Neutral Citation No: [2019] EWCA Civ 748

Case No: C5/2018/0603

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 31 January 2019

Before:

LORD JUSTICE HAMBLEN

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Between:

CL (INDIA)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Ms A John (instructed by Prime Law Solicitors) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

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Judgment

(Approved)

LORD JUSTICE HAMBLEN:

1. This is an application for permission to appeal brought by CL against a decision of Upper Tribunal ("UT") Judge Storey given on 8 January 2018. By an order dated 19 November 2018, Sir Wyn Williams adjourned the application to an oral hearing.

2. The background is that CL is an Indian national born on 8 September 1984. She entered the UK as a Tier 4 (General) student on 24 January 2011 with entry clearance from 13 September 2010 until 10 January 2013. She was granted further leave to remain as a Tier 4 (General) student on 6 March 2013 until 19 April 2015.

3. On 17 April 2015 CL applied for leave to remain on the grounds of marriage. CL's husband, KW, is a British citizen and has always lived in the UK. CL and KW married on 12 December 2014. On 2 July 2015 CL and KW attended a marriage interview. On 7 July 2015 the SSHD refused CL leave to remain. The SSHD did not accept that the couple were in a genuine and subsisting relationship and did not accept that there would be any insurmountable obstacles to the couple conducting their family life in India.

4. CL appealed to the First-tier Tribunal ("FTT"). FTT Judge Malcolm allowed her appeal. The FTT judge, after hearing evidence from the couple and three witnesses, was satisfied that CL's appeal was credible, that her relationship with her husband was genuine and subsisting and that the couple would face insurmountable obstacles living in India. The judge's findings in relation to insurmountable obstacles were set out in paragraph 94 as follows:

> "The appellant's husband is a British citizen and has always lived in the U.K, his family are in the U.K. It was his evidence that he would not be able to move to India if his wife was required to

> return to India as he simply would not be able to cope with the heat in the country and was very clear in his evidence that if his wife was required to return to India that he would not be able to return with her. I accept that this met the test of insurmountable obstacles to family life continuing outside the U.K (in terms of EX.1 (b))."

5. The FTT judge therefore accepted the evidence given that KW "would not be able to cope" with the heat in India and would not be able to return with her.

6. The SSHD's application for permission to appeal against the UT was refused by FTT Judge Osborne on 15 August 2017. He considered that the judge was entitled to make the findings that he did on the evidence before him and that there was no arguable error of law. Permission to appeal to the UT was granted by UT Judge Kekic on 28 January 2017.

7. UT Judge Storey heard the appeal on 8 December 2017. The SSHD had appealed to the UT on two grounds. First, the SSHD challenged the FTT judge's credibility findings, and secondly the SSHD attacked the FTT judge's finding on insurmountable obstacles. UT Judge Storey dismissed the SSHD's first ground of appeal. He held that it amounted merely to a disagreement with the judge's findings and no error of law was identified. The FTT judge was entitled to make the findings he did. The UT Judge found, however, that the FTT judge's treatment of the issue of insurmountable obstacles was unsatisfactory. He said as follows at paragraph 6:

> "It was one thing for the judge to accept Mr KW's subjective evidence that he would simply not be able to cope with the heat in India. What the judge was required to undertake, however, was an objective assessment of whether Mr KW could in fact cope with the heat and whether a difficulty of this kind would pose an insurmountable obstacle. The Supreme Court has confirmed in *Agyarko* [2017] UKSC 11 that insurmountable obstacles is a stringent test requiring an applicant to show serious hardship.

> Difficulty coping with heat is not in itself a serious hardship in a country, where there is air conditioning and available urban environments built to protect people against the heat."

8. The UT judge considered that the FTT judge's decision was legally flawed and in those circumstances he remade it, concluding that there were in fact no insurmountable obstacles and allowing the appeal. That decision was then appealed to this court, the main ground being in relation to the issue of insurmountable obstacles in the light of the FTT judge's findings. Sir Wyn Williams, who considered the matter on the papers, adjourned the application to an oral hearing, noting: "It is not entirely clear whether the test for judging insurmountable hurdles is an objective one".

9. At the hearing today Ms John for the applicant has submitted that the UT judge, having left the FTT judge's findings in relation to insurmountable obstacles and serious hardship undisturbed, should not have interfered with the FTT judge's conclusion and it was impermissible to introduce an entirely objective approach to the question of insurmountable obstacles and serious hardship and to ignore the findings which had been made. In particular, it is submitted that in circumstances where it had been found, in the light of credible witness evidence, that the applicant's husband simply would not be able to cope with the heat in India and that he would not be able to return with her, that should satisfy the test under EX.2, even if objectively for other persons those obstacles would not amount to insurmountable obstacles or serious hardship.

10. I am persuaded that there is an arguable ground of appeal here in the light of the findings made in paragraph 94 of the FTT judge's decision, the argument that those findings were accepted by the UT judge, and the question of whether the test of insurmountable obstacles, or the objective element of that test, means that those

findings are insufficient to mean that the test was satisfied. I am also satisfied that there is here an important point of principle to be considered, which I would put in the following terms. Is it open to the Upper Tribunal, having left the First Tier Tribunal judge's findings on the facts undisturbed, namely that the husband of an applicant for leave to remain would not be able to cope with the identified insurmountable obstacles in the country of return and would not be able to return with her, to conclude that the test is not whether the applicant's husband subjectively cannot surmount those obstacles but whether objectively he should be able do so?

11. In light of the point of principle raised and the arguability of the appeal, I grant permission.

Order: Application granted