in the UK.

6. She came to the UK as a visitor in 2006 and was granted leave to remain as a working holidaymaker between September 2008 and September 2010. After returning to India, she came to the UK again in 2011, as a Tier 4 (General) Student.

7. In 2009 the appellant met Mr Singh. They entered into a religious marriage the following year and their marriage was formally registered in 2012. The appellant and Mr Singh do not have children. They have sought IVF treatment in the UK but this has not progressed. There is a dispute about why this is the case (discussed below).

8. At the time the appellant met Mr Singh (in 2009) he was an Indian citizen in the UK unlawfully. However, in 2010 Mr Singh regularised his status and in 2012 he became a British citizen. Whether he has retained his Indian citizenship is disputed (see below).

9. In 2013, the appellant was granted 30 months limited leave to remain in the UK as Mr Singh's spouse. In support of this application, the appellant relied on an English-language test certificate from ETS.

10. In February 2015 the appellant's leave to remain was cancelled on the ground that she fraudulently obtained the ETS certificate (by using a proxy test taker). Litigation about whether the appellant engaged in the fraudulent activity identified by ETS has now been definitively resolved against the appellant: it is a preserved (and no longer disputed) finding of fact that the appellant cheated on the English language test submitted to support her application for leave as a spouse (which was granted in 2013).

11. Mr Singh has a successful business in the UK employing 5 people with a turnover of close to £1 million. Mr Singh and the appellant own their own home, as well as a rental property.

12. The appellant and Mr Singh both have family in India. It is a preserved finding that the appellant and Mr Singh will not face difficulties from their families in India on account of disapproval of the marriage.

Findings of fact in respect of disputed issues

13. The appellant and Mr Singh gave evidence orally. Although a Punjabi interpreter was used, it is apparent that they speak English to a competent level and I do not draw an adverse inference about their ability to speak English from the use of an interpreter.

14. Mr Lindsay asked detailed questions relating to the financial circumstances of Mr Singh and the appellant. In the light of the answers given, I make the following findings:

    a. The appellant and Mr Singh have a successful business selling UPVC windows and doors, with a turnover of almost £1 million. Due to different building requirements/methods and a different business environment in India, it is unlikely that they would be able to relocate this business, or start an equivalent business, in India.

    b. Mr Singh and the appellant have not made any serious enquiries as to the viability of selling the business. When asked by Mr Lindsay whether the business could be sold for a profit, Mr Singh's answer, at first, was that he cannot sell it. He then clarified that he could not close it quickly due to a lease and would not get back what he has put into it. He also said he has not thought about selling it. I find as a fact that there is no evidence, one way or the other, as to the viability of selling Mr Singh's business. Put another way, the appellant (upon whom the burden of proof lies) has not established that Mr Singh's business, which he states is successful and has a turnover of almost £1 million, could not be sold to generate a sum of money that would assist them in re-establishing themselves in India.

    c. The appellants own their home which they bought for £475,000 in 2018 and have a mortgage of approximately £180,000 on the property. When asked about the property's current value, their answer was that they do not know. When asked if the property could be sold to release capital, the appellant's answer was that they cannot do that as they have spent a lot on the property. When asked about renting the property out, her answer was that they could not have tenants as they would not be there to look after the property would not trust a letting agent. I find as a fact that the appellant and Mr Singh could release a substantial sum of money by selling their property; or, alternatively, they could generate a regular income by letting it out. I appreciate that they would be reluctant to do this given the investment they have made in their home and their desire to continue living in it, but nothing they said in response to questions posed by Mr Lindsay undermines my view that they could sell or rent out the property; and that either of these steps would generate funds that could support them in India.

    d. The appellants own a property that they rent out to tenants. Mr Singh stated that the property was bought in 2019 for £470,000 with 25% paid in cash. He stated that most of the income generated is used to cover the mortgage. Given the amount paid in cash, I find as a fact that a not insignificant amount of capital could be released by selling the property.

15. The evidence of Mr Singh and the appellant is that they do not have contact with the appellant's family. I accept that, on the balance of probabilities, this is the case. I therefore find as a fact that, on return to India, the appellant would not have support and assistance, or establish a relationship with, her family.

16. On the other hand, the appellant's and Mr Singh's evidence is that Mr Singh has family in India (a mother and brother) with whom they are in regular contact. Mr Singh stated that the appellant speaks to his mother every week. He also stated that his brother has his own family and would not look after the appellant. I find that the appellant, if returned, would maintain a relationship with Mr Singh's family. This is likely to entail continuing to speak to Mr Singh's mother on the telephone and visiting her (and Mr Singh's brother) from time to time. I do not consider it likely that the appellant will receive any financial assistance from Mr Singh's family or that she will live with them. This is likely to be the case whether or not Mr Singh accompanies the appellant.

17. The appellant and Mr Singh both state that they have not undertaken IVF treatment because the respondent holds the appellant's passport. Mr Lindsay does not agree that the respondent has prevented the appellant obtaining IVF. However, irrespective of the reality, I accept that the appellant and sponsor wish to undertake IVF and a material reason they have not pursued this is their genuinely held belief that they are impeded from doing so by the respondent holding the appellant's passport. No objective or expert evidence was submitted indicating that the appellant would be unable to obtain IVF treatment in India, and I did not understand Mr Raza to be arguing that this would be the case. Accordingly, I find that (a) the appellant and Mr Singh would like to undertake IVF treatment; (b) they believe that they have been unable to obtain IVF in the UK because the respondent holds the appellant's passport; and (c) it has not been established that their ability to access IVF treatment would be impeded by relocating to India.

18. Mr Singh states that by becoming British he relinquished his Indian nationality. The respondent's position is that Indian nationality law is complex and no evidence has been submitted to establish that Mr Singh has not retained his Indian nationality despite becoming British. Whether the sponsor has retained his Indian nationality is a matter of Indian law. Foreign law (including nationality law) is a matter of evidence, to be proved by expert evidence directed specifically to the point in issue. See *Hussein and Another (Status of passports: foreign law)* [2020] UKUT 00250 (IAC). As no evidence on this issue has been adduced, and the burden lies with the appellant, I do not accept that the appellant has established that Mr Singh is not an Indian national.

19. Mr Raza acknowledged that no evidence had been submitted indicating that, if Mr Singh is not Indian, he would face any impediments relocating to, or working in, India, as the British national husband of an Indian citizen. I therefore find as a fact that, even if Mr Singh is not Indian, he is entitled to live and work in India.

20. The appellant claims to suffer from depression and anxiety. Although very little evidence substantiating this was provided, I accept that she does suffer as claimed. No evidence was submitted indicating that there is any treatment or medication the appellant relies (or might in the future need to rely) on that would be unavailable in India. I therefore find that the appellant's depression and anxiety can be treated as effectively in India as it could be in the UK.

The article 8 balancing exercise

Factors weighing in favour of immigration control

21. I am required by section 117B(1) of the 2002 Act to have regard to the public interest in the maintenance of effective immigration controls. This weighs against the appellant because: (a) she does not meet the requirements of the Immigration Rules; and (b) she engaged in conduct (reliance on a fraudulently obtained ETS certificate) that undermines the integrity of the immigration system. Although the deception occurred many years ago, it is a very serious matter and therefore the public interest in effective immigration controls weighs heavily against the appellant.

Factors that weigh in favour of family and private life

22. The appellant is in a longstanding genuine and subsisting relationship with her British national husband. How much weight to attach to the relationship is not straightforward. The appellant was not in the UK unlawfully when the relationship commenced and therefore section 117B(4) of the 2002 Act does not require that only little weight is given to the relationship. However, at the time the relationship began Mr Singh was in the UK unlawfully and the appellant had an immigration status that did not give rise to any expectation that she would be able to settle in the UK. Accordingly, both she and Mr Singh entered into relationship in the full knowledge that they were not entitled to expect to continue their relationship permanently in the UK. This reduces the weight that I attach to the relationship. That said, they have lived together in a genuine relationship for many years during which have established a successful business, bought properties, and developed a private and family life in the UK. Moreover, by the time he married the appellant – and for the vast majority of the relationship – Mr Singh was a British citizen.

23. Also relevant to the weight I attach to the relationship are the impediments to it continuing in India. Mr Singh would face substantial difficulties relocating to India with the appellant. He would need to leave behind a successful business, his home, and the life he has enjoyed and become accustomed to in the UK. I have no doubt that he would find this stressful and upsetting. However, I do not accept that he would face obstacles integrating in India, or that the difficulties he would face would be particularly harsh. Even if he is not a citizen of India (which I will assume to be the case for the purposes of this article 8 assessment), there is no legal barrier to him relocating to (and working in) India. He is in a position to release substantial capital from his home and the property he rents out, which means that he would be able to afford to buy a home in India. In due course, he could release further funds from selling his business. He would not therefore face financial hardship. Nor would he have significant difficulty adapting to life in India, given his familiarity with the language, society and culture; and that he has family in the country. Although I accept he would not receive assistance from his brother and mother, their presence in India means that he would not be without family connections, which is likely to assist in establishing his private life.

24. The fact that there are not significant obstacles to the relationship continuing in India (or Mr Singh relocating to India with the appellant), reduces the weight that I attach to the relationship as a factor weighing against the appellant's removal. That said, requiring the appellant to leave the UK represents a significant interference with the relationship even if the appellant and Mr Singh decide to continue the relationship in India. In these circumstances, I attach weight to the relationship as a factor weighing in the appellant's favour.

25. If the appellant returns to India without Mr Singh, she will face challenges. This weighs in her favour. However, the challenges she would face fall a long way short of being significant obstacles to integration. She is familiar with the culture and society, would not be entirely alone given her relationship with Mr Singh's family, and would have the financial support of Mr Singh, who has sufficient income and assets to either purchase a property for the appellant or rent one for her, and to provide her with a regular income.

26. The appellant has established, with Mr Singh, a successful business with employees in the UK and appears to be well integrated into British society. She has lived in the UK for a long time. I find that she has a strong private life in the UK. However, in accordance with section 117B(5) of the 2002 Act (little weight should be given to a private life established by a person at a time when the person's immigration status is precarious), I attach little weight to her private life because it was established when she was in the UK with limited leave (i.e. an immigration status that is considered "precarious"). I recognise that there is a degree of flexibility when interpreting "little weight" in Section 117B(5), as explained in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58. However, nothing has been identified that, in my view, would justify giving more than little weight to her private life. For the avoidance of doubt, this is distinct from the appellant's family life with Mr Singh (discussed above), to which I have attached more than little weight.

27. The appellant suffers from depression and anxiety. I accept that this is likely to worsen if she is required to return to India, given that this would significantly disrupt her life. I attach only little weight to this consideration, however, because no evidence has been adduced indicating that the appellant would face any difficulty obtaining treatment and medication in India.

28. The appellant and Mr Singh would like to undertake IVF treatment. Given that their preference is to have this treatment in the UK, I attach some weight to this as a factor in the appellant's favour. However, I attach only little weight to this consideration because no evidence has been adduced indicating that they could not obtain IVF treatment in India.

Factors that are neutral

29. Sections 117B(2) and (3) of the 2002 Act require consideration to be given to the public interest in appellants speaking English and being financially independent. Neither of these considerations weigh against the appellant, as she speaks English and is financially independent.

30. Relying on *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, Mr Raza argued that it is disproportionate to require the appellant to leave the UK when it is certain she would be able to make a successful application for entry clearance. Mr Lindsay stated that he did not know whether the appellant would succeed in an application from India. Even if I accept Mr Raza's contention that an entry clearance application as a spouse of Mr Singh would inevitably succeed, I am not persuaded that this assists the appellant. As explained in *Alam & Anor v Secretary of State for the Home Department* [2023] EWCA Civ 30, *Chikwamba* is only potentially relevant on an appeal when an application for leave to remain has been refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance. This is not such a case. Moreover, given that no children would be negatively effected, no ongoing medical treatment would be impacted, and the appellant has the financial

means to live comfortably in India for a temporary period, I do not accept that temporarily moving to India in order to apply for entry would be disproportionate. For these reasons, I treat Mr Raza's "*Chikwamba*" argument as neutral in the overall balancing exercise.

The balance under Article 8

31. Cumulatively, the factors weighing on the appellant's side of the scales are significant. However, as explained above, I have attached substantial weight to the public interest in the maintenance of effective immigration controls. In my view, this public interest significantly outweighs the factors weighing in the appellant's favour. The appeal is therefore dismissed.

Notice of decision

32. The appeal is dismissed.

D. Sheridan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

6.4.2024