Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20395/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 February 2018	**On 14 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANUELL

Between

Mr GURDIP SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Maholtra, Counsel (Direct Access)
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Gibb on 24 October 2017 against the determination of First-tier Tribunal Judge O'Brien who had dismissed the appeal of the Appellant who had sought leave to remain in the United Kingdom on the basis of 10

years' continuous lawful residence and who had also raised Article 8 ECHR grounds outside the Immigration Rules, because of his relationship with a British Citizen. The decision and reasons was promulgated on 31 August 2017.

2. The Appellant is a national of India, born there on 25 May 1967. The Appellant had entered the United Kingdom as a visitor in 1999 but had not left at the expiration of his visa as required and remained unlawfully. The lawful long residence claim was thus entirely spurious. Judge O'Brien found that the relationship relied on was genuine yet that it had been formed at a time when the Appellant was in the United Kingdom unlawfully and that his partner was well aware of the Appellant's lack of status. The family life they shared could be lived in India and the partner's medical condition did not present insurmountable obstacles as the necessary support and treatment was available there. The Appellant could obtain work in India. Both he and his partner spoke Punjabi and both had family in India. The judge accordingly dismissed the appeal.

3. Permission to appeal was granted because it was considered arguable that the judge had erred in finding that there were no insurmountable obstacles, given the Appellant's partner's vulnerability and whether or not she would be able to enter India. Possibly the Chikwamba principle should have been considered if the decision and reasons could be read as finding that the couple could meet the Immigration Rules apart from overstaying, although that reading was not shared by Judge Gibb.

4. Standard directions were made by the tribunal. A rule 24 notice opposing the appeal was filed by the Respondent.

Submissions

5. Ms Maholtra for the Appellant relied on the permission. In summary counsel submitted that Judge O'Brien had not taken the Appellant's partner's state of health into account when considering whether or not there were insurmountable obstacles. The partner suffered from bi polar disorder which had worsened. The condition was acute and amounted to compelling circumstances. The presence of the Appellant was needed for the support he provided. The judge had not considered all of the facts, nor the Chikwamba principle. The determination was

unsafe and should be set aside and remade by another First-tier Tribunal judge.

6. Mr Clarke for the Respondent relied on the rule 24 notice and submitted that there was plainly no material error of law. The judge had made sustainable findings of fact, in effect alternative findings considering the case at its highest. Even then the judge had found that treatment and support would be available in India. The judge had also found that the Appellant would be able to obtain work in India. The permission to appeal application was simply a disagreement with the findings of fact. The onwards appeal should be dismissed.

7. In reply, Ms Maholtra revisited the whole case. Although India was a haven for health tourism, the difficulty was continuation of the existing treatment for the partner which the judge had not considered. Then there was the problem of obtaining a visa as the couple were not married. The relevant Home Office Guidance had not been taken into account by the judge. The judge's findings were inadequate.

No material error of law finding

8. In the tribunal's view the grant of permission to appeal (albeit with only partial encouragement) was not based on a full reading of the determination, and moreover failed to reflect the absence of merit in the whole claim. As noted above, the 10 year lawful continuous residence application was entirely spurious. The Appellant's partner formed the relationship knowing that the Appellant was unlawfully present. No attempt was made for him to return to India to seek entry clearance sponsored by her, as so obviously could have been done prior to 9 July 2012 when the Immigration Rules were made far more demanding, e.g., by the introduction of Appendix FM. There was no evidence that the possibility does not remain: see Appendix FM E-ECP.3.3.

9. Judge O'Brien's decision and reasons was full and careful, setting out the procedural history, the evidence and submissions in detail. There can be no doubt that the judge was correct to find that the Appellant's partner would be able to obtain the necessary treatment and

support for her conditions in India, where of course the Appellant's support would be available to her, which was advanced as central to her well being. The Appellant and his partner were plainly of a shared cultural and social background, Punjabi speaking, with family in India on both sides.

10. It was submitted in the grounds for permission to appeal that the judge failed to consider the Home Office Guidance on Family Life as a Partner or Parent. There was no copy of the Guidance current at the date of decision in the appeal file, no skeleton argument had been served at the first instance hearing and the Judge's record of proceedings makes no reference to any such submission made on the Appellant. The judge can hardly have been expected to consider the Guidance if he had not been asked to do so. In any event, as he considered the Appellant's case at its highest, the Guidance can have made no difference to the outcome.

11. It was further submitted that the judge had failed to consider whether or not the Appellant's partner would be able to obtain a visa for India but there was no evidence about that contention in the appeal file and no suggestion that the argument had been put to the judge. In any event, if as was submitted before the Upper Tribunal the main problem was that the Appellant and his partner are not married, the solution lies in their hands. There was no evidence that this solution was not available.

12. There was no doubt that the Appellant's lack of status meant he failed to meet the Immigration Rules, Appendix FM. There were also financial issues (see [30] of the decision), such that the Chikwamba principle as discussed in Agyarko [2015] EWCA Civ 440 was inapplicable and required no discussion.

13. The tribunal agrees with Mr Tarlow's submissions as to the judge's analysis and findings, which were open to the judge, and cannot be impugned as superficial, inadequate or unreasonable. The tribunal concludes that Ms Maholtra's valiant and heartfelt submissions, like the onwards grounds, amount in the end to no more than disagreement with the judge's decision. The tribunal finds that there was no material error of law in the decision challenged.

DECISION

The appeal is dismissed

The making of the previous decision did not involve the making of a material error on a point of law. The decision stands unchanged.

Signed Dated: 12 February 2018

Deputy Upper Tribunal Judge Manuell