Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/21990/2014**
IA/21996/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision and Reasons Promulgated**
On 10 February 2015	**On 16 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UMA MADAN LAL
MADAN LAL

Respondents

Representation:
For the Appellant: Mr Tallow, Home Office Presenting Officer
For the Respondents: Mr H Sarwar instructed by MA Consultants

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.

2. The appellants, nationals of India, appealed to the First-tier Tribunal against the decisions of the Secretary of State of 23 April 2014 to refuse to grant their applications for indefinite leave to remain and to remove them

from the UK. First-tier Tribunal Judge Camp allowed the appeals and the Secretary of State now appeals with permission to this Tribunal.

3. The background to these appeals is that the appellants, now aged 73 and 79, entered the UK on 15 September 2004 with visit visas and were granted leave to enter for six months. In October 2004 they applied for leave to remain as dependent parents and their applications were refused on 15 December 2004 with no right of appeal. On 27 February 2006 their solicitors applied on their behalf for leave to remain on the basis of their human rights. There was no response to this application and, after a number of requests for information about the application, the respondent wrote to them in June 2012 stating that there was no record of the application. On 21 January 2014 their current representatives applied on their behalf for indefinite leave to remain outside the Immigration Rules on the basis of their private and family life in the UK. Their applications were refused on 23 April 2014 on the basis that their circumstances were not sufficiently compelling or compassionate to justify a grant of indefinite leave to remain outside the Immigration Rules and they did not meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules.

4. First-tier Tribunal Judge Camp heard oral evidence from the first appellant and the appellant's son and grandson. In summary the evidence was that the appellants are close to and depend on their son in the UK. They have lived with their son for nine years. They also have a daughter, son-in-law and grandson in the UK. They have a daughter in India from whom they are estranged and they have no home in India. The first appellant suffers from depression and is unwell and the second appellant is forgetful.

5. The Judge accepted that the appellants do not meet the requirements of Appendix FM and paragraph 276ADE. The Judge went on to consider the appeals outside the Immigration Rules under Article 8 and allowed them on the basis that the decisions to remove the appellants are not proportionate.

6. The grounds of appeal to the Upper Tribunal contend that the First-tier Tribunal Judge misdirected himself in finding that delay was a determinative factor. It is contended that the appellants came to the UK as visitors and were at all times aware of the impermanence of their stay and therefore had no legitimate expectation that their applications would succeed and further that the delay had not disproportionately affected them as it had enabled them to remain in the UK and strengthen their ties here. Mr Tallow accepted that there had been a lengthy delay in this case. However he submitted that the Judge erred in treating this as a determining factor.

7. The grounds of appeal further contend that the unauthorised use of the NHS is a public interest factor and that the First-tier Tribunal Judge was wrong to consider that the delay had diminished this factor. Mr Tallow submitted that the Judge erred in paragraph 36 where he said;

> "36. By taking no action to remove the appellants since the expiry of their visit visas in 2005, the respondent cannot be said to have demonstrated any compelling need to maintain effective immigration control or to protect the United Kingdom's economic interests by preventing unauthorised use of the National Health Service."

8. Mr Sarwar submitted that the Judge carried out a substantive proportionality assessment from paragraphs 32 onwards considering all of the factors in the case. He submitted that the Judge relied on EB (Kosovo) v SSHD [2008] UKHL 41. He submitted the cases relied on in the grounds of appeal - MM (Delay –reasonable period – Akaeke – Strbac) [2005] UKAIT 00163 and HB (Ethiopia) [2006] EWCA Civ 1713 – pre-date EB (Kosovo) which is the key authority on delay. He submitted that the Judge considered other factors at paragraphs 28 and 29 of the determination and that delay was not the determinative factor in the Judge's proportionality assessment.

Error of law

9. The Judge outlined the history of the appellants' contact with the respondent since February 2006. The Judge concluded on the evidence before him that there was an unexplained and significant delay between then and June 2012 when the respondent asserted that no application had been received. The Judge said that he considered that the delay is a significant factor in this appeal. However he considered it in the context of the repeated attempts made by the appellants to regularise their stay during that period. He also considered it in the context of his findings as to family and private life made at paragraphs 22, 28 and 29 which underpin the proportionality assessment. This is clear from paragraph 38 where he quoted paragraph 14 of EB (Kosovo) where Lord Bingham said; "… the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier."

10. The Judge could have made it clearer that he weighed all of the factors in the proportionality exercise. However I am satisfied that it is clear from reading the decision as a whole that the Judge did consider all of the factors including the age of the appellants, their medical problems, their dependence on their son [22], the fact that they have lived with their son for nine years, are estranged from their daughter in India and have contact with their daughter and grandson in the UK [27, 28]. I am satisfied that the delay, whilst clearly a significant factor, was not determinative of the appeal. The weight to be attached to the delay was a matter fro the Judge.

11. At paragraph 36 of the determination the Judge did say that the delay reduced the weight of the need for effective immigration control. However this is in the context of and in accordance with the comments made by Baroness Hale in EB (Kosovo) as set out by the Judge in the preceding paragraph.

12. I am therefore satisfied that the decision of the First-tier Tribunal Judge does not contain a material error of law.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on point of law.

The decision of the First-tier Tribunal shall stand.

Signed Date: 13 March 2015

A Grimes
Deputy Judge of the Upper Tribunal