Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10102/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 22 June 2017	**On 26 June 2017**

Before

Deputy Upper Tribunal Judge Pickup

Between

URMILABEN BHAGUBHAI MISTRY
[No anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J Nicholson, instructed by One Immigration
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Lodge promulgated 22.8.16, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 22.10.15, to refuse his application for LTR on Human Rights grounds.

2. The Judge heard the appeal on 10.8.16.

3. First-tier Tribunal Judge Appleyard refused permission to appeal on

29.12.16. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Grubb granted permission to appeal on 9.2.17.

4. Thus the matter came before me on 22.6.17 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of the First-tier Tribunal to be set aside.

6. The history and background to the appeal has been somewhat confused. The appellant's husband is a British citizen born in India, but having lived between the ages of 10 and 30 in Kenya. He came to the UK in 1971. He worked in the UK until 2013, retiring at age 73.

7. He married the appellant, a citizen of India, and she came to the UK in 2011 with entry clearance as a spouse, with probationary leave for 2 years. The refusal decision erroneously states that she came on a visit visa. Unfortunately, she neglected to apply for FLR or ILR before the expiry of her spousal visa, and did not make her next application until 9 months after the expiry of her leave. Mr Nicholson submitted, and Mr Harrison did not demure, that had she made application in 2013 before expiry of her leave, she would most probably have succeeded in obtaining further or indefinite leave to remain. At that time her husband was still working and she would only have needed to demonstrate adequate accommodation and maintenance. The failure to renew her spousal leave was obviously an oversight.

8. There have been a number of previous applications to that which is the subject of this appeal, one of which involved an appeal to the First-tier Tribunal. After some discussion and investigation in the Home Office file, Mr Nicholson and Mr Harrison agreed that the correct regime under which the present application should be considered is that of Appendix FM. The Secretary of State considered EX1 and concluded that there were no insurmountable obstacles to family life continuing in India. Judge Lodge came to the same conclusion and went on at [24] of the decision to find nothing exceptional about the appellant's circumstances that was not already covered by the application of the Rules. The judge also concluded that it was not disproportionate for the appellant to return to India to make application for entry clearance.

9. However, in granting permission to appeal, Judge Grubb considered it arguable that the judge's conclusion that there were no insurmountable obstacles to continuing family life in India was irrational, and that the judge failed to properly assess the article 8 claim outside the Rules, applying Chikwamba.

10. The Rule 24 response, dated 23.2.17, submits that the grounds are no more than a disagreement with the findings of the judge.

11. The essential facts of the case include the following:

    (a) There is no dispute as to the genuineness of the relationship between the appellant and her British citizen husband;

    (b) They have had a steady and stable home life in the UK since 2011;

    (c) The failure to apply for FLR was an oversight and the Tribunal can be satisfied that had the application been made in time it would most likely have been successful;

    (d) At the time the application should have been made, the husband was still working. He has now retired and enjoys a state and private pension, though this is likely to be less than the Appendix FM threshold minimum income;

    (e) He has family in the UK, but none in India;

    (f) He has a range of health-relates ailments, including asthma, arthritis, osteoporosis, bronchitis, hypertension and cardiac complications. He has had problems with his pelvis since a fall in India in 1997. In short, he is not in the best of health and is now elderly. He stated that he would not be able to live in India because of the dusty climate and diesel fumes;

    (g) Whilst he has visited India and speaks the native language, he has not lived in India since the age of 10, spending his formative years in Kenya. However, he has visited for lengthy periods and thus is familiar with the culture;

12. The circumstances when applied the EX2 definition of very significant difficulties which could not be overcome or which would entail very serious hardship for the appellant or her husband, are probably best assessed as borderline. Judge Lodge concluded that they were insufficient to amount to insurmountable obstacles and, strictly interpreted, that conclusion was open to the judge.

13. However, I find that in considering the circumstances outside the Rules pursuant to article 8 ECHR, the judge's conclusion that the removal would not be disproportionate is not sustainable by cogent reason and is irrational. Given the ages, length of residence, state of health, his British citizenship and the inadvertent way in which renewal of her spousal visa was overlooked, there would be no practical purpose of requiring the appellant to return to India to make an application for entry clearance. Nothing has changed in the nature or subsistence of a genuine relationship would have continued to subsist without hindrance, had the right application been made at the right time. This was not in real terms a situation of precarious family life. That one neglectful error has cause

years of heartache and expense for the appellant and her husband. I am satisfied that it would be unduly harsh and disproportionate to separate the appellant from her husband or to require them to continue family life in India. I am satisfied that the facts so obviously call for the application to be granted that the refusal to do so is disproportionate and unjustifiably harsh. There is no public interest to be protected here that is prejudiced by allowing the appellant to remain, as she would have been able to do had she made the right application at the right time. The law has to be applied in a sensible and practical way rather than purely literal. As the Court of Appeal in Agyarko stated, it is possible that a case might be found exceptional for the purposes of the relevant test under article 8 in relation to precarious family life even when there are no insurmountable obstacles to continuing family life overseas. I am satisfied that the cumulative compelling and compassionate factors to be taken into account in the proportionality balancing exercise that ultimately must fall in the appellant's favour and justify allowing the appellant to remain, at least outside the Rules, if not within them.

Conclusions:

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it on human rights grounds only. The appeal remains dismissed on immigration grounds.

Signed

Deputy Upper Tribunal Judge Pickup
Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a fee award.

Reasons: The appeal has been allowed.

Signed

Deputy Upper Tribunal Judge Pickup
Dated