**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/08760/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 13th December 2018** | **On 15th January 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**DEV RAJ**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Davison of Counsel instructed by HSBS Law
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of Judge Aziz made following a hearing at Birmingham on 3rd September 2018.

**Background**

2. The appellant is a citizen of India born on 3rd April 1979. He arrived in the UK in July 2010 with a six month visit visa and after his leave expired he overstayed. He made an unsuccessful application for leave to remain on 23rd April 2013 on the basis of his private and family life and a further application on 28th October 2016. That resulted in the refusal by the respondent dated 28th July 2017 which is the subject of the decision before the Immigration Judge.

3. The appellant's case is based upon his relationship with a British national, Ms [S], who has been diagnosed with paranoid schizophrenia and has learning difficulties. It was accepted by the respondent and by the judge that the appellant is in a genuine and subsisting relationship with her, but that nevertheless it was proportionate to expect him to return to India either to live there with his wife or to apply for entry clearance.

4. The judge recorded the evidence from the appellant and from his wife and from members of her family. She is British born and last went to India in 1993. She said that she would go with him temporarily to make an application to come to the UK but could not live there permanently.

5. The judge said that the oral evidence was confusing. He accepted that Ms [S] had schizophrenia and a learning disability, but said that the medical evidence did not shed any light on her daily care needs or her ability to live an independent life. He recorded that she worked on a voluntary basis in a charity shop for a few hours, three days a week. He considered that the appellant's evidence was contradictory in that at one point he said that he wanted to take employment and at another said that he could not work because he had to look after his wife. The fact that Miss [S] was currently working and hoping to secure full-time employment undermined the assertions made by members of her family as to her inability to live independently and her having daily care needs which could only be met by her husband.

6. The judge concluded that the appellant had not demonstrated that he could meet the requirements of the Immigration Rules and said there were no compelling or exceptional circumstances which might warrant consideration of the application outside the Rules. However, if he was wrong about that then the balance of the argument lay in favour of the respondent. He dismissed the appeal.

**The Grounds of Application**

7. The appellant sought permission to appeal on the grounds that the judge had not adequately considered the position of the appellant's wife when making his assessment of the Article 8 issues. The judge had not asked the witnesses what the level of care was which she required. The impact of his leaving the country had not been considered. It had been accepted that the couple were in a genuine relationship and, given her medical conditions, it was not reasonable to expect her to follow the appellant to India.

8. Permission to appeal was granted by Judge Gibb on 29th October 2018 in the following terms:-

> "The grounds are arguable. The judge arguably uses an incorrect legal framework, post *Agyarko v SSHD [2017] UKSC 11* where a threshold approach is used. It is also arguable that the judge, when conducting a proportionality assessment in the alternative, omitted relevant factors, including the entry clearance point. It is arguable that the judge restricted himself to considering the appellant's wife's care needs, omitting to address the full question of very serious hardship within the Rules, or unjustifiably harsh consequences outside them. It is arguable that, regardless of the findings as to care needs, the medical evidence that was accepted placed the appellant's wife in a category far from what would be expected of a person without her mental and physical health problems, and that there was a need to address this in the required assessments inside and outside the Rules."

9. Mr Davison relied on his grounds and pointed out that the judge had reached a number of positive findings accepting that there was a genuine relationship between the appellant and his wife and that relocating to India would cause a degree of difficulty for her. However, he had not properly assessed the impact of his removal on her, given that she has substantial mental health problems which ought to have been weighed in the balance. It was crucial for him to make a finding on her ability to settle in India and to decide whether it was reasonable to expect her to accompany her husband when he applies for entry clearance.

10. Mr Tarlow said that initially he had considered that the grounds were a mere disagreement with the decision, but having heard the submissions from Mr Davison accepted that there had been no proper assessment of the effect of the decision on Ms [S], and that the decision needed to be remade.

**Submissions**

11. Mr Tarlow submitted that the balance of the argument still lay with the Secretary of State. The appellant had been here unlawfully for many years. There was a functioning system of healthcare in India and it was perfectly reasonable to expect the appellant's wife to return there, either permanently or to obtain entry clearance on return.

12. Mr Davison submitted that it would be wholly unreasonable to expect Miss [S] to go to India permanently. The evidence in the documentation showed that in all likelihood they would meet the requirements of the Immigration Rules and given her health conditions it was not reasonable to expect her to accompany him there in order to make an application which would be likely to succeed.

**Findings and Conclusions**

13. The Immigration Judge erred in law in that he did not take into account relevant matters, namely the effect of the appellant's removal upon his vulnerable wife. The

reasoning in respect of Article 8 mainly consists of a series of statements of the law but does not engage with the evidence in relation to her.

14. Accordingly, the decision is set aside.

15. However, the overall decision will remain the same for the following reasons.

16. It was accepted by Mr Davison that the appellant cannot meet the requirements of the Immigration Rules, and he did not seek to argue that the relevant tests set out in Appendix FM and paragraph 276ADE(1)(vi) had been met.

17. In deciding whether the appellant ought to succeed in relation to Article 8 outside the Rules it is necessary to take into account the factors set out in paragraph 117B of the 2002 Act.

18. The maintenance of effective immigration controls is in the public interest. The appellant has a poor immigration history having arrived as a visitor and overstayed. Little weight should be given therefore to either his private life or to his relationship with his partner because it was established at a time when he was in the UK unlawfully.

19. Paragraph 117B(6) is not relevant because although evidence has now been produced that the appellant's wife is in the early stages of pregnancy there is no genuine and subsisting parental relationship with a qualifying child in this case.

20. The evidence in relation to the appellant's wife is set out in the extremely large bundle of documents produced to the First-tier Tribunal. There is a letter dated 27th March 2018 which states that she suffers from paranoid schizophrenia and has a learning disability and is on repeat medication. The letters from both the GP and the NHS Foundation Trust at Sandwell state that she suffers from mild learning difficulties and was admitted in 2013 to Hallam Street Hospital with a psychotic illness. Her conditions cause poor motivation and lack of initiative to do things. She requires anti-psychotic medication which she has always adhered to. The GP said that she does not presently suffer from any behavioural problems, taking her medication regularly and attending outpatient clinics.

21. According to the evidence given to the judge she manages to work voluntarily on Mondays, Wednesdays and Fridays for two-and-a-half hours on each day, keeping the tables and shop area clean, hanging the clothes and keeping the shop tidy and sometimes operating the tills. She apparently hopes to secure full-time employment.

22. Like the First-tier Judge, I accept that Ms [S] requires some level of help, and in particular needs medication in order to keep her underlying condition under control. However, there is a functioning system of healthcare in India and if she were to go there with the appellant for a short period of time whilst he applied for entry clearance there is no reason to think that she would be unable to obtain that medication.

23. I agree with Mr Davison that it would not be reasonable to expect her to live in India permanently, given that she clearly comes from a large and close family who give her a great deal of support, and without that support it is very likely that she would struggle.

24. Ms [S] receives a number of benefits because of her underlying health condition and they are evidenced in the bank statements which have been produced. She would therefore not be required to meet the income level normally needed in entry clearance cases for spouses because she is exempt from those financial provisions. It can be seen from the bank statements that on the whole the couple managed to live within their means and they live independently in accommodation of their own. On the face of it therefore there ought to be no delay and no obstacle to the appellant obtaining entry clearance to join her here.

25. I conclude that it is proportionate to expect him to do that. His wife can either remain in the UK with her family or accompany him there for the period it takes for him to make the application. His immigration history is poor. There is a strong public interest in his removal and in my judgement that public interest outweighs the interest of his wife in this case.

**Notice of Decision**

26. The original judge erred in law. His decision has been set aside. It is remade as follows:-

    The appellant's appeal is dismissed.

27. No anonymity direction is made.

Deborah Taylor

Signed Date 4 January 2019

Deputy Upper Tribunal Judge Taylor