Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14251/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2016	**On 15 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHANTABEN ISHWARBHAI PATEL
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas (Senior Home Office Presenting Officer)
For the Respondent: Mr G Davison (Ratna and Co)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of Shantaben Ishwarbhai Patel, a citizen of India born 7 December 1928, to allow her appeal against the Entry Clearance Officer's refusal to admit her as a returning resident dated 28 October 2014.

2. Her claim for re-entry is summarised in the witness statement that in itself comprises the greater part of the decision below in so far as that

document actually bears on the issues requiring determination. She had been a widow since her husband's death on 13 September 1995. She had joined her youngest son here in 1997 and was granted indefinite leave to remain as his dependent. She lived in with him and his family, managing the grandchildren.

3. She visited her other sons in India from time to time. Unfortunately her eldest son had grown increasingly ill, and the other sons were not in a position to look after him. On her last visit to see her sons in India, she discovered that her eldest son had retired from work and had fallen very ill. His wife suffered from chronic arthritis and could not care for him. He had become increasingly aggressive and would only listen to his mother. Accordingly she remained there to look after him, and as time passed the two year maximum period for returning without any query being raised as to her indefinite leave to remain passed.

4. Her daughter sought to help her to apply as returning resident but several applications were refused, and at one point she was advised to make an application as a visitor instead. Eventually she received the decision against which she now appealed. Her youngest son and his wife continued to support her financially, letting her retain the interest from the fixed deposits he and his wife held in India and also remitting funds to her. They spoke every weekend by telephone, and they paid for her holidays. Her intention had always been to reside in the United Kingdom permanently.

5. The First-tier Tribunal discussed the importance of maintaining the rule of law and adhering to obligations enshrined in the Human Rights Convention, and noted that there was judicial authority, such as *Sarwan Singh*, for the proposition that the Rules had not always been applied humanely. Given the advanced age of the Appellant and that she would not be a burden on public funds, it was appropriate to grant her entry clearance in order that she might spend the final phase of her life in comfort.

6. Grounds of appeal took issue with the disposition of the appeal on the basis that the First-tier Tribunal had not correctly resolved the question posed by Rule 19 as to the propriety of readmitting a person who had stayed away for more than two years.

7. Before me Mr Kotas submitted that there were no reasons given to explain the decision made below. Mr Davidson contended that whilst the decision was not a thorough one, the outcome had been inevitable and did not merit any detailed justification.

Findings and reasons

8. I do not consider that the approach of the First-tier Tribunal is legally sustainable. The Entry Clearance Officer is a party to the appeal and

the public is entitled to expect that the judiciary will engage with the reasoning of a representative of the public interest in upholding immigration control. However poor the decision subject to appeal may considered to be, it requires a minimal level of engagement before the judicial decision properly respects the separation of powers that is a hallmark of the rule of law.

9. Lord Bridge in *Save Britain's Heritage v No 1 Poultry Ltd* [1991] 1 WLR 153 stated that:

> "The overriding test must always be: is the Tribunal providing both parties with the material which will enable them to know that the Tribunal has made no error of law in reaching its findings of fact? ... A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any expressed reference to it by the Tribunal; in other cases it may not. Secondly, the appellant is entitled to know the basis of fact upon which the conclusion has been reached."

10. The Immigration Rules set out:

> "18. A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:
>
> (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and
>
> (ii) has not been away from the United Kingdom for more than 2 years; and
>
> (iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and
>
> (iv) now seeks admission for the purpose of settlement.
>
> 18A. Those who qualify for admission to the United Kingdom as returning residents in accordance with paragraph 18 do not need a visa to enter the UK.
>
> 19. A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life."

11. Here the First-tier Tribunal was charged with determining whether the discretion in Rule 19 was properly exercised. That exercise of discretion is fully reviewable given this appeal is brought under the saved provisions of the Nationality Immigration and Asylum Act 2002 with the consequence that under section 86(2)(b) thereof "the Tribunal must allow the appeal in so far as it thinks that a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently."

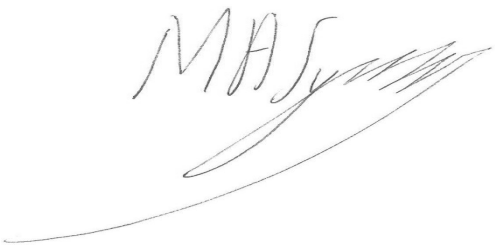
12. Mr Davison may very well be right that the Respondent's circumstances represent a powerful case for a positive exercise of discretion in her favour, given her evidence that she always intended to live in this country, her strong family connections here, and her understandable wish to remain abroad to care for her sick son. There is of course no requirement that she present an exceptional or compelling case: the discretion represents a bare balancing exercise, to which a consideration of her right to private and family life will be relevant. However, it cannot be said that her case was so unanswerable that it required no measured assessment whatsoever: for example it is not readily apparent for how long she remained back in India.

13. The Respondent is an elderly lady of almost ninety years of age who asserts that she has always intended to make the United Kingdom her home, as she was entitled to do given the grant of settlement to her almost twenty years ago. Given her advanced years there is a clear public interest, bearing in mind the importance of the overriding objective to ensure that the processes of the Tribunal are accessible and available to those subject to its jurisdiction, in her appeal coming on again for hearing at the first opportunity the First-tier Tribunal can reasonably find to list it.

Decision:

The decision of the First-tier Tribunal contains a material error of law. As there are no lawful relevant findings upon which to build, the matter is suitable for re-hearing in the First-tier Tribunal. I accordingly remit the appeal to that forum.

Signed: Date: 8 February 2016



Deputy Upper Tribunal Judge Symes