Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02750/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 December 2017	**On 8 January 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS CATHRINE LAL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Z Ahmad, Home Office Presenting Officer
For the Respondent: Ms A Jones, Counsel, instructed by Prime Law Solicitors

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of India. In a decision sent on 6 February 2017 First-tier Tribunal (FtT) Judge Malcolm allowed her appeal against a decision made by the appellant (hereafter the Secretary of State, or SSHD) refusing leave to remain on the basis of her marriage on 17 April 2015 to a British citizen KW. The SSHD had not accepted the couple were in a genuine and subsisting relationship and did not accept in any event that there would be insurmountable obstacles to the couple conducting their family life in India.

2. The judge heard evidence from the couple and three witnesses and was satisfied the couple's evidence was credible and that their relationship was genuine and subsisting and that they would face insurmountable obstacles living in India.

3. The SSHD's grounds of appeal were two-pronged. The first prong challenged the judge's credibility findings; the second assailed the judge's conclusion on insurmountable obstacles.

4. I consider the SSHD's first ground to fall well short of identifying an error of law. The points raised merely disagree with the judge's findings. Ms Ahmad sought to argue that the judge's findings on certain issues of inconsistency were inconclusive. However, it is clear that the judge, having seen and heard from the couple and three witnesses and having also considered a number of other statements, including from stepchildren, was satisfied that the alleged inconsistencies identified by the SSHD were either not upon examination actual or significant inconsistencies or were of a minor nature. Paragraphs 77-88 represents a careful examination of all the alleged inconsistencies.

5. The second prong of the grounds is another matter, however. It takes aim at the judge's treatment of the issue of insurmountable obstacles at paragraph 94:

> "94. The appellant's husband is a British citizen and has always lived in the U.K, his family are in the U.K. It was his evidence that he would not be able to move to India if his wife was required to return to India as he simply would not be able to cope with the heat in the country and was very clear in his evidence that if his wife was required to return to India that he would not be able to return with her. I accept that this met the test of insurmountable obstacles to family life continuing outside the U.K (in terms of EX.1 (b))."

6. On its face this passage is clearly an unsatisfactory treatment of the issue. It was one thing for the judge to accept Mr KW's subjective evidence that he would simply not be able to cope with the heat in India. What the judge was required to undertake, however, was an objective assessment of whether Mr KW could in fact cope with the heat and whether a difficulty of this kind would pose an insurmountable obstacle. The Supreme Court has confirmed in **Agyarko [2017] UKSC 11** that insurmountable obstacles is a stringent test requiring an applicant to show serious hardship. Difficulty coping with heat is not in itself a serious hardship in a country, where there is air conditioning and available urban environments built to protect people against the heat.

7. Ms Jones sought to argue that the judge's assessment at paragraph 94 had to be read in the light of the decision as a whole and the evidence as a whole, but looking wider there is really nothing else that is shown over and above Mr KW's difficulties with hot weather. Significantly, there was no medical evidence identifying Mr KW as having any specific condition that would make exposure to hot weather medically harmful. Paragraph 94 represents a singular failure to treat the insurmountable obstacles threshold as a high one.

8. For the above reasons I conclude that the decision of the FtT Judge is legally flawed.

9. I have considered whether I am in a position to re-make the decision without further ado. I have decided I am. The claimant has produced extensive documentation in support of his appeal and I have the benefit of the judge's findings of fact on all aspects of the couple's relationship and their circumstances in the UK. The only issue concerns insurmountable obstacles.

10. As regards insurmountable obstacles, the only matters apart from Mr KW's difficulties with hot weather that were identified by Ms Jones were his age and the relationships the couple have with other family members and friends in the UK. As regards age, Mr KW is 73 but is not said to be in poor health or to have medical problems. Whilst I attach significant weight to the ties the couple have in the UK, I do not consider that they suffice to show that disrupting the couple's enjoyment of those ties would pose insurmountable obstacles to them living in India. Neither have any minor children (Mr KW's youngest child from a former marriage is aged 20 and was said to live with KW only as a temporary measure).

11. It will doubtless seem harsh to the claimant and her husband and other family members and friends that the decision made in this appeal is adverse to the claimant. Unfortunately the relevant legislative framework imposes rigorous criteria that must be met by all applicants and appellants and one reflection of that is the requirement to show insurmountable obstacles. The claimant cannot meet an essential requirement of the Immigration Rules. So far as concerns her circumstances considering Article 8 outside the Rules, the difficulties in the way of the claimant being able to succeed are even greater, as s117B(4) of NIAA 2002 requires me to attach little weight to a couple's relationship when that has been entered into at a time the claimant's immigration status is precarious. When the couple entered into marriage the claimant was an overstayer and she has never had settled status. There are no compelling circumstances that demonstrate that in India the claimant would not be able to live with her husband without serious hardship. Accordingly I have no alternative but to dismiss the claimant's appeal.

12. To conclude:-

    The decision of the FtT Judge is set aside for material error of law.

    The decision I re-make is to dismiss the claimant's appeal.

No anonymity direction is made.

Signed Date: 4 January 2018

Dr H H Storey
Judge of the Upper Tribunal