Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06934/2019 (V)

THE IMMIGRATION ACTS

Heard on 19 January 2021 **Decision & Reasons Promulgated**

At a remote hearing via Skype On 3 February 2021

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MAYUR [P]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr N Ahmed, Counsel
For the respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

Introduction

1. The appellant has appealed against a decision of First-tier Tribunal ('FTT') Judge Fowell, sent on 27 August 2019, dismissing his appeal on Article 8, ECHR grounds.

Background

2. The appellant is a citizen of India born in 1987. His immigration status is not in dispute: although he arrived lawfully as a visitor in 2003, he remained as an unlawful overstayer. He made a human rights application on 23 October 2018 based upon his relationship with a British citizen partner, who I shall refer to as R. R was born in India and arrived in the UK as a spouse of a British citizen in

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2005. She divorced her spouse in 2018 but obtained British citizenship in 2012. R has been in employment for a lengthy period in the UK and owns her own property.

3. The relationship between the appellant and R began in 2016 with a religious marriage taking place on 22 August 2016. The relationship has been accepted to be genuine and subsisting, and was not challenged by the SSHD at the FTT hearing.

FTT's findings

4. The FTT heard evidence from the appellant and R and considered psychiatric reports diagnosing the appellant with PTSD. The FTT accepted that the appellant was in a genuine and subsisting relationship with R but rejected the claim on behalf of the appellant that:

    (i) he had lost all family ties in India;
    (ii) he experienced traumatic events in India in 2002 from which he continued to suffer;
    (iii) R needed to remain in the UK for IVF purposes such that this constituted an 'insurmountable obstacle' to family life in India;
    (iv) the financial requirements of the Immigration Rules were met when the requisite 'specified evidence' was not submitted.

5. The FTT concluded that there was an absence of 'insurmountable obstacles' and the requirements of the Immigration Rules could not be met, before addressing the impact of the interference upon family life pursuant to Article 8. In relation to Article 8, the FTT addressed the relevant public interest considerations together with R (Agyarko) v SSHD [2017] UKSC 11 and the principle in Chikwamba v SSHD [2008] UKHL 40, before concluding that it would not be a disproportionate breach of family life to remove the appellant in circumstances where family life could be exercised in India.

Appeal to the Upper Tribunal ('UT')

6. The appellant applied for permission to appeal in grounds drafted by Mr Ahmed. At a previous hearing on 6 November 2020, which was adjourned due to a lack of court time, Mr Ahmed 'recalibrated' the grounds without any objection from the respondent's then representative. Mr Ahmed relied upon four grounds of appeal, which can be summarised as follows.

    (1) In determining whether the requirements in EX.1 Appendix FM to the Immigration Rules were met, the FTT failed to take into account relevant evidence to the effect that relocation would entail serious hardship for both the appellant and R.

    (2) The FTT erred in law its approach to the financial requirements of the Immigration Rules.

(3) The FTT erred in law in its approach to the Chikwamba principle.

(4) In determining the issue of proportionality, the FTT failed to consider the reasonableness of expecting R to relocate in accordance with the guidance in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630.

7. FTT Judge Keane granted permission to appeal in a decision dated 17 January 2020. He observed that the FTT may not have arrived at findings of fact in respect of R's personal circumstances. He made no observations regarding any of the other grounds of appeal but granted permission to appeal on all grounds.

8. The respondent relied upon a rule 24 Notice and skeleton argument. The appellant relied upon the grounds of appeal, amended grounds of appeal and a skeleton argument.

9. At the beginning of the hearing before me Mr Ahmed alerted me to a refused adjournment application dated 15 January 2021. I invited him to renew the application orally but he made it clear that he was content to continue with the hearing. He made oral submissions reflecting the written submissions concerning the four grounds of appeal. Mrs Pettersen invited me to dismiss the appeal for the reasons set out in the respondent's skeleton argument.

10. After hearing from both representatives, I reserved my decision. I now give that decision with reasons.

Error of law discussion

Ground 1 – 'insurmountable obstacles'

11. I am satisfied that the FTT gave tolerably clear reasons for finding that there would not be 'insurmountable obstacles' to family life in India. The appellant relied upon four main factors in support of his submission regarding 'insurmountable obstacles': (i) he had no ties left in India; (ii) he feared return to India because of his experiences in 2002; (iii) R had commenced IVF in the UK; (iv) R did not have Indian nationality. The FTT addressed each of these in turn and made findings of fact entirely open to it.

12. The grounds do no more than disagree with the FTT's rejection of the appellant's claim that he had no family contacts left in India.

13. The FTT comprehensively set out the relevant detail within two psychiatric reports (prepared in 2015 and 2019) relied upon by the appellant, at [6] and [7]. The FTT gave adequate reasons for rejecting the psychiatrists' conclusions that the appellant suffered from PTSD as a consequence of the 2002 riots in India: the medical records from the GP had not been disclosed; this was particularly concerning because the claim was not raised for many years despite numerous

previous applications; the treatment prescribed was consistent with depression for reasons relation to uncertain immigration status; the appellant did not provide any detail of the riots or his involvement in them in his witness statement and the account and diagnosis rested entirely on what he told the psychiatrist. Significantly, the FTT acknowledged that the psychiatrists' reports might be sufficient in an asylum appeal where the lower standard of proof applied. The FTT was entitled to find for the reasons provided that the appellant did not displace the balance of probabilities standard.

14. The FTT was well-aware of R's personal circumstances and had those in mind when considering whether the obstacles she faced would be 'insurmountable'. The FTT summarised R's evidence at [12] to 15], noted the submissions to this effect at [19] and [20] and specifically addressed the two specific matters relied upon on behalf of the appellant at [27] to [29]: IVF treatment in the UK and lack of Indian nationality. I turn to those two issues now.

15. I accept the SSHD's submission that the FTT was entitled to find that there was a paucity of evidence as to the claim that R needed to be in the UK to undergo IVF in circumstances wherein the treatment itself had not commenced but in any event could take place in India.

16. The contention that Indian nationality does not permit dual nationality does not engage with the FTT's finding that R has been able to visit India for lengthy periods. I accept the SSHD's submissions on this issue. It is clear that R was born in India and resided there for a lengthy period. Even assuming that when she gained British citizenship in 2012, she lost her Indian citizenship, she still visited India in 2016 and 2018 and saw a gynaecologist there in relation to IVF treatment. The burden rested upon the appellant to establish that R would not be able to reside in India as the appellant's spouse. There was a requirement on the part of the appellant to lead evidence on this issue and not to rely upon mere assertion before the FTT – see GM (Sri Lanka) at [30].

17. I accept, as the grounds contend, that it is difficult to see the relevance of the requirements on the 'minimum income requirement' not being met upon 'insurmountable obstacles'. However, when the decision is read as a whole, the FTT fully addressed the appellant's case on 'insurmountable obstacles' and the inclusion of [30] and [31] prior to the conclusion at [32] was meant to explain why the FTT concluded that the Immigration Rules could not be met: (i) no 'insurmountable obstacles' for the purposes of EX.1 and (ii) the financial requirements could not be met.

18. It is regrettable that the FTT referred to the potential for IVF treatment and the appellant's subjective fear on return as not amounting to "*an exceptional circumstance on the evidence presented*" at [31]. However the FTT's factual findings on these two matters were entirely open to it for the reasons set out above. In addition, the FTT could have approached this issue in a more structured manner as recommended in Lal v SSHD [2019] EWCA Civ 1925 at

[36] and [37]. Nevertheless, the findings of fact underpinning the issue of 'insurmountable obstacles' was open to the FTT. Given those findings, on no legitimate view could the obstacles to family life in India be properly be said to be 'insurmountable' and the other errors identified within Mr Ahmed's skeleton are therefore immaterial.

Ground 2 – financial requirements

19. It is clear from the FTT's recording of R's oral evidence at [14] and [15] and the SSHD's representative's submissions at [17] that the appellant's ability to meet the financial requirements of the Immigration Rules at the date of decision and date of hearing was disputed, and the contrary submission in the grounds of appeal is without any merit.

20. The assertion in the grounds that the 'specified' documents relevant to the date of application were submitted is difficult to follow. It is clear from R's own evidence that her work circumstances changed because she left the job she had at the date of the application. When considering whether the Rules were met at the date of hearing as part of the Article 8 balancing exercise, the FTT was entitled to have the concerns it did regarding the inadequacies of the financial evidence.

21. The grounds contend that all the evidence demonstrated that R was financially independent. That entirely fails to address the FTT's clear concerns that the evidence relied upon as at the date of hearing was not 'specified' evidence and insufficient for the reasons set out at [31] and again at [37].

Ground 3 – Chikwamba principle

22. Mr Ahmed submitted that the FTT should have concluded that there was no public interest in removing the appellant from the UK in order to make an entry clearance application that would be certain to succeed. However, the FTT remained concerned that the financial requirements had not been properly evidenced by reference to the appropriate 'specified' documents. Having directed itself to [51] of Agyarko, the FTT made the clear finding that entry clearance was not certain to be granted at [40]. That was clearly a finding open to the FTT given the findings as to the inadequacies of the financial evidence. Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) at [83] to [99] makes it clear that reliance upon Chikwamba did not obviate the need to address all the relevant considerations in s. 117B of the Nationality, Immigration and Asylum Act 2002. The FTT clearly addressed those considerations from [33] of its decision. The FTT was entitled to find that there was a strong public interest in removing the appellant when he was an unlawful overstayer for a lengthy period who was unable to meet the financial requirements of the Rules. The FTT was also correct to attach little weight to the family life established by the appellant when he was *unlawfully* in the UK pursuant to s. 117(4)(b) of the 2002 Act – see GM (Sri Lanka) at [35].

Ground 4 – reasonableness of relocation in India

23. Mr Ahmed submitted that at [35] the FTT erroneously directed itself to the need to demonstrate 'insurmountable obstacles' for the purposes of Article 8. That betrays a misreading of the FTT's balancing exercise conducted over the course of [33] to [41]. At [35] the FTT was solely dealing with s. 117B(1). It reminded itself that it was in the public interest for the Rules to be met and in this case the 'insurmountable obstacles' test under the Rules applied (but could not be met). This was just one factor considered by the FTT, which then went on to address the other public interest considerations in s.117B at [36] to [38] and the Chikwamba principle at [39] and [40].

24. Although the FTT did not explicitly weigh up R's British citizenship and commitments in the UK, or the appellant's lengthy (unlawful) residence in the UK, these were clearly well-known to it, when the decision is read as a whole. Mr Ahmed submitted that the FTT was obliged to address the reasonableness of expecting a British citizen to relocate to India. That is what the FTT did when undertaking the balancing exercise. There was no need to undertake a separate analysis of reasonableness provided that all relevant factors were addressed during the balancing exercise. As GM (Sri Lanka) made clear at [52] it was important to address what was "*proportionate or reasonable*". The FTT did not apply a 'mechanistic ability to relocate' test but considered proportionality having considered all the relevant considerations in favour of the appellant remaining in the UK, as against the public interest in removing him. That assessment could have been fuller and clearer, but it was adequate.

25. In any event, the FTT's factual findings were such that the result in this case was inevitable. There was a strong public interest in removal and little weight could be given to the relationship pursuant to s. 117B(4)(b). I do not accept Mr Ahmed's submission that the 'little weight provision' should have been tempered by the length of the relationship. By the time of the FTT decision the relationship was of some three years vintage. By contrast the appellant remained in the UK as an overstayer for over 12 years before commencing this relationship.

Conclusion

26. As I said at the hearing, Mr Ahmed said all that he could on behalf of the appellant but for the reasons I have set out above, the grounds of appeal as clarified and recalibrated are not made out.

Notice of decision

The FTT decision does not contain an error of law and I do not set it aside.

Signed: *Melanie Plimmer*   Dated:
Upper Tribunal Judge Plimmer   19 January 2021