**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/34180/2013

**THE IMMIGRATION ACTS**

| **Heard at Birmingham Sheldon Court** | **Determination Promulgated** |
|---|---|
| **On 5th September 2014** | **On 12th September 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR JASBIR SINGH**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Samra (Solicitor)
For the Respondent: Mr Mills (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Pacey promulgated on 21st May 2014, following an appeal at Birmingham Sheldon Court on 12th May 2014. In the determination, the judge dismissed the appeal of Jasbir Singh.

The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and the matter comes before me.

## The Appellant

2. The Appellant is a male, a citizen of India, who was born on 28th February 1991. He appeals against the decision of the Respondent Secretary of State refusing his application for leave to remain in the UK on the basis of his marriage to a British born girl by the name of Ms Michelle Byng, who is present and settled in the UK, and whom he has married on 17th September 2012.

## The Appellant's Claim

3. The Appellant's claim essentially is that his wife is English. She cannot relocate to India for cultural reasons. She does not speak Punjabi. She would not obtain a permit in India. Moreover, she is looking after her elderly grandmother, who has cancer. She also had family in the UK, including her father and her sister.

## The Judge's Findings

4. The judge noted that the Sponsor herself, Ms Michelle Byng, "is not of Indian ethnicity but is white Caucasian, and hence there is a difference in culture between them". It was also alleged that the Appellant's family disapproved of his marriage to Michelle Byng. The judge made the following findings.

5. First, the Appellant and his wife, Ms Michelle Byng, currently lived separately from their "disapproving family", and there was no reason why upon return to India, in a very large country, they could not continue to do the same.

6. Second, there was no suggestion that Indian society generally would not accept them for cultural reasons as a couple.

7. Third, the Appellant had spent most of his life in India himself.

8. Fourth, English was a very widely spoken language in India and the Sponsor was educated and the judge held that, "I do not accept that she would not be able to obtain employment there and indeed when I suggested she could work in a call centre she did not dispute this ..." (paragraph 19).

9. Finally, there was the issue of "caring for her elderly grandmother" and the judge held that the support that the grandmother derives from her granddaughter "is emotional as well as physical, and an unrelated carer could not provide that emotional support" (paragraph 20).

10. The judge accepted that the grandmother "would miss her granddaughter should she move to India" but that this is not an "insurmountable obstacle" (paragraph 21). At the moment the Sponsor visits her grandmother three times a week and there are four days in a week when she is not visited by the Sponsor, Ms Michelle Byng.

11. Accordingly, the judge held that the Appellant could not succeed under the Immigration Rules. As far as Article 8 was concerned, the judge held that "Article 8 outside the Rules is not engaged" and based this upon the analysis in **Haleemudeen [2014] EWCA Civ 558** and **Gulshan [2013] UKUT 00640**.

## Grounds of Application

12. The grounds of application state that the judge did not properly consider the Immigration Rules. It is said that the judge failed to have regard to the Immigration Rules in making an Article 8 assessment. It is also said that the judge should have applied Article 8 outside the Immigration Rules.

13. On 1st July 2014, permission to appeal was granted on the basis that the judge arguably failed to apply Article 8 outside the Immigration Rules.

14. On 9th July 2014, a Rule 24 response was entered on the basis that the judge having applied Appendix FM of the Immigration Rules found that the Appellant did not meet the Rules, and the judge was entitled to apply **Gulshan**, and asked whether compelling circumstances existed requiring a consideration of Article 8 outside the Immigration Rules. Having done so, the Judge was right to conclude as she did.

## Submissions

15. At the hearing before me on 5th September 2014, Mr Samra, appearing on behalf of the Appellant took me through the determination of Judge Pacey. He stated that the judge held (at paragraph 16) that the couple had a genuine and subsisting relationship and that "the only issue, therefore, is whether there are insurmountable obstacles to the couple moving to India" (paragraph 16). One issue was whether the Appellant could meet the financial threshold requirement for a married couple. This is set at £18,600 under the Rules. The Appellant could not meet this because, as a student he is only allowed to work twenty hours per week, which necessarily brings his income down below to what is realistically achievable, such that he would always fails to meet with the Rules. That must mean that there were insurmountable obstacles in his path.

16. Second, in applying the exceptions in the Immigration Rules under EX1(b) the judge was wrong to conclude that there were "no compelling circumstances in this case" (paragraph 25). This is because if the Appellant met all the other requirements, including that the marriage was genuine and subsisting, then there were compelling

circumstances to consider. The evidence before the judge was that his sponsoring wife was "heavily involved in caring for her elderly grandmother" (paragraph 20). The Appellant himself could not work more than twenty hours. These are all compelling circumstances. He asked me to make a finding of an error of law to allow the appeal.

17. For his part, Mr Mills stated that the Court of Appeal judgment of **MM (Lebanon) [2014] EWCA Civ 985** did not support the arguments of Mr Samra. Attention had been drawn, in the documentation that Mr Samra had handed to court at the outset, to his reference to paragraph 134 of Lord Justice Aikens's judgment. The judge had held that where the Immigration Rules are not a "complete code" the decision-maker is entitled to look at the various factors that can be taken into account in the decision. Even where there are references to "exceptional circumstances" in the code, there will still be a proportionality exercise to carry out. The fact was that Appendix FM was a complete code. Even if the Sponsor was a British citizen, consideration had to be given to whether she could realistically relocate to a country like India, which the judge here gave proper reasons for so finding, and the new Rules did now refer to a requirement of "exceptional circumstances" and these had to be applied to every spouse regardless of his or her circumstances. Applying the considerations, it was clear that the judge had reached the right decision on the right balance of considerations.

18. In reply, Mr Samra submitted that the judge was simply wrong at paragraph 25 to say that Article 8 was not engaged.

## No Error of Law

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law such that I should set aside that decision under Section 12(1) of TCEA 2007) and remake the decision. I am aware that Mr Samra has very skilfully put before me the relevant excerpts from **MM (Lebanon)**, together with the relevant paragraph from **Sanade [2012] UKUT 00048**, together with the excerpt from EX.1 relating to "exceptions to certain eligibility requirements for leave to remain as a partner or parent". The essential question here is whether there are "insurmountable obstacles to family life". The issue is serious enough to be considered in terms of the proportionality of the decision made.

20. The biggest obstacle facing the Sponsor from going to India, is not that she would not get a job there because she accepts that she would (see paragraph 19) but that she is "heavily involved in caring for her elderly grandmother". This care, however, is not a 24 hour care that she is providing, but only one where the Sponsor visits her grandmother three times a week (see paragraph 21).

21. Even more importantly, however, there is no evidence, and there was none before the judge, that social services, who have extracted their obligation to provide care for the elderly, have refused to provide such care.

22. In the circumstances, the judge was entitled to reach the conclusion that there were no insurmountable obstacles to family life continuing if the Appellant were to return to India. In any event, it is open to the Appellant to return to India and to make an application to join his spouse in the UK as and when he becomes eligible to do so.

**Decision**

23. There is no true error of law in the original judge's decision. The determination shall stand.

24. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th September 2014