IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28787/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 March 2016	**On 29 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MRS SHANTI RAMBHAI GODHANIA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B K Sharma, Legal Representative
For the Respondent: Mr C Avery, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of the First-tier Tribunal dismissing her appeal against a decision taken on 3 July 2014 refusing her application for further leave to remain in the United Kingdom on the basis of her marriage.

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Background Facts

2. The appellant is a citizen of India born on 1 July 1981. She came to the United Kingdom on 28 February 2012 on a spouse visa which granted her leave to remain in the UK until 30 April 2014. On 23 April 2014 she applied for further leave to remain on the basis of her marriage to Mr Lakhman Odedra, an Indian national, who is settled in the UK. The respondent considered the application under Appendix FM of the Immigration Rules HC 395 (as amended). The respondent considered that the appellant did not meet the financial requirements or the English language requirements of the Immigration Rules. The respondent considered that there were no insurmountable obstacles preventing the appellant from continuing her relationship with her husband in India. The respondent also considered the appellant's application under paragraph 276ADE of the Immigration Rules. The respondent considered that the appellant had not lost all ties to India and therefore was not satisfied that she met the requirements of the Immigration Rules. The Secretary of State also considered that there were no particular circumstances that warranted a grant of leave to remain outside the requirements of the Immigration Rules.

The Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 24 March 2015 First-tier Tribunal Judge Kelly dismissed the appellant's appeal. The First-tier Tribunal found that the appellant did not meet the financial requirements in E-LTRP.3.1 because the appellant had failed to provide all of the very specific evidence that is required under Appendix FM-SE to establish that she and Mr Odedra met the £18,600 income threshold. The judge also found that the appellant had failed to satisfy the English language requirement in E-LTRP.4.1. The judge considered whether the appellant met the requirements of paragraph EX.1(b) of Appendix FM finding that there were no insurmountable obstacles to family life with Mr Odedra continuing outside the United Kingdom. The judge also considered whether there were any features of the appellant's case not covered by the Rules upon which her appeal might succeed under Article 8 outside the Rules but found that there were none.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal. On 9 June 2015 First-tier Tribunal Judge De Haney granted permission to appeal. The grounds set out that there seemed to be no consideration of SS (Congo) and Others [2015] EWCA Civ 387 and it is arguable that the Article 8 assessment lacks detail. Thus the appeal came before me.

The Hearing Before the Upper Tribunal

5. At the commencement of the hearing Mr Sharma handed up a document, which was a pass notification letter for a Life in the UK test with a test date of 17 June 2015. This document was not before the First-tier Tribunal Judge. It could therefore only be

relevant if I were to find that there was a material error of law in the First-tier Tribunal's decision. Mr Sharma submitted that the ESOL certificate provided at the time of the hearing was valid. He referred to a new certificate in the bundle submitted for the purposes of the hearing before the Upper Tribunal at page 106 to 109 of the bundle. I indicated to Mr Sharma that I could not see anything in the grounds of appeal where the appellant had sought permission to appeal against the judge's findings on the English language requirement. Mr Sharma referred me to ground 1(b) of the grounds of appeal, however I pointed out to Mr Sharma that that did not refer to the English language requirement and was headed Appendix FM Section 1.7 Financial Requirement. I asked Mr Sharma if the bundle prepared for the hearing before the Upper Tribunal contained only documents that were before the First-tier Tribunal. Mr Sharma indicated that the documents were documents that were before the First-tier Tribunal. However, the documents that he referred me to at pages 106 to 109 are dated 29 June 2015 and therefore postdate the hearing before the First-tier Tribunal, which was held on 13 March 2015. I note that there are a number of other documents in the bundle that were not before the First-tier Tribunal Judge. No application was made by Mr Sharma to admit new evidence before the Upper Tribunal. The appellant was given directions reminding of the need to make an application pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I indicated to Mr Sharma that, as this was an error of law hearing, documents that were not before the First-tier Tribunal Judge cannot be relied on to demonstrate that there was an error of law. There was no application to amend the grounds of appeal against the judge's finding that the appellant did not meet the language requirements, rather Mr Sharma suggested that nevertheless I could take the new evidence into account.

6. There is no appeal against the judge's findings in relation to the English language requirements and for the avoidance of doubt (if Mr Sharma's submissions are to be treated as an application for the grounds to be amended) I have not allowed the grounds to be amended so as to grant permission to appeal against those findings.

Summary of Submissions

The appellant's submissions

7. The grounds of appeal (which are lengthy) assert that the determination is so unreasonable that no reasonable Tribunal could ever have come to it. It is asserted that the Tribunal Judge erred by misapplying the law. The Tribunal used an incorrect interpretation of the Rules at Appendix FM-SE paragraph 5(b)(ii). It is also asserted that the Tribunal considered incorrectly that it was required to look only at the period up to the date of application. It is asserted that the appellant, at the date of the hearing, met the requirements of the Immigration Rules at Appendix FM-SE. It is asserted in the alternative that the appellant meets the requirements of EX.1 of Appendix FM as there are insurmountable obstacles to the appellant and her husband continuing their family life outside the UK. It is further asserted that the Tribunal materially erred by putting undue weight on irrelevant matters and failing to take relevant matters into consideration. It is asserted that it is unreasonable and

unlawful to require a person legitimately settled and domiciled in the UK to leave this country in order to maintain her family life, because of her ethnicity. The grounds set out that the Tribunal erred by failing to determine the appeal on human rights grounds by rigorously going through the systematic balancing exercise as laid down in Razgar (on the application of) v Secretary of State for the Home Department [2004] UKHL 27. It is asserted that the Tribunal acted unreasonably by failing to place due weight on the grievous consequences of the decision for the appellant's and her family's life. It is also asserted that the Tribunal failed to determine whether the respondent's failure to allow the appellant more time to pass the language requirement by granting her leave outside the Rules was in accordance with the law.

8. Mr Sharma's submissions were lengthy and at times did not relate to the purpose of the hearing before the Upper Tribunal, which was to consider whether or not there was an error of law in the First-tier Tribunal's decision. I have summarised Mr Sharma's submissions insofar as they were relevant to the matter before the Upper Tribunal.

9. Mr Sharma submitted that the appellant was granted entry clearance on the grounds that her marriage was genuine and subsisting and on the understanding that the sponsor was working and could maintain and accommodate his wife without recourse to public funds. He submitted that there is no reason to believe that in the foreseeable future the appellant will become a burden on the state. He referred to a bundle of documents submitted for the Upper Tribunal hearing, submitting that he had provided the contract of employment issued by Tesco at page 10 of the bundle. I indicated to Mr Sharma that this document was not before the First-tier Tribunal. Mr Sharma referred me to pages 11 to 45 of the bundle submitting that those documents were before the First-tier Tribunal Judge. However, I indicated to Mr Sharma that several of these documents could not have been before the First-tier Tribunal because they post-dated the date of the hearing. Whilst they may be material if I found an error of law I indicated that Mr Sharma needed to address me on the error f law point first. Mr Sharma submitted that I could take into account evidence up to the date of today's hearing. I reminded Mr Sharma that the matter before me was whether or not the First-tier Tribunal had made a material error of law. I indicated to Mr Sharma that with regard to the judge's findings on financial requirements he needed to address me on paragraph 18 of the First-tier Tribunal Judge's decision where the judge had found that the appellant had not provided the specified evidence required in Appendix FM-SE of either her or her sponsor's income. Mr Sharma referred me to page 11 of the Upper Tribunal bundle and the P60 that was provided. He submitted that the judge was wrong to find that specified evidence was not provided. Mr Sharma agreed that the relevant period for which evidence was required was September 2013 to April 2014, the six-month period prior to the application. I referred Mr Sharma to paragraph 9 of the First-tier Tribunal decision where the judge sets out the evidence that was before him. Mr Sharma submitted that documents were sent in to the Home Office in relation to an application made on 23 April 2014 but that the Home Office had requested that an application was made on a different form. He referred to a letter accompanying the application and a box ticked on the application, which indicated that financial evidence had been

submitted to the Home Office. He indicated that it was clear that the sponsor and the appellant between them earned in excess of the £18,600 threshold and that they have now provided pay slips. I asked Mr Sharma to take me to the documents that were before the First-tier Tribunal. Mr Sharma referred me to a number of documents, however not all of those documents were before the First-tier Tribunal. In response to my questions about which documents were before the First-tier Tribunal, Mr Sharma submitted that it was the duty of the First-tier Tribunal judge to ask the Home Office for the documents and that the appellant should not be penalised because of an innocent mistake. He submitted that the documents had been sent in to the Home Office (although he could not identify what had actually been sent). He submitted that the totality of the evidence of the appellant and the sponsor is that they were very much independent financially at the date of the refusal, the date of the appeal and as at today's date. With regard to the English language requirement, Mr Sharma submitted that he has now provided a certificate that the appellant has passed the Life in the UK test. He submitted that I was entitled to take all the evidence into account and come to a different conclusion in favour of the appellant. With regard to the judge's findings on the right to respect for private and family life, Mr Sharma submitted that it was not clear what the interest was behind removing the appellant. She is in a genuine marriage, has no bad immigration history, no criminal record. He submitted that she cannot live far away from her husband and that removing the appellant is not a sensible approach. He relied on the grounds of appeal.

The Respondent's Submissions

10. The respondent served a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. It is asserted that the appellant could not meet the terms of Appendix FM-SE. It is asserted that in any event the respondent fails to see the materiality under the Immigration Rules given the secondary finding that the appellant had failed to pass her Life in the UK test notwithstanding her previous five attempts. The respondent also asserts that in terms of insurmountable obstacles, given that the appellant spoke at the hearing in Gujarati and both the appellant and sponsor have family in India where they both lived prior to coming to the UK, it is submitted that the appellant's application amounts to no more than a disagreement with the reasoned findings of the judge. The respondent notes that at paragraph 12 the judge recorded the submission "they could not live together in India as they plan to spend their future in the United Kingdom and raise their children here".

11. Mr Avery relied on the Rule 24 response. He submitted that the grounds and the submissions did not identify an error of law in the First-tier Tribunal decision. He asserted that the appellant has not pointed to any error of law with regard to the finding that the specified evidence required in Appendix FM-SE. He submitted that there was nothing in the grounds or submissions to indicate that the judge's application of Appendix FM EX.1 was incorrect. He submitted that there was nothing that indicated that the judge should have gone on to consider Article 8 outside the Rules, there were no compelling circumstances arising in this case. He referred to the grant of permission and the reference to the case of SS (Congo). He

submitted that it is difficult to see how this case would assist the appellant as it confirms that there is no need to go on to consider Article 8 outside the Rules if there are no factors or circumstances that have not been considered under the Rules. He also observed that the case of SS (Congo) had not been promulgated when the First-tier Tribunal heard this case. He submitted that there was no error of law and that should the appellant be unsuccessful in this appeal it is open to the appellant to make another application if circumstances have changed.

The appellant's response

12. In reply Mr Sharma submitted that I was entitled to take the evidence regarding the English language and Life in the UK test into account, as this was an in-country appeal. He submitted that the appellant came to the UK in accordance with the law and was granted permission to enter the UK. If there is a problem with regard to something technical, then there are insufficient grounds to remove the appellant. He asserted that unless the Home Office could establish that the appellant was a terrorist or suffered an illness that would affect the whole of London, then there were no grounds for removing the appellant from the United Kingdom.

Discussion

13. Although the appellant asserts that she met the requirements under E-LTRP.3.1 in terms of the financial requirements, the judge records at paragraph 18 that the appellant has not provided the very specific evidence that is required under Appendix FM-SE to establish that she meets the income threshold. The judge sets out how that evidence is deficient. At paragraph 18 the judge notes:

> "...The evidence which she has failed to provide includes: a letter from her employer and Mr Odedra's employer confirming that the pay slips provided are authentic; a letter from each of their employers confirming their employment, their gross annual salary, the length of their employment, the period over which they have been paid the level of salary relied upon in the application and the type of employment involved; and personal bank statements covering the same period as the pay slips showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly. This information is required in respect of both the appellant's employment and Mr Odedra's employment because neither of them individually earn above the minimum £18,600 income threshold. The appellant has not provided any evidence to show that she has sufficient savings to meet the requirements of E-LTRP.3.1(b) or that she meets the requirements of E-LTRP.3.1.(c)".

14. It is worth setting out the provisions relating to evidence referred to by the judge in full. Appendix FM-SE at paragraph 2:

> 2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
>
> (a) Payslips covering:

(i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or …

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary;

(ii) the length of their employment;

(iii) the period over which they have been or were paid the level of salary relied upon in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency).

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly

15. The appellant has not addressed the judge's findings in relation to the requirement for this specific evidence in the grounds of appeal and, despite requests from me to do so at the hearing, Mr Sharma could not identify documents that were before the First-tier Tribunal judge that met those requirements.

16. All of the requirements in Paragraph 2 must be met. I have considered very carefully the documents that were before the First-tier Tribunal Judge, as set out by the judge in paragraph 18 of the decision. Mr Sharma could not refer me to documents that were before the First-tier Tribunal Judge that did cover the requisite period, which he agreed was September 2013 to April 2014, which met all the requirements of Appendix FM-SE. I do not accept Mr Sharma's submission that I can take into account, when deciding whether or not there was an error of law in the decision of the First-tier Tribunal, evidence that was not before the First-tier Tribunal Judge. I do not accept Mr Sharma's submission that there was a duty on the First-tier Tribunal judge to ask the respondent to provide documents that the judge had no knowledge of. This was the appellant's appeal. It was for the appellant to prove her case before the First-tier Tribunal. The appellant provided a bundle of documents for the hearing. If there were other documents that had been submitted to the Secretary of State then the appellant ought to have provided them for the hearing or at the very least have raised as an issue that there were documents that had been submitted to the Secretary of State that were not in the bundle. I have not taken any of the evidence that was not before the First-tier Tribunal Judge into consideration when arriving at my conclusion on error of law.

17. The appellant has failed to demonstrate that she provided the specific evidence required under Appendix FM-SE. All the requirements in paragraph 2 must be met. The judge's finding that the appellant did not meet the financial requirements was correct on the evidence before him.

18. In any event, as asserted by the respondent, the appellant has failed to satisfy the English language requirement in E-LTRP.4.1. There has been no appeal against that finding of the judge, therefore the appellant also did not meet the requirements of the Immigration Rules on the basis that she failed to satisfy the English language requirement.

19. The judge considered whether the appellant met the requirements of paragraph EX.1(b) of Appendix FM. The issue in the case is whether or not there were insurmountable obstacles to family life continuing outside the UK. The judge set out that insurmountable obstacles requires very significant difficulties faced by the applicant or the partner in continuing family life outside the UK and which could not be overcome or would entail very serious hardship for the appellant or her partner. The judge notes that the case law suggests that insurmountable should not be read as impossible but that it raises a higher test than reasonable to expect (paragraph 20).

20. The judge has applied the correct test. In R (on the application of Agyarko and others) v Secretary of State for the Home Department [2015] EWCA Civ 440, (2015) ('Agyarko') the Court of appeal held:

> '[21] The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an Applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
>
> [22] This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under art 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, para 39 (". . . whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them . . ."). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para 117: there were no insurmountable obstacles to the family settling in Suriname, even though the Applicant and her family would experience hardship if forced to do so).
>
> [23] For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way …
>
> [25] …The mere facts that Mr Benette is a British Citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there- could not constitute insurmountable obstacles to his doing so.'

21. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) it was held that the term 'insurmountable obstacles' in provisions such as Section EX.1 are not obstacles which are impossible to surmount: they concern the practical possibilities of relocation.

22. At paragraph 21 the judge considered that the appellant and Mr Odedra have both spent the significant majority of their lives in India and that there are therefore no significant language or cultural barriers to prevent them from re-establishing themselves in their country of birth. The judge notes that the parents of the appellant and Mr Odedra continue to live in India, as does the sister of Mr Odedra, and that there would therefore be relatives in India to support and assist them on their arrival. He notes that the couple have no children or other significant ties to this country. The judge notes that they are both in paid employment in the UK but finds that this does not amount to an insurmountable obstacle and that it would be open to them to seek work in India. The judge notes also that the appellant and Mr Odedra have some savings which would assist them. The judge's conclusion that there were no insurmountable obstacles was one that was open to the judge. As held in Agyarko, the test of insurmountable obstacles imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules, the test is not whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom, it is a much more stringent test. The judge did not err in finding that there were no insurmountable obstacles on the facts of this case.

23. There was no appeal against the judge's findings in relation to private life under paragraph 276ADE.

24. The appellant asserts that the judge erred by failing to consider Article 8 outside the Rules and in not applying the systematic balancing exercise as laid down in Razgar. At paragraph 22 of the decision the judge considered whether there were any features of the appellant's case which are not covered by the Rules and upon which her appeal might succeed under Article 8 outside the Rules. The judge found that there were none. As set out in the case of R (on the application of Sunassee) v Upper Tribunal (Immigration and Asylum Chamber) [2015] EWHC 1604 (Admin) the court held at paragraph 36:

> "In SS (Congo) the Court of Appeal re-stated the context and considered the role of public policy as expressed in the Rules in the proportionality assessment. This is at the heart of the present issue. The law is, as I have said, that the decision maker is entitled to decide that Article 8 considerations have been fully addressed in the Rules when dealing with 'stage two'. If they have, it is enough to say so. This will necessarily involve deciding whether there is a 'gap' between the Rules and Article 8, and then whether there are circumstances in the case under consideration that take it outside the class of cases which the Rules properly provide for. Whether these circumstances are described as 'compelling' or 'exceptional' is not a matter of substance. They must be relevant, weighty, and not fully provided for within the Rules. In practice they are likely to be both compelling and exceptional, but this is not a legal requirement. ..."

25. The appellant has not identified any circumstances that have not already been considered under the Immigration Rules when it was considered whether or not there were insurmountable obstacles to the appellant's family life continuing outside the UK. In the absence of any compelling reasons as to why her case ought to be considered outside the Rules, the judge was correct in his assessment that there were no features of the appellant's case that were not covered by the Rules.

26. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appellant has not discharged the burden of satisfying me that there was any error of law in the First-tier Tribunal's decision without which it is not capable of being set-aside. The appeal is dismissed. The decision of the Secretary of State stands.

Signed *P M Ramshaw* Date 13 March 2016

Deputy Upper Tribunal Judge Ramshaw