Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08455/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2019	**On 07 February 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR GULSHARAN SINGH RATHORE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Turner, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. In a decision sent on 5 October 2018 Judge O'Hagan of the First-tier Tribunal (FtT) dismissed his appeal against the decision of the respondent dated 22 March 2018 refusing leave to remain.

2. The first ground on the basis of which the appellant was successful in obtaining a grant of permission was that the judge had erred in dismissing the appeal albeit

accepting that the appellant might meet the requirements of the Rules if he made a fresh application or from outside the country. It was submitted that there was no rational reason to require him to return to India to make an entry clearance application and so the decision was contrary to the principles set out in **Chikwamba** [2008] UKHL 40 and subsequent cases such as **Hayat** [2012] EWCA Civ 1054 and **Agyarko** [2017] UKSC 11. Despite Mr Turner's valiant efforts to advance this ground, I am not persuaded that it is made out. My principal reasons for so concluding are firstly that the judge clearly did not accept that the appellant met the (in-country) Immigration Rules presently and very expressly found that the appellant had not shown that there would be any insurmountable obstacles to family life taking place in India. At most the judge was prepared to accept that the appellant "would now satisfy paragraph GEN.1.2 were he to reapply" (paragraph 34). Meeting that requirement would not suffice to succeed under the Rules. Secondly the judge expressly fell short of expressing a view as to whether the appellant, if he returned to India, and applied for entry clearance as a partner, would be likely to succeed. At paragraph 46 the judge stated:

> "I have also considered the point raised by Ms Turner that this case falls within the ambit of the principles set out in **Chikwamba** [2008] UKHL 41 and **Hayat [**2011] EWCA 1054. Ms Turner submitted that, if an application were to be made from abroad, there was no reason why it would not be successful. Maybe so, but equally maybe not. I do not know whether an application made from abroad would succeed, and it is not appropriate for me to speculate. What I can say with confidence is that this case is not one of those limited number where it is clear than application would succeed, and the requirement that someone return to make one is a matter of form over substance. The position addressed in **Chikwamba** [2008] UKHL 41 and **Hayat** [2011] EWCA 1054 applies in a small number of cases, and is not the norm."

3. The appellant's second ground targets the judge's treatment of the issue of whether he had shown compelling Article 8 circumstances outside the Rules. It was submitted that the judge's erroneous approach to the appellant's situation within the Rules infected his approach to the issue of whether there would be insurmountable obstacles in the way of him and his wife restarting their family life in India. It was emphasised that she is a British citizen, had lived in the UK since aged 7, had her whole family here, that she looks after her father, was of good character, was financially self-sufficient (earning £19,000 per annum) and has accommodation.

4. Mr Turner also criticised the judge for referring in paragraph 34 to a "thought experiment".

5. Dealing with the last point first, it seems to me that in referring to a "thought experiment" all the judge was meaning to say, infelicitously expressed as it may have been, was that in order to assess whether there were compelling circumstances outside the Rules he had to consider the extent to which the appellant met some or all of the requirements of the Rules. That exercise was unexceptionable, indeed incumbent on the judge to undertake as part of the proportionality assessment.

6. As regards the contention that the judge erred in assessing the issue of insurmountable obstacles (and that this error "infected" his assessment outside the Rules), the decision exhibits sound reasons for concluding that the appellant had not shown insurmountable obstacles. The judge weighed in the appellant's favour that (in addition to being a British citizen) his wife has not lived in India since she was 7 and that she has established friendships and employment here. However, in the judge's assessment these failures were outweighed by the fact that (like the appellant) his wife was of Indian origin, she speaks Punjabi, that she would be seeking a new life in India with the support of her husband and his family, that she is educated and able and could adapt, and that she does not have health problems. The judge also noted that the appellant's immigration status was precarious when he met Mrs Kaur and that he has made some use of public funds. The judge's proportionality assessment was entirely within the range of reasonable responses.

7. The judge also addressed the circumstances of Mrs Kaur's father, stating at paragraph 40 that:

> "In respect of Mrs Kaur's father, I accept that she loves him, and helps in his care. Whilst I accept that, they do not live together. He lives alone. That suggests that, despite his disabilities, he is able to enjoy a reasonable degree of independence. She is not the only family member who helps him. On her account, the care is shared with her brother. The time that she is able to give will necessarily be limited by the demands of her work, her relationship with her husband, and the demands of running her own household jointly with her husband. There are other family members in the country who can help."

8. To some extent, straddling grounds 1 and 2, Mr Turner sought to argue that the judge filed to properly address the **Chikwamba** issue. He contends that the judge's treatment at paragraph 46 amounted to a failure to address the issue. I disagree. The judge made express reference to case law authority and on the evidence before the judge this was not a case where the appellant could be seen to meet all the out-of-country requirements of the Immigration Rules relating to partners. Further and in particular (and unlike the factual scenario in **Chikwamba**), this was not a case where it would be unrealistic to expect the spouse to accompany the appellant to his country of origin.

9. For the above reasons I conclude that the judge did not materially err in law and accordingly his decision to dismiss the appellant's appeal must stand.

No anonymity direction is made.

Signed Date: 3 January 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal