Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15980/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 23 May 2019	On 10 June 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

FAYEZA [F]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, instructed by Katani & Co Solicitors
For the Respondent: Mr A Govan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of India, has been granted permission to appeal the decision of Designated Judge of the First-tier Tribunal Judge Murray. For reasons given in her decision dated 9 November 2018, the judge dismissed the appellant's appeal against the Secretary of State's decision dated 18 July 2018 refusing her further leave to remain in the United Kingdom. The appellant had entered on a valid Tier 4 Student visa in September 2016 with leave until 12 January 2018. On 11 January 2018 she made a human rights claim based on her family life with her partner [AM]. He is a refugee of Iranian origin. They had started living together in August 2017, having met a month earlier.

2. The judge observed that having a close relationship, both parties would have known the situation was precarious when they entered into the relationship. With the appellant having finished her Masters Degree with a qualification in Dentistry and in Public Health, it is likely she would be able to live in the UAE where she had been for a considerable time. Her partner could stay with her in India. The judge did not consider there would be problems in the appellant integrating into India when she leaves the United Kingdom. The relationship was a short one and there was insufficient evidence to show that it was genuine and subsisting. The judge did not find that there were any exceptional circumstances or that there were insurmountable obstacles based on the objective evidence were she to return to India.

3. The grounds of challenge are that the judge had erred in finding there was insufficient evidence to show the relationship was genuine and subsisting. There was failure to give sufficient reasons or to look at the evidence in the round. The second ground relates to the judge's conclusion the appellant could go to the UAE. She was not being removed there but to India. There was insufficient evidence to reach the finding that she would be able to obtain a residence permit and the judge had failed to ask the correct question whether there was a sensible reason for her to go back and apply for entry clearance with reference to *SSHD v Hayat* [2013] Imm AR 15 and *Chikwamba v SSHD* [2008] 1WLR 40. In addition, the judge failed to take account of the difficulties the appellant's partner would encounter in India and the positive factors of her competence in English, the absence of being a financial burden and the lawful basis when she commenced her relationship.

4. Permission was initially refused by Designated Judge of the First-tier Tribunal Peart but on renewal it was granted by Upper Tribunal Judge Warr. In doing so, he explained that he was inclined to agree with the grounds that some reasoning was required to support the view of the judge on the issue of whether the relationship was genuine and subsisting.

5. The key passages from the judge's decision are as follows:

> "38. This is an appellant who came to the United Kingdom to study and since she arrived here has always known that she would require to return to India when her visa ended. Her situation in the United Kingdom has therefore always been precarious. When she entered into her relationship with her partner, who is a refugee from Iran, she knew that that was her situation. It is not clear whether she told him this but she probably did as she states that they have a close relationship so both of them knew the situation was precarious when they entered into the relationship.
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> 39. The appellant has now finished her Masters Degree so she has a qualification in Dentistry and a Master Degree in Public Health. I accept that it is unlikely that this appellant can go to live in the UAF unless she applies for work there, as her relatives are no longer there, they are in India. She has however lived in the UAE for a considerable time and with her qualifications it is likely that

she would be able to get a residence permit there as she could probably get a good job there. Based on her evidence she is not interested in this and has not made any enquiries.

40. She states that her parents are strict Muslims and would object to her relationship with her present partner. He is not a Muslim and he is not Indian. Her evidence is that he is an atheist. She states that they cannot go to live in India together but that is not supported by the objective evidence. The objective evidence states that live-in relationships are becoming more popular in India and they are not illegal. The relationships states that if she returns to India she will have to go to stay with her parents but she is an educated woman with good qualifications and I believe that she could internally relocate in India and get work. She would not require to be with her parents. Her evidence is that if she goes to India and stays with her current partner she could be the subject of an honour killing from her family, but when the appellant gave evidence about this she seemed to think this was unlikely.

41. The appellant's partner has refugee status in the United Kingdom and he could go to stay with her in India. She could go there and apply to bring him over to join her or she could apply from India to join him in the United Kingdom.

42. At present the terms of the Immigration Rules cannot be satisfied. The terms of paragraph 276ADE(1) cannot be satisfied but it has been put to me that paragraph 276ADE(1)(vi) can be satisfied as this appellant would have great difficulty integrating into India if she has to return. I find that on the balance of probabilities that is not the case. She has not been in the United Kingdom for long. Although she lived in the UAE for a considerable time she has spent time in India and knows the culture and the language. She is an educated woman and I find that there would be no problems in her integrating into India when she leaves the United Kingdom.

43. With regard to her family, she and her partner have not lived together for two years. Under the Rules she cannot be described as a partner. The relationship has been a short one and there is insufficient evidence before me to show that it is genuine and subsisting. The terms of EX1 do not apply."

6. In a concluding paragraph at [48], the judge observed:

"48. The appellant came to the United Kingdom on a student visa. When her visa expired she should have returned to India. At that time she had a residence permit in the UAE so she could have returned there. Her situation in the UK was always precarious and the relationship she has entered into was entered into in the knowledge that it was precarious. When her circumstances are considered and are weighed against effective immigration control, which is a necessity for the United Kingdom, I find that public interest and effective immigration control must succeed. The appellant has no right to be here. It would not be unreasonable to expect this appellant to go to India now that her visa has expired. She then has a choice as to whether she applies for Mr [M] to join her or she applies to come to the United Kingdom to join him. I do

> not believe that she would be in danger from her family. This is not a protection claim. If she feels that she would be in danger then she could submit a protection claim. She states that it would be difficult for her and her partner to live together in India but this is not an insurmountable obstacle based on the objective evidence."

7. A 24 response was served on 18 March 2019 in which the Secretary of State argued that:

> "3. The genuine and subsisting nature of the appellant's relationship within the UK was challenged in the refusal decision, the HOPO relied upon the refusal decision and there was no suggestion any concession was made that the relationship was accepted as genuine. The FTTJ was entitled to find this remained an issue for the appellant, upon whom the burden of proof lay, to address. The FTTJ found the appellant failed to meet the definition of 'partner' within the [Immigration Rules] and the evidence was inadequate.
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> 4. However the materiality of the above is clearly informed by the fact that the FTTJ nonetheless went on to consider the requirements of 276ADE(1)(vi) and a '*Razgar*' proportionality assessment with due regard to Section 117B and found removal was not a proportionate interference for the cogent reasons given, even were the relationship genuine."

8. I take each ground in turn. The judge was required to make a finding on the genuineness of the relationship. The challenge is that judge had failed to give any or sufficient reasons for reaching the finding it was not. The fact that it was a short relationship did not mean it was not genuine. The judge had failed to make any finding or adequate findings on whether the appellant's partner's evidence was reliable, plausible and credible. These aspects were material. It is also argued there was a failure to look at the evidence in the round.

9. Mr Winter observed that Mr Govan had indicated to him prior to the hearing that he considered the judge's reference to the genuineness of the relationship was in fact a reference to the requirements of the rule, in particular E-LTRP.1.7. This led to discussion of the correctness of the Secretary of State's approach since the evidence indicated the couple had started living together on 28 August 2017 and thus some way short of the two years for the definition of partner which in GEN.1.2. which (relevant to this case) provides:

> "(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere within this Appendix."

10. The application was made on 11 January 2018. Both Mr Winter and Mr Govan accepted that without this gateway requirement being met, none of the rules were in play including EX.1. As to why the Secretary of State had considered these, Mr Govan suggested that it was simply a "belt and braces" approach.

11. To an extent this is distraction from the issue I am required to address under this ground. The structure of the judge's decision, as will be seen from the passages cited above, indicates a detailed consideration of the circumstances of the relationship and how the couple might be able to continue it abroad until the mention of insufficiency of evidence in paragraph 43 as to its genuineness. It is not entirely clear whether the judge was concerned about the credibility of the relationship itself or whether the requirements of the rules which in any event were inapplicable could be met. Her decision contains a detailed record of all the evidence, including that given by the appellant's partner, and so it cannot be said the judge failed to take that into account. It is therefore difficult to see why she considered there was insufficient evidence. In my judgment the judge failed to make a clear reasoned finding on a key aspect of this case which is at the heart of the appeal with the risk that this may have undermined the correctness of her proportionality assessment.

12. As to ground 2, a number of factors are raised including:

    (i) The irrelevancy of the possibility of the appellant going to the UAE and the absence of sufficient evidence to find that she could get a residence permit.

    (ii) A failure to assess whether the appellant would be able to get a good job in the United Kingdom and thus be financially independent.

    (iii) A failure to assess whether the appellant's partner could go to India in the absence of ties and not speaking the language.

    (iv) A failure to adequately assess that the appellant speaks English and is not a financial burden.

13. In my judgment, the judge took all these factors into account and gave adequate reasons on each in deciding that the couple could like outside the UK. I consider it was permissible of her to identify the possibility of relocation to the UAE where the appellant had been before as an alternative to India; Article 8 considerations are not simply fixed with the removal destination where alternatives may apply which may be in prospect or present an opportunity. It is correct that the judge did not refer specifically to the factors in Section 117B as to language competence and financial independence. However, these aspects are neutral. There is no dispute that they are met but they do not add significant weight to the proportionality exercise. Although the judge's reasoning over the possibility of the appellant's partner living in India was brief, her survey of all the evidence indicates that all the relevant factors were taken into account. I find no error on this ground. An aspect Mr Winter added in his submissions was the disadvantage to the appellant's partner of relocating to India since he would lose the possibility of indefinite leave to remain in the United Kingdom which would be available after 22 March 2021. It is not clear whether this was argued before the judge but in any event, I do not consider it relevant to whether the family life can be continued abroad.

14. Turning to ground 3, Mr Winter argued that the judge had failed to ask the correct question which was whether there was a sensible reason for the appellant to return and apply for entry clearance. Reference is made in the grounds to the decision in *SSHD v Hayat & Treebhowan* [2013] Imm AR 15. In particular, the appellant and her partner would have to meet the minimum financial requirements. Mr Winter explained that although in employment, the appellant's partner could not meet the current threshold, and furthermore the Entry Clearance Officer was not in the best position to assess matters, including whether the relationship was genuine and subsisting with reference to *Chikwamba*.

15. I invited the parties to have regard to the decision in *SSHD v R (on the application of Kaur)* [2018] EWCA Civ 1423 in which Holroyde LJ reviewed the jurisprudence that flowed from *Chikwamba*. He also referred to the Tribunal decision *Hayat v SSHD* [2011] UKUT 444 (IAC) which gave guidance as to the approach to be taken in these terms:

> "23. Since the decision of the Deputy Judge in this case, the meaning of "insurmountable obstacles" has been definitively stated by the Supreme Court in *Agyarko*. Lord Reed, with whom the other Justices of the Supreme Court agreed, referred to *Jeunesse v The Netherlands* (2015) 60 EHRR 17, GC, saying:
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> > "42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion: para 107.
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> > 43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer ... 'Insurmountable obstacles' is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to

> move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

24. Lord Reed went on to refer, at paragraph 44, to the fact that the July 2012 version of the Rules (which was applicable in that case, and is applicable in this) did not define the expression "insurmountable obstacles". With effect from July 2014, however, Appendix FM was amended by the addition of paragraph EX.2, which states –

> "For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.""

16. Holroyde LJ observed after quoting the above passage:

> "With every respect to the Upper Tribunal, I do not think Lord Brown's words in *Chikwamba* justify the inclusion of the word "usually" in paragraph 23 of their decision. He went on to conclude:
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> 45. I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK, and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain."

17. It is correct the judge did not cite any of the above authorities. However, I am not persuaded that even if she had done so, the outcome could have been any different. On no basis could this be described as a "very clear case" particularly in the light of the acknowledged difficulties by the appellant's partner meeting the financial criteria. I do not find error on this ground.

18. I return to the first ground. The question I must ask is whether the judge's proportionality exercise was undermined by her lack of clarity over the credibility of the relationship. In my judgment, the judge's error was not confined to the credibility of the relationship but also to other aspects of the proportionality exercise. Her reference in [38] to the parties' knowledge that the situation was precarious when they entered into a relationship fails to take into account the fact that the appellant had lawful leave when the relationship began. The appellant continues to have s. 3C leave under the Immigration Act 1971 and the relationship is not therefore caught by s.117B(iv) of the Nationality, Immigration and Asylum Act 2002 even if she were able to demonstrate that her partner was a qualifying partner. It is to be noted that the fact of his refugee status does not

disqualify him however from being a partner under the Immigration Rules Appendix FM – Family Members.

19. The parties were content for me to re-make the decision if I am satisfied there was error based on their submissions and the new evidence filed, which Mr Govan did not challenge. That evidence includes updated witness statements by the appellant and her partner, details of their accommodation and photographs.

20. The appellant explains why it would be difficult for her to move to India with reference to her relationship and the risk of an arranged marriage. She refers also to her concerns over obtaining employment in a country where there are many with postgraduate degrees, as well as her absence of financial support. She refers also to the challenges her partner would face in India as a foreigner. Reference to UAE difficulties is explained by reference to her father having retired and is no longer sponsoring her.

21. The appellant's partner refers to his current studies in the United Kingdom for electrical engineering and the challenges that he would face in moving to India, which would have a negative impact on their relationship.

22. I am readily satisfied on the unchallenged evidence that the relationship is genuine and subsisting. It was formed at a time when the appellant had lawful leave. Both the appellant and her partner are in a position to make a contribution to the United Kingdom economy and both evidently have competence in English.

23. It is clear that the couple will find it difficult to adjust to life in India but not unreasonably so. Having regard to the appellant's partner's salary, any entry clearance application would be faced with difficulties. There is no challenge to the First-tier Tribunal Judge's findings as to the circumstances the appellant will face on return to India and it remains open to her partner to join her should he wish to do so in the event that an application for entry clearance is not successful. Despite their objections to such an eventuality, it is one that they could reasonably embrace despite their apprehensions. The parties will have been aware when the relationship was formed of the uncertainty of where their future might lie. That is a factor relevant to the proportionality consideration.

24. The Secretary of State has set out her policy in the Immigration Rules and that is, where she is concerned, the public interest lies. The financial criteria is the only sticking point for the couple. In [81] of *MM (Lebanon) v SSHD & Ors* [2017] UKSC 10 their Lordships observed:

> "But the fact that a Rule causes hardship to many, including some who are in no way to blame for the situation in which they now find themselves, does not mean that it is incompatible with the Convention rights or otherwise unlawful at common law. As far as the Convention rights are concerned, the arguments have concentrated on Article 8, the right to respect for private and family life, either alone or in conjunction with Article 14, the right to enjoy the Convention rights

> without discrimination, rather than on Article 12, the right to marry and found a family. The MIR does not, as such, prevent a couple marrying. It does, however, present a serious obstacle to their enjoying family life together. Further, unlike the temporary impediment held to be unlawful in *Quila*, the MIR may constitute a permanent impediment to many couples, because the sponsor will never be able to earn above the threshold and the couple will not be able to amass sufficient savings to make good the shortfall. Female sponsors, who have constituted as many as a third of the total, are disproportionately affected, because of the persisting gender pay gap, as are sponsors from certain ethnic groups whose earnings tend to be lower, and those from parts of the country where wages are depressed."

25. Having regard to the qualifications that the appellant's partner is seeking as an electrician, I think it more likely than not he will soon reach, once employed, the minimum income threshold. If the decision is reached that he remains in the United Kingdom, the expectation is that their separation, pending a successful entry clearance application, will not be a lengthy one. Accordingly, I am not satisfied in this case that there are exceptional circumstances that can justify this appeal succeeding on Article 8 grounds.

26. I set aside the decision of the First-tier Tribunal for error of law. I re-make the decision but come to the same conclusion and dismiss the appeal.

No anonymity direction is made.

Signed Date 3 June 2019

UTJ Dawson
Upper Tribunal Judge Dawson