Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34122/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 September 2017	**On 21 September 2017**
Extempore judgement	

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR PAWAN KUMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Bahja, Counsel instructed by Duncan Lewis & Co, Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India. His date of birth is 3 December 1981. He made an application for leave to remain which was refused on 27 October 2015. He appealed against that decision and his appeal was dismissed under Article 8, by Judge of the First-tier Tribunal Nicholls, following a hearing on 9 December 2016. Permission was granted by Judge of the First-tier Tribunal Osborne on 24 July 2017.

2. The Appellant came to the UK as a visitor in 2006. He has been an overstayer since the expiry of his leave in 2007. The judge heard evidence from the Appellant, his wife and his mother-in-law.

3. The Appellant gave evidence in English at the hearing. The Appellant and his wife were married in a Hindu ceremony on 19 August 2016. They have lived together since 2011. The Appellant's family do not approve of his marriage to his wife and their relationship generally because she is a divorcée. They could not live together in India. His wife would not be welcomed by his family.

4. Ms Sheth, the Appellant's wife, was born in the UK in 1985 and is a British citizen. Her evidence was that she is employed by Santander Bank and she also studies. In relation to her employment she is a senior member of a team dealing with high net worth clients looking after investment portfolios and dealing with the client's requirements. Her evidence was that she earns enough to support herself and the Appellant. At the hearing before me it was confirmed that the evidence before the judge was that she was earned in excess of £30,000 per annum. She is the only child of parents here and they have health problems and she helps them. She would not be able to live in India because it is not generally accepted in India for people to divorce, she has always been taken ill when travelling to India previously, she has never met any of the Appellant's family and that she believes that the human rights position as regards women in India is such that it was unreasonable to expect her to live there.

5. The Appellant's mother-in-law, Mrs Shakuntala Sheth, gave evidence. Her evidence was that she and her husband were born in Tanzania. Mrs Sheth is employed as a cashier at Sainsbury's. Her daughter is her only child. Mrs Sheth suffers from rheumatoid arthritis and other health problems. She and her husband rely on her daughter and the Appellant for a considerable amount of day-to-day assistance.

6. The judge's findings are found at paras 16 to 23. The judge, at para 17, stated that the Appellant's representative did not seek to argue insurmountable obstacles or very significant obstacles in the context of the Immigration Rules. The judge found, at paragraph 18, that the Appellant cannot meet the terms of the Immigration Rules, but went on to consider proportionality. The judge recorded that the Appellant relied on the fact that he had entered the UK lawfully and married a British citizen and that she was well-paid in a responsible job here. The judge concluded that there was no "independent confirmation" of the Appellant's family having rejected him. In any event, he concluded that the original home area of the Appellant and his family is Haryana this is only a small part of the large Indian sub-continent. He noted that the Appellant's evidence was that he had lived independently in Delhi and he found that the Appellant had not given any reason why he could not return there and find work. The judge found at para 20, in respect of the human rights position, that there was no evidence to show that there would be such a level of discrimination and disapproval as to amount to a "sufficiently serious interference with article 8". In respect of the wife's parents' medical needs the judge concluded:-

> "The evidence is, however, that the parents both manage to retain employment and to live independently. Mrs Sheth attended the hearing and although she was assisted by walking stick (sic), she was clearly able to move around and she was obviously fully mentally capable. There is no indication that there has been

> any form of professional independent assessment which shows that they are in need of special care provision. Whilst the assistance of their daughter is, undoubtedly, valuable, I am not satisfied that the evidence in this appeal demonstrates factors which could properly be described as exceptional or particularly compelling which would serve to outweigh the substantial weight which must be given to immigration control".

7. The judge attached little weight to the relationship that the Appellant had formed with his wife, taking into account section 117B(4) of the 2002 Act. The judge went on to conclude that the interference would be justified and proportionate. In respect of any potential application for entry clearance the judge concluded at para 23 :-

> "It is wrong for me to speculate about the outcome of an application for entry clearance for settlement. That will be a matter for an entry clearance officer on the basis of the evidence and documentation submitted with the application"

8. The grounds before Judge Osborne are twofold. It is asserted that there was no assessment under the Immigration Rules with specific reference to EX.1. which was raised in the skeleton argument before the First-tier Tribunal and the judge erred in not making an assessment of insurmountable obstacles. In respect of this ground I accept that the judge should have considered insurmountable obstacles, but did not do so. He misunderstood how the Appellant's case was to be advanced in the skeleton argument that was before him. However, the issue is whether or not this is material to the outcome, which I will go on to consider in due course. The second ground relates to the proportionality assessment generally and it is asserted in the grounds that the judge failed to make findings in respect of four matters; the Appellant's estrangement from his family; whether the Appellant's wife has a genuine well-founded fear of her human rights being breached in India; whether the Appellant took steps to renew his passport and if there were any difficulties for him doing so and whether the Appellant has been reporting, as he asserted, since 2009. It is also asserted in the grounds that there were no credibility findings in respect of the evidence Appellant's wife and mother-in-law. Mr Bahja expanded on this ground in his oral submissions to me. He asserted that the judge failed to consider that the Appellant and his wife were different nationalities and that she originates from Tanzania, that the Appellant's spouse is an only child and that her father is disabled. He also relied on the unreported case of Iman (IA/20153/2013). The point as I understood it to be is that the judge failed to factor the issues mentioned into the proportionality exercise.

9. At the hearing before me Mr Bahja made an application to amend the grounds to add a further ground that the judge failed to consider the Chikwamba point (Chikwamba v Secretary of State for the Home Department [2008] UKHL 40), although he accepted that this was not directly advanced before the First-tier Tribunal. Ms Pal's response to the application was that she was able to engage with the issue. It was engaged with by the Respondent in the Rule 24 response (at para 7) and this was

relied on in submissions by Ms Pal; namely that there was no error of law because first; it was not an issue that had been raised before the First-tier Tribunal Judge and; secondly, because of the public interest argument. I could see no prejudice to the Respondent in allowing the application to amend the grounds and allowed the Appellant to pursue the ground on the Chikwamba point.

10. The Supreme Court in Agyarko [2017] UKSC 11, stated:-

> "51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

11. In respect of grounds 1 and 2, it is unarguable that the judge did not consider the Appellant's evidence of estrangement from his family and the evidence generally in respect of the Appellant's wife's fears in having to live in India (see paras 20 and 21). Whilst the judge stated that there was no "independent confirmation" of the rejection by the Appellant's family of the Appellant and his wife (see para 19), the judge went on to conclude that the Appellant on his own evidence lived independently in Delhi and that the couple could live anywhere in India, and there is no challenge to this finding. The judge, in my view, properly engaged with the evidence in terms of human rights abuses in India. He concluded that there was no evidence to show such a level of discrimination, as asserted by the Appellant, and there is no challenge of substance to this finding of the judge. It is unarguable that the judge did not engage with the evidence in relation to the wife's parents and their health concerns (see para 21). The judge did not find the witnesses lacking in credibility, but concluded that the evidence relating to the health of the Appellant's parents-in-law was not sufficient to establish that their respective health conditions were such to amount to compelling circumstances. The judge was mindful that the Appellant's partner was a British citizen and did not have ties are connections with India. There is no indication by the judge whether he accepted the Appellant's evidence or not in relation to renewal of his passport, but this was not material to insurmountable obstacles or Article 8 generally. The Respondent's case was not that the Appellant had failed to report and this was not a material consideration.

12. The judge made extensive and adequate findings which are grounded in the evidence in respect of the substantive Article 8 assessment. There was no evidence before the judge which could have justified a finding of insurmountable obstacles. The unrepresented case relied on by the Appellant does not assist his case. The judge

was entitled to conclude, on the evidence before him, that there were no compelling circumstances. Having regard to the judgment in Agyarko, I conclude that the error in failing to make a discrete finding in respect of insurmountable obstacles was not material to the outcome in this case.

13. I have gone on to consider the third ground of appeal relating to the Chikwamba point. Ms Pal accepted that the Appellant's wife was in employment and that he met the requirements of the Rules and that an application for entry clearance would be granted, but maintained that there is no error of law because the case was not advanced on this basis and because of the public interest argument. Ms Pal did not expand on the public interest argument. In my view the judge erred because he should have gone on to consider proportionality in the light of Chikwamba. He touched on it at para 23, but his reference to speculation was misconceived because the evidence before him was that the Appellant would meet the maintenance requirements of the Rules. The Supreme Court decision of Agyarko post-dates the decision of the FtT, but it resurrects the Chikwamba argument. The judge materially erred for the above reasons and I set aside the decision. I went on to remake the decision.

14. I have taken into account section 117B of the 2002 Act. The Appellant is an overstayer and the maintenance of immigration is in the public interest. Little weight should be accorded to a relationship with a qualified partner established when the Appellant was here unlawfully. However, the weight to be attached to the public interest is not fixed and is reduced, in this case, by the fact that the Appellant would meet the requirements for entry clearance. I am persuaded that the Appellant has shown compelling circumstances and that the decision is not proportionate to the public interest in removal. I remake the decision and allow the appeal under Article 8.

Notice of Decision

15. For the above reasons the decision of the First-tier Tribunal to dismiss the appeal under Article 8 is set aside and I go on to allow the appeal under Article 8.

15. No anonymity direction is made.

Signed *Joanna McWilliam* Date 21 September 2017

Upper Tribunal Judge McWilliam