Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/09810/2019 (P)**

THE IMMIGRATION ACTS

Decision made pursuant to Rule 34 **Decision & Reasons Promulgated**

On 13 August 2020 **On 19 August 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

PARULBEN YOGESHKUMAR PATEL

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

For the appellant: Not represented

For the Respondent: Ms R Pettersen, Senior Home Office Presenting Officer

1. This appeal was listed before me on 13.8.20 and by consent of the parties as a remote hearing. The form of remote hearing was video by Skype (V). A face to

face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

2. However, whilst Ms Pettersen attended on behalf of the respondent, there was no attendance by or on behalf of the appellant, who has not registered any legal representative with the Tribunal. I was satisfied from the information in the Tribunal's case file that the appellant had been properly notified of the remote hearing. After some delay and with the making of further enquiries, a telephone number was found for the appellant and she was contacted. I spoke to her directly. She informed me that she had received the Notice of Hearing, sent by email on 29.7.20, and the subsequent email containing the Skype invitation. She could not adequately explain why, if she did not intend to attend, she had not informed the Tribunal of that fact, or of any difficulties she faced. She told me that she had passed the information to a person, possibly a solicitor, who was handling her affairs, and had heard nothing else. Over the telephone, I agreed to adjourn the remote hearing, and have it relisted so that she could attend or instruct legal representation.

3. Later the same day, however, the Upper Tribunal received an email from the appellant stating that she wished for the hearing to proceed in her absence, relying on the grounds of application for permission and her witness statement, together with her bundle put before the First-tier Tribunal.

4. As the hearing had already been adjourned, it was not possible to reconvene. However, the respondent was contacted and Ms Pettersen invited to make brief written submissions of what she would have said, had the remote hearing gone ahead, which were received on 14.7.20 and are summarised below.

5. I have in effect acceded to the appellant's request for the matter to be dealt with in her absence and have taken into account all the documents and evidence she relies on, making the decision on the papers without a hearing under Rule 34.

6. Ms Pettersen's brief written submissions accept that the First-tier Tribunal Judge erred in not taking into account the partner's grant of Indefinite Leave to Remain but submit that the error was not material because (i) the appellant was unable to bring herself within the Rules; and (ii) the First-tier Tribunal considered the question of whether the appellant's partner could go to India with her and took into account the medical evidence. It is submitted that the grounds do not demonstrate that the judge erred in the proportionality assessment.

7. Whilst the appellant may not have seen these submissions, they are, with respect to Ms Pettersen, unremarkable and unsurprising. I have carefully considered whether the appellant is in any way disadvantaged by these brief submissions. However, as I have already noted, the appellant was content for the hearing to

proceed in her absence and all that has now happened is that Ms Pettersen has put into bullet-point notes what she undoubtedly would have submitted orally at the remote hearing. Had any novel issue been raised, I would certainly have invited a written response from the appellant. On the limited submissions made, however, I am satisfied that seeking a reply from the appellant is not necessary for me to deal with this case fairly and justly in accordance with the Tribunal's overriding objectives.

8. The appellant, who is an Indian national born on 20.11.80, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 4.3.20, dismissing her human rights appeal against the decision of the Secretary of State, dated 29.5.19, to refuse her application for Leave to Remain on private life grounds only.

9. The grounds assert that the First-tier Tribunal Judge misdirected himself in law in the article 8 ECHR assessment by failing to accord appropriate weight to material matters, in particular that the appellant's partner had been granted Indefinite Leave to Remain on 12.6.19.

10. Permission to appeal was granted by First-tier Tribunal Judge O'Garro on 18.5.20, citing GM (Sri Lanka) [2019] EWCA Civ 1630, to the effect that "*the proportionality test to be applied in considering appeals outside the Rules is whether a "fair balance" is struck between competing public and private interests (and not one of exceptionality), that the test is to be applied on the circumstances of the individual case evaluated in the "real world". The court also said that a court has a duty to do what is right and consistent with human rights law and must take account of the most up-to-date information of an appellant's circumstances*."

11. It was noted that at [10] of the decision the judge accepted that the appellant's partner has been granted Indefinite Leave to Remain on 12.6.19 but the judge considered "*that was post decision and the change in his status is therefore a new matter for the purposes of this appeal. I may not consider it without the consent of the Respondent which has not been given. For reasons which will become apparent below it has little bearing on the issues I must consider*."

12. Judge O'Garro considered it arguable that the First-tier Tribunal erred in law in not taking the appellant's partner's grant of Indefinite Leave to Remain into account in the proportionality assessment, and that "*in the light of the guidance given by GM, it is arguable that by failing to do so, the judge made a perverse or irrational finding on a matter that was material to the outcome*."

13. There was no issue but that the appellant and her partner enjoy a genuine and subsisting relationship. They have no children.

14. The judge stated at [10] the partner's change of immigration status had little bearing on the outcome of the appeal. Whilst at the date of application the partner had not yet been granted Indefinite Leave to Remain, that was the case by the date of the appeal hearing on 12.2.20. I am satisfied that as this was a human rights appeal, the First-tier Tribunal should have taken into account the appellant's circumstances as they were at the date of the hearing. As stated above, the respondent also accepts that this was an error. However, for the reasons set out below, I am not satisfied that this error was material to the outcome of the appeal.

15. The appellant has never had lawful leave to enter or remain in the UK. She has made a number of unsuccessful applications under different routes for leave to remain. In the application made on 24.12.18, which led to the impugned decision, the appellant stated, "*I am not applying as a family member – I am only applying on the basis of private life in the UK*." Her covering or supporting letter of 7.1.19 asserts that she and her partner had established a private life in the UK and that she had establish strong ties since her arrival in 2006. Although she was not relying on family life, the respondent's decision considered both private and family life within and without the Rules.

16. The grounds of appeal to the First-tier Tribunal are drafted in entirely generic and unparticularised terms in which no reference is made to family life and it is difficult to see on what basis she wished to appeal. However, in her witness statement prepared for the First-tier Tribunal appeal hearing, the appellant erroneously claims that she applied for leave to remain as the spouse of her partner. The reality is that she specifically did not want to be considered under the partner route. In the statement, the appellant accepted that she was unable to meet the requirements of Appendix FM and disclosed that her husband was unemployed and in receipt of benefits. It was perhaps for that reason that she relied on private life under paragraph 276ADE (1)(vi) and, alternatively, outside the Rules, claiming that there were very significant obstacles to her integration in India, a country with which she claimed to be "*thoroughly unfamiliar*." However, I note at [14] of the witness statement that she claimed family life with her husband, relying on human rights grounds. In the premises, it appears that the appellant has changed the basis upon which she sought leave to remain in the UK. Nevertheless, the respondent and the First-tier Tribunal both considered family and private life grounds.

17. The refusal decision noted that in October 2017 the partner had been granted Discretionary Leave to Remain until 17.10.20. It is not at all clear on what basis the appellant's partner was granted first discretionary and then indefinite Leave to Remain. The grounds of appeal to the Upper Tribunal suggest that the grant of discretionary leave was because he could not return to India. From the judicial review papers contained within the appellant's bundle, I note the respondent's

complaint that the partner never mentioned the appellant or any dependent in any of his applications for leave to remain. Evidently, when he was granted discretionary leave, the respondent was unaware of any relationship between the appellant and the partner. As stated above, I accept that the judge should have taken into account that the partner now has settled status in the UK. However, as also stated, I am satisfied that the change of circumstances of the partner made little difference to the merits of the appellant's claim.

18. The appellant could not succeed under Appendix FM because she was in breach of the immigration status eligibility requirement and EX1 did not apply, because there were not, as the judge found, insurmountable obstacles (very significant difficulties which could not be overcome) to family life continuing outside the UK. If there were such obstacles, as the appellant now asserts, they were not clearly identified in any of the grounds or submissions made to the First-tier Tribunal. Whilst the partner had Indefinite Leave to Remain, there appeared no reason why he and the appellant could not live in India, if he chose to accompany or join her there. As the judge noted at [12], they are both Indian citizens and lived in India until coming to the UK in 2006, at which time the appellant was 25 and her husband 36. Although they wished to live in the UK, the judge did not accept that they would be thoroughly unfamiliar with India, as the appellant claimed. Neither did the judge accept at [13] that there were very significant obstacles to integration in India. All of those findings were entirely open to the judge on the evidence. It follows that the appellant could never have succeeded under the Rules, which fact is highly relevant to the article 8 proportionality assessment outside the Rules.

19. In considering the matter outside the Rules, the judge noted R (on the applications of Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11 and that it is likely to be only in exceptional circumstances that removal where the Rules cannot be met would constitute a violation of article 8. Agyarko noted that there was not a condition of exceptionality, but quoting Lord Bingham:

> "the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:
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> "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in Razgar [R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 2 AC 368], para 20.

> He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)
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> 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."

20. The First-tier Tribunal Judge cited Agyarko at [16] of the decision and at [17] accepted that the ultimate question was one of proportionality. The judge went on to consider the R (Razgar) v Secretary of State for the Home Department [2004] UKHKL 27 stepped approach. The judge also applied section 117B of the Nationality, Immigration and Asylum Act 2002 which sets out the public interest considerations. The fact is that little weight could be accorded to the private of family life developed in the UK whilst the appellant's immigration status was both precarious and unlawful.

21. I am satisfied that nothing in the decision of the First-tier Tribunal was inconsistent with the proper approach to the article 8 proportionality balancing exercise outside the Rules. On the findings of the judge and on the evidence, there was nothing to demonstrate that there were such circumstances in the appellant's case that refusal would result in unjustifiably harsh consequences. Even had the judge specifically taken into account the grant of Indefinite Leave to Remain in the proportionality balancing exercise, I am entirely satisfied that the balance would inevitably have fallen against the appellant and in favour of removal being proportionate. In this regard, I have carefully considered what difference the Indefinite Leave to Remain could have made. It would perhaps have removed one obstacle under Appendix FM but as stated above, the appellant still could not succeed because of the eligibility requirement and, under EX1, the absence of very significant obstacles to integration in India.

22. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The making of the decision in the appeal did not involve the making of an error of law.

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 14 August 2020