Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02267/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Decision & Reasons Promulgated**
On 19th February 2015	**On 24th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS KULDEEP KAUR KHERA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Khan (Counsel)
For the Respondent: Mr D Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge EMM Smith, promulgated on 26th June 2014, following a hearing at Bennett House, Stoke-on-Trent on 9th May and 13th June 2014. In the determination, the judge dismissed the appeal

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of Mrs Kuldeep Kaur Khera. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of India. She was born on 10th August 1984. She appeals against the decision of the Respondent Secretary of State, dated 25th March 2014, rejecting her claim to be entitled to remain in the UK on the basis of her marriage with a British citizen, present and settled in the UK, namely, Mr Amarthpal Singh Khera.

The Appellant's Claim

3. The Appellant's claim is that on 5th January 2013, she was introduced to Mr Khera's family in Leicester, and they became engaged and on 25th May 2013 they married and began living together. She was at the time pregnant. Her child was due on 5th September 2014. The child has now been born. Mr Khera is in employment. He has two jobs. He works as a till operator and he also works with Industrial Personnel Services Ltd. There is a background to the Appellant's history. She initially arrived in the UK on 15th August 2009 on a working holidaymaker's visa. This was valid until 3rd August 2011. She came to join her fiancé. She lived with the fiancé's family. She was subjected, however, to verbal, physical and sexual abuse, at the hands of the fiancé's family. In November 2009 she returned back to India. She re-entered on a valid visa in March 2010 and lived near Birmingham. Between March 2010 and 15th August 2012 she lived at various addresses doing domestic work and it was at the Sikh temple in Leicester that she met Amarthpal Singh Khera, the person to whom she is currently married, and with whom she has founded a family.

The Judge's Findings

4. The judge found the Appellant and her husband, Mr Khera to be credible witnesses. He held that, "I am satisfied that Mr Khera married the Appellant because he loved her and accept that he is in a subsisting relationship with the Appellant" (paragraph 31). However, the Appellant had not mentioned her relationship with Mr Khera at the time when she was interviewed or in correspondence thereafter. When the Appellant gave an explanation before the judge that her culture frowns upon such a disclosure, the judge accepted this explanation (paragraph 31). The judge rejected that there were major discrepancies in the accounts of Mr Khera and the Appellant. As he explained, "discrepancies there were but in my view they were not significant taking into account the facts of this case" (paragraph 31). The judge concluded that the appeal could only be resolved under the provisions of Appendix FM of the Rules. Paragraph 276ADE was not applicable. The asylum claim, which had earlier been made, was not being pursued.

5. The nub of the judge's conclusions are as follows. First, the judge held that, "I'm satisfied that the Appellant is in a genuine and subsisting relationship with a British citizen, however, what is in contention is whether there are insurmountable obstacles

to family life with her husband outside the UK" (paragraph 37). This meant that consideration had to be given as to whether the Appellant could live outside the United Kingdom, that is to say in India, in order to pursue their genuine and subsisting family life there. This leads to the second point. Second, the judge made findings with respect to this at paragraph 38 of the determination. As he observed, the Appellant returned to India in 2009. She remained there for several months. She remained with her family. That family would support her. However, the difficulty lay in relation to the husband. He was a British citizen, born and brought up in the UK.

6. As the judge recounted, "her husband had made enquiries with Moon Travel and an independent advisor as to whether, in the absence of employment, he would obtain a visa to travel to India. He was told he would not".

7. The judge was concerned, however, that the husband, Mr Khera,

> "has not communicated with the Indian High Commission and has not produced any evidence to support his contentions. Whilst I accept his evidence that he has been so advised I am satisfied that the advice is the result of his lack of effort to see if employment is available. After all I have found him to be a resourceful, intelligent and articulate man. Accepting as I do that he was born in the UK, his family live here and those relatives he has in India are distant relatives, I do note that his brother, despite having no close relatives in India, decided to marry there four to five years ago which is when this witness last visited India" (paragraph 38).

8. Accordingly, given the "Appellant's husband's inability or desire to making any enquiries in India in respect of employment and accommodation" the judge could not be satisfied that there were "insurmountable obstacles" to the Appellant and her husband relocating to India. As he concluded, "there are no obstacles that the Appellant and her husband cannot overcome .... the closest I have is that her husband has lived in the UK and she does not want to return there to live" (paragraph 41). The appeal was dismissed.

Grounds of Application

9. The grounds of application state that in adopting the "insurmountable obstacles" test the judge misdirected himself in the context of the reasonableness of relocation for the Appellant's British citizen spouse.

10. On 11th July 2014, permission to appeal was granted.

11. On 23rd July 2014, a Rule 24 response was entered to the effect that the judge had not erred in law in his approach to Appendix FM and the consideration of insurmountable obstacles.

Submissions

12. At the hearing before me on 19th February 2015, the Appellant was represented by Mr F Khan, who provided a helpfully short skeleton argument summarising the case on behalf of the Appellant. In brief, the appeal was being put on the basis that if the judge had before him evidence which fulfilled, as at the date of the hearing, the requirements of "insurmountable obstacles", then the appeal should have been allowed as a matter of law. The judge had accepted on the evidence as at the date of the hearing that the Appellant's spouse could not get a visa to live in India. At the hearing, Mr Khan submitted that the appeal should succeed for two reasons in particular first, the judge did not reject the Appellant's husband's evidence that he had made enquiries at two different sources, both of whom had told him that he could not obtain a visa in the absence of employment in India. Second, the fact was that the Appellant did not, as at the date of the hearing, have a visa. Therefore, both these facts amounted to an "insurmountable obstacle" facing the Appellant's husband in relocating to India.

13. For his part, Mr Mills submitted that the judge read the requirement of "insurmountable obstacles" in the right way. At paragraph 38, the judge was concerned that proper enquiries had not been made by the Appellant's husband. In particular, the judge was clear that no enquiries were made with the Indian High Commission and the Appellant's husband "has not produced any evidence to support his contentions". Second, the Appellant's husband did nothing to look for work. Hypothetically, he could obtain a visa.

14. In reply, Mr Khan submitted that the Appellant's husband did not simply make enquiries with a travel agent, such as Moon Travel, but also with an "independent advisor". This is clear from paragraph 38.

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows.

16. First, what is at issue here are the rights of a British citizen husband, born and brought up in the United Kingdom, who has never lived in India, and has no desire to do so. As the judge himself explained, "the closest I have is that her husband has lived in the UK and she does not want to return there to live" (paragraph 41). The judge failed to give this particular aspect the individuated consideration that it deserved. This is because in **MM [2013] EWHC 1900**, Mr Justice Blake made it clear that, "British citizens were in a different class to foreigners generally, as they had a constitutional right of residence in their own country as well as a human right to marry, found a family have respect accorded to their family life" (see paragraph 123).

17. Second, on this basis, and against the background of the Appellant's husband having made enquiries from two different sources, namely, from Moon Travel and an independent advisor, it was sufficient, on a balance of probabilities, to say that with no home and job, or family relatives in that country, the Appellant's husband would

face an insurmountable obstacle in moving there. The judge's contention that there was no such insurmountable obstacle, is based upon the observation that the Appellant's husband is "resourceful, intelligent, and an articulate man" (paragraph 38). This does not deal with the fact that the Appellant's husband is a British citizen.

18. The judge's observations were also based on the fact that the Appellant's husband's brother, despite having no close relatives in India, decided to marry there four to five years ago (paragraph 38). However, many people choose to marry spouses from their country of ancestry without choosing to relocate there. On the whole, in fact, the trend is decidedly the other way, with the foreign spouse coming to the UK. There was no evidence, notwithstanding the judge's observation, of the Appellant's husband's brother having relocated to India himself. Accordingly, in all the circumstances, it was not reasonable to expect the Appellant's husband, as a British citizen who had never lived in India, to relocate to that country, when he had no job and no home there to go to.

19. Second, the judge did deal with Article 8 ECHR at length (see paragraphs 42 to 44). Those submissions were made before me either by Mr Mills or by Mr Khan with respect to Article 8 ECHR. If the Appellant did not succeed under the Rules however, then consideration had to be given to whether she could succeed under Article 8 ECHR jurisprudence. The position is that where the relevant group of Immigration Rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular Immigration Rule or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code. But if the relevant group of Immigration Rules is not such a "complete code", then the proportionality test would be more at large, and it will be guided by the **Huang** tests and the UK Strasbourg case law. Lord Justice Aikens has made it clear in **MM (Lebanon) [2014] EWCA Civ 985**, that the question is whether a party has an arguable case that there may be "grounds for granting leave to remain outside the Rules". If that is the case, as was the case here, then they will have to be determined by the relevant decision maker. The judge failed to give consideration to such jurisprudence.

Re-Making the Decision

20. I have re-made the decision on the basis of the findings of the original judge, and the submissions I have heard today. I am allowing this appeal for the reasons that I have set out above.

21. First, the judge was wrong to conclude, with respect to a British citizen husband who had never lived in India, and where there was no evidence of his having a job or a home there, that because he was resourceful and intelligent, that there were no insurmountable obstacles in his path to relocating there. The fact that he was a British citizen was a material difference and consideration in his case.

22. Second, the Appellant's husband had made reasonable enquiries and on a balance of probabilities these suggested that he would have difficulty in procuring a visa

without a job there. As a British citizen, in order to go and work in India, he would have needed a specific visa for this purpose.

23. Third, and in any event, the appeal succeeds under Article 8 ECHR on the basis of the **Huang** and **Razgar** tests, because it would be disproportionate to expect a person properly settled in this country, having been born and brought up in this country, and the citizenship of which he holds, to relocate to India, where he has a constitutional right to remain in the state of which he is a national.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 24th February 2015