Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24336/2014**

Heard at Field House **Decision and Reasons Promulgated**
On 28th August 2015 **On 22nd September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between
MRS PRIYAS GURMUKHANI
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B.Singh, Counsel, Malik Law Chambers Solicitors (Southall).
For the Respondent: Mr.P.Nath, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. I refer to the parties as they were in the First-tier Tribunal although it is the respondent who is appealing in these proceedings.

2. The appellant is a national of India, born on 10th June 1989.

3. She came to the United Kingdom on 20 September 2013 as a visitor. She states that on 2nd October 2013 she met Mr Nayee, a British national whose family originated in India. On the 8th November 2013 they married. Her visa was to expire on 31 January 2014.On the 28 January 2014 she applied for further leave to remain as a spouse.

4. Her application was refused on 28th January 2014 on the basis paragraph 276 ADE and appendixes FM of the rules were not met.

5. Her appeal was heard by Judge Clemes of the First-tier Tribunal sitting at Newport on 22 January 2015. In a decision promulgated on 17 February 2015 the appeal was allowed on the basis paragraph EX.1 (b) of Appendix FM applied. The judge found there were insurmountable obstacles to family life continuing outside the United Kingdom. Because of this the judge did not go on to make a finding on private life under paragraph 276 ADE and the question of the appellant's ability to integrate to life in India.

6. The case made on appeal was that Mr Nayee was the sole carer of his mother who suffered from poor health. Because of his caring commitment he worked part-time. Since his marriage, his wife had shared the caring role which meant he was able to work full-time, earning £18,360 per annum. He had siblings but they have their own commitments.

7. The appellant indicated she was an only child and her father died in 2007 and her mother remarried. When she was 18 she went to Australia and married. She returned to India a few years later and obtained a divorce. She is from Mumbai and speaks English and Hindi. Her husband has been brought up in the United Kingdom. His family are from Gujarat but he has little knowledge of India having only visit for a few holidays and has a limited command of Gujarati.

8. The judge concluded there were insurmountable obstacles to family life continuing outside the United Kingdom. Reference was made to linguistic and cultural difficulties for Mr Nayee if he were to live in India. In addition he had his caring responsibilities.

9. The respondent sought leave to appeal to the Upper Tribunal on the basis the decision was premised on material errors of law. Firstly, the appellant came to the United Kingdom as a visitor and so E-LTRPL 2.1(a) applied. At paragraph 3 of the decision the judge referred to the statutory provisions but did not apply them correctly. Reference was made to Sabir (app FM-EXI. Not freestanding)[2014UKUT 63. Secondly, the judge did not adequately explain what the insurmountable obstacles were that prevented life continuing in India. There was no finding on the ability of either Mr Nayee's siblings or third parties to care for his mother in his absence. There were no findings as to her care needs. Mr Nayee had been able to care for his mother on his own by reducing his hours of work. It was contended that the appellant and her husband could return to India and she could seek employment and he could improve his linguistic skills.

The Upper Tribunal

10. Judge Clemes materially erred in law in allowing the appeal on the basis paragraph EX.1 (b) of Appendix FM applied. This is because the appellant was

here as a visitor. Consequently, I set the decision aside and proceeded to remake it.

11. The appellant and her husband gave evidence. The appellant is expecting her first child on or about 22 October 2015. She is hoping for a natural birth but this would be subject to her medical condition. She was noted to have high blood pressure and pre-eclampsia. The birth may have to be induced or a Caesarean section required. She said her mother is in India and after the appellant's father died in 2007 she remarried in 2012 and her stepfather was not welcoming. On the 23rd July 2007 the appellant married and she and her husband went to live in Australia. They separated after two years and she returned to India were she obtained a divorce on the 16th September 2013. She lived on her own and used savings and maintenance from her husband. In the past she worked in sales and as a model.

12. The appellant and her husband described how his mother was. I was told that she requires oxygen around 15 hours per day. Her mobility is restricted and she has problems with bladder control. She was on 21 tablets per day. Her doctor advised reducing the intake of steroids. However, as the medication is withdrawn she experiences dizzy spells.

13. Mr Nayee said that his father suffered a series of strokes whilst on holiday in India and died. Mr Nayee promised him he would take care of his mother. He is her youngest child. He has two brothers. He said his older brother is estranged from the family because he blames his mother for his father's death. In oral evidence he states that one of his brothers is living in America. This must have been a recent move because in his statement of 19 January 2015 at paragraph 3 he indicates all his siblings are settled in the United Kingdom. In oral evidence he said his sister lives about 20 minutes drive from the family home .She is married and has three children. She works as a receptionist in a local hospital. He said that his mother does not speak English and spends her time in prayer. He said that a care package had been in place which consisted of two calls per day lasting one hour each. However, his mother did not like people calling, particularly as she could not communicate with them and this was discontinued.

14. In submissions, Mr.Nath argued that a care package had been in place before and could be reinstated if the appellant and her husband went to India. The appellant had been able to live independently in India before. He highlighted the precariousness of her immigration status when they married. It was open to her to apply for re-entry from India as a spouse. I was referred to the public interest, consideration set out in section 117.

15. Mr Singh submitted that the appeal should be allowed under article 8. He questioned whether it was proportionate to require the appellant to return to India and reapply for entry clearance particularly if she had a child. He submitted that her husband could not go to India with her because his mother

depended on him to give her medication and explain things that were said in English. She submitted the Home Office by its decision, was requiring Mr Nayee to choose between his mother and wife. He queried how Mr Nayee's mother's needs could be met if he were not here. He also argued I should have regard to the best interests of the appellant's unborn child who would be entitled to British nationality. He pointed out that the appellant spoke English and the family were financially independent.

Consideration.

16. The appellant cannot meet the immigration rules because of her immigration status (see Sabir (Appendix FM)-EX.1 not free standing) [2014] UKUT 63). She relies upon a freestanding article 8 claim. It is not in dispute that the relationship between the appellant and her husband is genuine. The issue in the appeal relates to the final limb of the sequential approach in Razgar.

17. The first observation I make and on which I place particular weight is the fact that when the appellant married she was here on a visitor Visa. This was due to expire two and a half months after her marriage. Therefore, she and her husband were aware her immigration status was precarious.

18. Mr Nayee chose to marry. He was aware of his mother's needs. He would have known the likely consequence would be that his wife would have to return to India and reapply for entry clearance. Alternatively he could accompany her and live with her in India either until her application for entry clearance was decided or reside there long term.

19. The medical evidence submitted indicates his mother has poor health. She is 75 years old. She was hospitalised for four days in December 2014 with a chest infection. She has chronic medical conditions and her respiratory condition is such that she requires the use of a home nebuliser. Her GP in a letter dated 24th January 2014 states she has the lung condition, hypersensitivity pneumonitis; type 2 diabetes and epilepsy.

20. In the past she was provided with a home care package. If her son were to go to India she would require help if she was to remain at home. She has a daughter who lives nearby. Whilst her daughter has her own commitments I see no reason why she could not provide some help to her mother and supervise third-party care. A care package could be organised through her GP and a social worker. She does not have a command of the English language and so there are some special needs. However, her daughter could provide the necessary stimulation and checks on her mother. If the appellant and her husband were to go to India and no other family member took on the caring role there is the possibility of care in a residential or nursing home. I can appreciate that Mr Nayee is anxious for his mother to remain at home. However, the dilemma he faces was through his own choice.

21. The appellant has lived independently in India. She is educated to degree level. Her husband has an appreciation of Indian culture through his family background. He has some knowledge of Gujarati and can communicate with his mother, who has limited English. He has trained as an optical consultant.

22. I am required to have regard to the consideration set out in section 117.In AM (S 117B) Malawi [2015]UKUT 290 , the Upper Tribunal noted the distinction between a person in the United Kingdom unlawfully and that of someone whose immigration status has been precarious. Section 117 B (4) provides little weight should be given to a relationship form with a qualifying partner established when the person was in the United Kingdom unlawfully. The appellant was not in the country unlawfully. Rather her immigration status was precarious. A person has a precarious immigration status if they are dependent upon obtaining a further grant of leave. Section 117 (B)(5) which provides that little weight should be given where the persons status is precarious only applies in respect of private life. The Upper Tribunal at paragraph 14 pointed out that section 117 B did not grant any form of immigration status on an individual who does not meet the immigration rules on the basis of having a good command of English or being financially independent.

23. In Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 444 (IAC) it was held that the significance of Chikwamba v SSHD [2008] UKHL 40 was that in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the Immigration Rules from abroad, that the legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. This is not the situation here and to expect the appellant to return to India and reapply for entry clearance is not being obtuse. The immigration rules provide for entry clearance as a fiancé or as a spouse provided the requirements are met. The appellant did not choose this route but in effect is attempting to short-circuit the process.

24. Mr Singh has submitted that I should have regard to the best interests of the appellant's unborn child who would be entitled British nationality. Section 55 is not an anticipatory provision. However, had the child been born my view would have been unchanged. It is acknowledged that in general the best interests of a child are to be with both parents. The case law emphasises the significance of British nationality. In this instance what may be in the best interests of the as yet unborn child is outweighed by the need for immigration control. In the circumstance it is proportionate to expect the appellant to return to India. She can be accompanied by her husband as he so decides. There is the option of applying for entry clearance under the rules whereby the family can be reunited in the United Kingdom.

Decision

25. The decision of the First-tier Tribunal did involve a material error of law. I set aside that decision.

26. I remake the decision. The appeal is dismissed under the immigration rules and there is no breach of article 8.

Deputy Upper Tribunal Judge Farrelly
20th September 2015

Anonymity

27. The First-tier Tribunal did not make an order for anonymity. No application for such an order has been made before me. I see no reason of substance for making one

Deputy Upper Tribunal Judge Farrelly