IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004542
First-tier Tribunal No: HU/52064/2022
IA/03215/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2024

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

GURNAM MATHARU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person, assisted by his wife.
For the Respondent: Mrs Arif, a Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 22 May 2024

DECISION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Dieu ('the Judge'), promulgated following a hearing at Birmingham on 6 March 2023, in which the Judge dismissed his appeal against the refusal of his application for leave to remain in United Kingdom.
2. The Applicant is a citizen of India born on 25 November 1975 who has made a number of applications on human rights grounds as noted by the Judge at [2]. The most recent application of 1 May 2021 was refused on 15 March 2022. That decision was the subject of the appeal before the Judge.
3. The Judge's findings are set out from [19] of the decision under challenge. The Judge finds no very significant obstacles to the Appellant's relationship with his partner continuing abroad.
4. The Judge refers to a previous determination promulgated on 4 August 2016 by Judge Colyer which the Judge took as a starting point for considering the merits of the appeal.

5. The Judge does not, however, treat the earlier decision as being binding and clearly considers the evidence of what has changed since that date. The Judge notes the Appellant and his wife spent a further 6 years together in UK and that there may have been a slight decline in his wife's health but did not find that any of this changed the substance of the early determination, established insurmountable obstacles, or would result in unjustifiably harsh consequences. The Judge did not find the claim the Appellant's wife would not be able to access medical treatment in India made out on the evidence.
6. The Judge finds the Appellant will be enough of an insider when considering the issue of integration pursuant to paragraph 276 ADE(1)(vi).
7. The Judge finds an option open to the Appellant is make an entry clearance application which is one of the balancing factors in the public interest, although notes the Appellant was unable to meet the requirements for entry clearance as a spouse at that time [21].
8. The Judge accepts the Appellant enjoys private and family life in the UK recognised by Article 8 ECHR but finds the decision under challenge does not amount to a disproportionate interference with such rights. The Judge finds the Appellant cannot meet any requirements of the immigration rules, that there are no sufficiently compelling features, and having had regard to section 117(B) of the Nationality, Immigration Asylum Act 2002 and the public interest, that the appeal must be dismissed on human rights grounds.
9. The Appellant sought permission to appeal which was not admitted by another judge of the First-tier Tribunal, but which was renewed to the Upper Tribunal. Permission to appeal was purportedly granted on 8 November 2023, the operative part of the grant being in the following terms:

    1. The appellant is a citizen of India who applies to remain in the UK on human rights grounds.
    2. This is a renewed application for permission to appeal against the decision of the First-tier Tribunal made in Birmingham.
    3. The grounds of appeal contend, in short summary, as follows. It is argued that the First-tier Tribunal have failed to take into account that since the previous appeal in 2016 the appellant and his wife have married, that she had applied for PIP and that her health had deteriorated since that time so she was reliant on the appellant for physical and mental support, further as the appellant's wife is a British citizen she cannot be treated in India except at the cost of private treatment and would not be able to remain more than 180 days.
    4. It is arguable that the First-tier Tribunal did not consider the evidence in the witness statement of the appellant's wife, that she could not remain in India for more than 6 months, that she was not entitled to free medical treatment in India, due to being a British citizen, in the context of the accepted evidence about the unskilled work the appellant is likely to be able to undertake and the documentary evidence of the numerous medical consultations for a variety of conditions that his wife has had since 2016.
    5. The appellant should be prepared to remake the appeal immediately if any error of law is found and thus to have filed a bundle of any updating evidence relevant to the remaking going to his wife's ill-health and/or inability to remain in India.

10. The grant of permission by the Upper Tribunal makes no reference to the appeal being out of time or makes any finding that it is appropriate in all the circumstances for time to be extended and the appeal admitted.
11. As a result of the failure to deal with the time issue the grant only takes effect as a conditional grant dependent upon time being extended - see Ndwanyi (Permission to appeal; challenging decision on timeliness) [2021] UKUT 378 (IAC).
12. We therefore focused our attention upon seeking an explanation for why the appeal was nearly two months late.

13. We heard evidence from both the Appellant and his wife. It is fair to say that their accounts were contradictory. The Appellant stated he was unaware that the appeal had been dismissed until he was told when he was signing on at the Home Office, as a result of which he contacted his solicitor who claimed not to know and who emailed the tribunal to find out. When the decision was received the solicitor advised him he could appeal.
14. The Appellant's wife stated that they went to the solicitor to find out whether the decision had been made and that the solicitor, having looked at the computer, advised them they had received a decision which had been overlooked, and that they could appeal.
15. A third version is that provided by the solicitors themselves with the application for permission to appeal, which is in the following terms:

> The Appeal was heard by the FTT on 06/03/2023. To date we have not received any notification by email (as we normally do in all cases) informing us that a decision has been made. We were thus unaware of the FTT's decision and only came to learn of the same when undertaking our regular file reviews. As soon as we came to learn of the FTT's decision we informed our client immediately on 05/06/2023. It is unclear as to why we have not been notified of the FTT's decision (like we do in all other cases). We kindly request the Application for Permission to be considered in time.

16. The comment by the solicitors that they had not received any notification by email, as they normally do in all cases, may have been the situation that prevailed prior to use by the First-tier Tribunal of the Portal. This decision was loaded onto the Portal by the Judge in the normal manner. Simultaneously the parties to the proceedings are notified and receive a copy of the decision. No supporting email is therefore needed or sent.
17. Such notification was presumably sent out as evidenced by the Appellant's claim that when he went to sign on the Home Office immigration staff are aware that the appeal had been dismissed.
18. It is not known why the solicitors were waiting for an email when they would have been aware that the Portal did not require one being sent. We find it likely on the balance of probabilities that the determination was promulgated by use of the Portal and that notification of that was received by both representatives.
19. There is no satisfactory explanation for why the solicitors did not take immediate action in terms of advising the Appellant of any right of appeal, other than they failed to take appropriate action until they reviewed the file and discovered the decision had been promulgated. We accept if that is the case the Appellant is not responsible for that period of the delay.
20. We accept as credible that having discovered that the appeal was dismissed, the solicitors would have taken steps to inform the Appellant immediately, which they did on 5 June 2023. What we have at this stage, therefore, is a period of delay between 5 June 2023 and the appeal being lodged on 12 June 2023. The solicitors would have been aware of the need to take urgent action as they were already out of time and needed to seek permission for the appeal to be admitted. There is, however, no satisfactory explanation for this period of delay.
21. There is, therefore, no satisfactory explanation for all the period of delay.
22. We have gone on to consider the position as it would be if the appeal had been in time or we extended time, but do not find it we would have found error of law material to the decision to dismiss the appeal in any event.
23. The Judge clearly considered the evidence with the required degree of anxious scrutiny, has made findings supported by adequate reasons, and the conclusion that the decision is proportionate in light of the immigration history and facts as found has not been shown to be a rationally objectionable conclusion.

24. On that basis, considering the overriding objective, interest of justice, and need for procedural rigour, we do not find the Appellant has established that it is appropriate in all the circumstances to extend time.
25. As time is not extended there is no extant appeal before us upon which we are required to make a substantive decision.
26. We record at this point a comment made to the Appellant and his wife having announced our decision in court regarding the time issue. A supplementary bundle received very shortly before today's hearing contained further evidence that the Appellant was seeking to rely upon as a basis for challenging the Judge's decision. This includes evidence relating to his wife's medical condition. The difficulty with this evidence is that it did not exist at the time the Judge made the decision to dismiss the appeal and was therefore not evidence that the Judge could have been found to have failed to consider. It is effectively new material which may give rise to a fresh claim. The Appellant was advised that consideration should be given to seeking advice as to whether the material is sufficient to warrant a fresh claim being made. That is a matter for him.
27. We also drew to the Appellant's attention the finding of the Judge that it would not be disproportionate for him to return to India to make an application to enter the UK lawfully which would enable his wife to remain in the UK.
28. We also repeat the further comment that there may be a misunderstanding in the mind of the Appellant, as what the Judge was clearly indicating is that it would be proportionate for the Appellant and his wife to continue their family life as husband and wife in India by way of settlement rather than she reside there as a visitor.
29. It was also indicated the Appellant should make any fresh application within 28 days of this decision being promulgated as otherwise enforcement action may commence.

Notice of Decision

30. The appeal it out of time. Time is not extended. The appeal is not admitted.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 May 2024