Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06846/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 2nd October 2014	**On 9th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

HABEN JAYANILAL PATEL
(NO ANONYMITY DIRECTION GIVEN)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge D S Borsada promulgated on 20th May 2014, following a hearing at Birmingham on 14th May 2014. In the determination, the judge dismissed the appeal of Haben Jayanilal Patel, who 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 female, a citizen of India, who was born on 26th October 1968. She appeals against the decision of the Respondent dated 20th January 2014 refusing her application for leave to remain in the UK and directing that she be removed back to India.

The Appellant's Claim

3. The Appellant's claim is that she entered the UK on 4th November 2008 as a wife of a UK Sponsor, Jayantilal Patel, a person present and settled in the UK, who was a British citizen. She subsequently overstayed. However, her Sponsor, had lived in the UK and worked here for 40 years, and had never lived in India, although he spoke Gujarati. The Respondent had accepted that the Appellant met the suitability requirements of the Immigration Rules. However, the Appellant had not lived in the UK for a continuous period of twenty years. Therefore, she could return to India with her Gujarati speaking husband.

The Judge's Findings

4. The judge had regard to leading case law in this jurisdiction, namely, to **Sanade [2012] UKUT 0004**; to **Razgar [2004] UKHL 27**, and to **Hayat [2011] UKUT**. He observed that there was no dispute that this was a genuine and subsisting relationship, that the Appellant and the Sponsor enjoyed a close family life "and that if a separation were forced on them then this would adversely affect their emotional wellbeing" (paragraph 7). The Sponsor had not lived in India but he was "from a culturally similar background to his wife and speaks Gujarati". The judge was also cognisant of the fact that if the Sponsor had to move to India "he would have to give up all his rights and privileges as a UK citizen", although the Sponsor's relationship with his children "would not be affected by the move" (paragraph 7). The judge went on to also recognise "the very great difficulties and problems this couple might face moving to India in order to continue family life there", but this did not "meet the insurmountable obstacles test" (paragraph 8). The judge was clear that there were no exceptional circumstances and that it was not "unjustifiably harsh" to require the Appellant and the Sponsor to return to India (paragraph 9). The appeal was dismissed.

Grounds of Application

5. The grounds of application state that the judge's conclusions were perverse and irrational in suggesting that there were no insurmountable obstacles for family life continuing in India, and in suggesting that there were no exceptional circumstances, given the basic findings of fact made.

6. On 16th July 2014, permission to appeal was granted on the basis that it was arguable that there was an inadequacy of consideration and

reasoning by the judge in considering the evidence from the Appellant and the sponsoring husband, who appeared at the hearing unrepresented.

7. On 24th July 2014, a Rule 24 response was entered by the Respondent Secretary of State.

Submissions

8. At the hearing before me, Mr Ahmed, appearing on behalf of the Appellant, referred to his skeleton argument and relied upon the cases of **Sanade** and **MF (Nigeria)**. He submitted that it was not reasonable for a British citizen, who had not ever lived in India, to go to India and relinquish his right to remain in the country of his citizenship, just so as to be able to enjoy family life with his Indian wife. The Sponsor had only gone to India for one week in order to marry the Appellant. In **MF (Nigeria)** the Home Office Presenting Officer had conceded (see paragraph 72) that a British citizen "not be required to leave the country of his citizenship". Similar conclusions were reached in **Sanade**.

9. For his part, Mr Mills submitted that reliance upon **Sanade** was misplaced because it was well-known that the British government had subsequently introduced new Rules in order to overcome the effects of **Sanade**, opening up the possibility for British citizens to be required to relocate to another country. The judge was clear that there were no insurmountable obstacles, although there might be a degree of harshness in requiring the Sponsor to go to India. This is because the judge had made clear findings that the Sponsor spoke Gujarati, was of Gujarati extraction, and could reasonably live in India.

10. In reply, Mr Ahmed repeated his reliance upon **Sanade** and **MF (Nigeria)** which did not countenance the possibility of a British citizen being required to live elsewhere. In particular paragraph 49 of **MF (Nigeria)** was relevant because Lord Dyson advocated the very outcome which the Appellant relied upon in this case.

Error of Law

11. 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. My reasons are as follows.

12. First, there are the very findings of fact made by the judge himself. The Sponsor, Jayantilal Patel, is a British citizen. He has never lived in India. He has only been married there to the Appellant. The judge made no finding that the Sponsor was willing to go and live in a country where he had never lived, having resided in the UK for 40 years and worked here. On the contrary, the judge held that, "I noted and accepted that the Appellant and the Sponsor did enjoy a close family life and that if a

separation were forced on them then this would adversely affect their emotional wellbeing" (paragraph 7).

13. The judge also concluded that there were "very great difficulties and problems this couple might face moving to India in order to continue family life there …" (paragraph 8).

14. In these two conclusions, the judge has first found that a separation between the couple would make the living of a family life very difficult. The judge has then found that an enforced living together in India for both of them would present "very great difficulties and problems".

15. In the recent judgment of Lord Aikens in **MM (Lebanon) [2014] EWCA Civ 985**, the Court of Appeal held that there is no further intermediary test if an Appellant cannot comply with the Immigration Rules because, "if the applicant cannot satisfy the Rules then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker" (paragraph 128).

16. On this basis, given the findings that the judge had already made, it was irrational to conclude that there would be no "unjustifiably harsh consequences" and no "exceptional circumstances" because what was unjustifiably harsh or exceptional had already been highlighted by the judge.

17. Secondly, and no less importantly, the Sponsor is a British citizen who has made the United Kingdom his home, and has exercised his right to be here by living in this country for 40 years. The right of citizenship is not without consequence. In **MM [2013] EWHC 1900** Mr Justice Blake stated that "British citizens … had a constitutional right of residence in their own country as well as a human right to marry, found a family and have respect accorded to their family life" (paragraph 126). Although the case of **MM** has subsequently been overruled in the Court of Appeal, as clear from the judgment of Lord Justice Aikens, this particular aspect of the judgment in the High Court remains intact. Indeed, the case of **Sanade** and **MF (Nigeria)** make it clear (especially at paragraph 72 of the latter) that requiring a British citizen to enjoy his family life in another country, which is not the country of his citizenship, is bound to be an "exceptional" circumstance and one that is correspondingly "unjustifiably harsh", such as to require particular justification. None exists in this case given that this is a genuine and subsisting marriage, and given that family life is being enjoyed between the couple.

Remaking the Decision

18. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Decision

19. 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 remake the decision as follows. This appeal is allowed.

20. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th October 2014