Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00659/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2018	**On 31 January 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MRS SURINDER KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wells, Legal Representative, Fast Track Immigration Services
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 14 September 2018 Judge Havard of the First-tier Tribunal (FtT) dismissed the appeal of the appellant, a citizen of India, against the decision made by the respondent on 30 November 2017 refusing her leave to remain in the UK.

2. The appellant's grounds contend first of all that the judge failed to consider the appellant's case under the transitional provisions of the

Immigration Rules requiring that the appellant's case be dealt with under the Rules in force as at 8 July 2012. This failure was said secondly to undermine his findings with respect to the maintenance requirement and the English Language/Knowledge of Life in the UK requirement and by extension the judge's consideration of the appellant's Article 8 circumstances outside the Rules.

3. As regards the first ground, Ms Everett did not dispute that the judge had failed to assess the appellant's case under the correct Rules. She pointed out that the respondent had proceeded on the basis that the appellant's case fell to be considered under the pre-9 July 2012 Rules and in the respondent's view so should have the judge.

4. I concur with the representatives that the appellant was entitled under transitional provisions to have her application for settlement decided under the pre-9 July 2012 Rules. She had submitted her application prior to 9 July 2012. Accordingly it was wrong of the judge to apply the post-9 July 2012 Rules to the appellant's case.

5. In order to show that this error was material, however, the appellant has to show that it had a material impact on the outcome of the judge's assessment of the appellant's circumstances under the Rules or outside them.

6. Mr Wells submits that the judge's error was material because by applying the strict evidence requirements set out in Appendix FM-SE the judge misdirected himself in relation to the approach taken to the assessment of income from salaries and from the company.

7. Mr Wells submits that there was also material error in the judge's treatment of the appellant's failure to sit the Knowledge of Life in the UK test, since she had explained in her covering letter that she had valid medical reasons, which were supported by medical evidence and the judge failed to consider whether the respondent had conducted a consideration in accordance with the guidance document "Knowledge of Language and Life in the UK."

8. Further, Mr Wells submits that the appellant was able to comply with the English language requirements as they stood prior to 9 July 2012.

9. I am not persuaded that the appellant's second ground is made out.

10. Whilst it is true that the judge erroneously assessed the appellant's financial circumstances by reference to post 9 July 2012 requirements, his principal findings of fact meant that the appellant was also unable to meet the pre-9 July 2012 maintenance requirements. From paragraphs 84-104 it is clear that, quite separately from the fact that the appellant had failed to provide specified documents, she had not produced satisfactory

evidence to show she could be adequately maintained. At paragraph 90 the judge stated:

> "Not only was the documentation supplied by the Appellant inadequate and non-compliant with the Rules, the evidence, both oral and documentary, in respect of income, was contradictory to a material degree."

11. The judge went on to note that there was no evidence in the form of bank statements of any monthly payments of wages being made into the appellant's current account (paragraph 93); and that the appellant had not established she had been paid a dividend by her husband's company (CLSL) (paragraphs 96-98). In relation to the maintenance requirement under the pre-9 July 2012 Rules, the onus of proof lay on the appellant to show that such maintenance would be adequate using the level of income and other benefits that would be available if the family were drawing income support as a yardstick (**KA and Others (adequacy of maintenance).** It is sufficiently clear that the judge was not satisfied by the evidence that she had discharged this burden quite apart from the issue of whether she met additional (more onerous) requirements introduced by the 9 July 2012 Rules.

12. As regards the Life in the UK requirement Mr Wells accepted that this was a requirement that was applicable under the pre-9 July 2012 Rules. The simple facts regarding this test are:

    (1) that the appellant took it and failed it; and

    (2) that she requested an exemption for this test;

    (3) the respondent (albeit doing this under "Modernised Guidance") did consider this request but decided not to exercise discretion to waive it because the medical evidence was insufficient; and that

    (4) the judge also considered whether a waiver was appropriate and decided not, stating at paragraphs 108-111 that:

> "108. The Appellant has not taken the English language test. She states that the reason for her failure to do so is as a result of suffering from persistent headaches which prevents her from concentrating for any length of time. The Appellant suggests that any activity which calls for prolonged concentration will bring on a headache.
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> 109. In support of her application the Appellant had included a handwritten note from City Hospital dated 18 February 2017 which refers to her undergoing medical treatment for depression and headaches and that she had been admitted on 18 February 2017 for hypertension and chest pain although there was no further information about what has happened since. Otherwise, there is a letter from the Appellant's GP dated 28 June 2017 which confirms that the Appellant is suffering from recurrent headaches for which she had been prescribed Amitriptyline which can make her drowsy. It states that she has been referred to a neurologist and I have been informed that the Appellant is due to attend a consultation with a neurologist and I have been informed

that the Appellant is due to attend a consultation with a neurologist in August 2018.

110. The Appellant confirmed that, despite her headaches, she was able to continue her work until she was prevented from doing so by the Home Office in August 2017. She accepted that, had she not been prevented from working by the Home Office she would have continued to do so. This involved standing at a conveyor belt for seven or eight hours a day sorting through a potato crop, removing any potatoes which did not meet the required standard.

111. On her own evidence, the Appellant was and is capable of working as described between four to six days a week and between seven to eight hours a day. Whilst I accept that the Appellant may suffer from headaches, there is an absence of any medical evidence to support her contention that she suffers from headaches to the extent that she is unable to sit the English test."

13. It is true that the judge's analysis was directed to the appellant's failure to meet the English language requirement, but the judge's reasons for finding the medical evidence unsatisfactory as regards the Knowledge of Life in the UK test were equally applicable to the issue of whether the appellant's failure in respect of this test was attributable to valid medical reasons. Mr Wells has not sought to suggest that different medical or other considerations should have applied to both tests.

14. It remains that the judge was wrong to consider that the appellant's failure to meet the English language requirements of the post 9 July 2012 Rules was relevant. It is not now in dispute that she was able to meet the relevant English language requirements of the pre-9 July 2012 Rules.

15. Particularly given therefore that the judge erred in applying post 9 July 2012 financial and English language requirements, it is necessary to ask whether these errors had a material impact on the judge's assessment of the appellant, Article 8 considerations outside the Rules. Despite Mr Wells' valiant attempts to persuade me otherwise I cannot see that there was any material impact.

16. Had the judge applied the correct Rules he would still have been obliged to conclude that the appellant did not meet their requirements both as regards the maintenance requirement and the Knowledge of Life in the UK requirement. It is not in dispute that in doing so he would still also have been obliged to have regard to the considerations set out in s.117A-D of the NIAA 2002. But when doing so, he would still have been obliged to conclude that the appellant did not meet the requirements of the Rules and to treat this failure as a significant factor and to count against her lack of financial independence. I accept that in paragraphs 121 and 123 the judge treated as public interest factors weighing against the appellant not just (correctly) her failure to pass the Knowledge of Life in the UK tests but also (incorrectly) her failure to meet the English language requirement. But even had the judge understood that her English language proficiency

was sufficient under the relevant Immigration Rules applicable to her, it would not have significantly altered the assessment he made as regards whether she had shown compelling circumstances. In this regard what the judge stated at paragraphs 124-125 is very significant:

> "124. I have come to the conclusion that there are no compelling reasons to support a finding that the Respondent's decision to refuse the Appellant's application was disproportionate. In my judgement, on the basis of my findings, the public interest in maintaining immigration control outweighs the interests of the Appellant and her right to a family life.
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> 125. I have reached the same conclusion with regard to her right to a private life. I have taken into account what has been said by the Appellant at paragraph 17 of her statement. I do not accept that it would not be possible for both the Appellant and her husband to earn a living if they were to return to India. I also do not accept that, having lived in India until 2013, it would now represent a foreign country to the Appellant. I have considered what the Appellant's husband has said at paragraph 14 of his statement. It is not specific in setting out any obstacles the Appellant may face if she were to return. The Appellant has spent the vast majority of her life in India. The Appellant's husband came to the UK in 2010. Although the Appellant became married in 2011, it was not until June 2013 that she came to the UK. The Appellant therefore managed to live in India from 2010 until 2013 whilst her husband was in the UK. She has family in India and it is also open to her husband to return with her. The Appellant will not experience any language difficulties and will be fully aware of the country's culture and norms of living in India. I do not consider that there would be very significant obstacles to the Appellant's integration into day-to-day life in India."

17. Paragraph 124 makes clear that there was a public interest in the maintenance of immigration controls against the appellant. Paragraph 125 makes clear that there would not be very significant obstacles to the appellant and her husband resuming their family life in India. The judge's findings in this regard were entirely within the range of reasonable responses. Neither the appellant's grounds nor Mr Wells' skeleton argument identify any set of considerations that could be taken to amount to compelling circumstances, even assuming the appellant had been assessed under the correct Immigration Rules.

18. For the above reasons I conclude that the judge did not materially err in law.

No anonymity direction is made.

Signed Date: 31 December 2018

H H Storey

Dr H H Storey
Judge of the Upper Tribunal