



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal no: **IA/16460/2013**

THE IMMIGRATION ACTS

At **Field House**
on **20.04.2015**

Decision signed: **05.05.2015**
sent out: **14.05.2015**

Before:

Upper Tribunal Judge **John FREEMAN**

Between:

Sanjoy DEY

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Jamil Dhanji* (counsel instructed by DJ Webb & Co)

For the respondent: Mr Sebastian Kandola

DETERMINATION AND REASONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge John Hamilton), sitting at Hatton Cross on 24 October 2013, to dismiss a widower's article 8 appeal by a citizen of India, born 30 April 1968. Since then, the case has been to the Court of Appeal and back by way of a consent order: All that needs to be said about that here for the moment is to give the result, which is that the Upper Tribunal hearing starts again before me, but from the point where it is agreed that the judge made a material error of law, in not taking proper

***NOTE:** no anonymity direction made at first instance will continue, unless extended by me.*

account of what is said to be the 'historical injustice' of the Home Office not giving him a husband visa before his late wife died. The limited point on which the judge allowed the appeal (the unlawfulness of the removal directions when made) stands so far as it goes; but the law on it has now of course changed.

2. **Relevant dates**

early September	2008	appellant meets wife, a British citizen, in India appellant comes here as visitor (professional musician): becomes engaged to be married to wife, and they start living together: wife later diagnosed with ovarian cancer
10 February	2009	appellant and wife marry in India
13 February		both return here, appellant on visit visa (still valid)
23 March		visit visa extended for 6 months, owing to wife's condition
4 September		appellant applies for husband visa in India
4 November		refused, on maintenance grounds, and because 'no insurmountable obstacles to family life with that partner continuing outside the UK': appellant and wife remain in India
1 March	2010	appellant's appeal allowed on human rights grounds
11 April		wife dies in India
3 May		appellant reports his wife's death, but makes it clear he still wants to come here and wind up her affairs
19 May		appellant given husband visa till 19 August 2012
17 August	2012	appellant applies for indefinite leave to remain
23 April	2013	application refused: appellant does not qualify for leave (a) under paragraph 287 (b) of Rules, as husband visa not issued before wife's death; (b) under paragraph 276ADE, as still has ties with India

3. The appellant's case, in a nutshell, is that the failure on the part of the entry clearance officer to give him a visa at any time between his appeal being allowed on 1 March 2010 and his wife's death on 11 April amounts to a 'historic injustice' not catered for by the Rules as they stand, so that amounts to the exceptional circumstances now required for success under article 8, outside the terms of the Rules.
4. Mr Dhanji helpfully referred me to *Geraldo & others* [2013] EWHC 2763 (Admin). This is a permission decision, not normally citable as authority

itself; but King J at paragraph 29 conveniently summed up the effect of previous authority, as follows:

- (i) the historic injustice must be based upon some prior illegality ...
- (ii) there must be sufficient causal connection between that illegality and the alleged historic injustice caused thereby, and
- (iii) the alleged prejudice caused to the claimant by the decision under challenge to justify the intervention of the court.
- (iv) Considerations of 'conspicuous unfairness' are not in themselves a relevant test to trigger the intervention of the court, although the degree of prejudice may be a relevant factor when it comes to the question of remedy.

5. It will be clear that the appellant's case depends on there having been 'some prior illegality': I don't think just under 6 weeks' delay in the issuing of a visa, following a successful appeal, can be classified like that, unless of course there has been a direction for expedition, which in this case there was not. Of course it took the entry clearance officer till 19 May to give him his husband visa, following his request on 3 May; but none of the delay after 11 April was material to the position under paragraph 287, the relevant part of which requires that:

- (a) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the spouse or civil partner of a person present and settled in the United Kingdom in accordance with paragraphs 281 to 286 of these Rules;
- (b) ... and
 - (ii) the person whom the applicant was admitted or granted an extension of stay to join died during that period

6. It doesn't seem to me that the trite statement of the law in the statement of reasons attached to the Court of Appeal consent order establishes any prior illegality on the six weeks' delay in issuing a husband visa. What the statement of reasons said at paragraph 6 was this "A refusal of leave that amounts to a disproportionate interference with an individual's Article 8 rights is unlawful, such as is the case in the decision [to refuse the appellant a husband visa while his wife was still alive, though seriously ill] dated 4 November 2009". To that extent, the decision reversed on appeal on 1 March 2010 was not only wrong on its merits, but unlawful.

7. The next question is what 'historic injustice' was caused the appellant by not giving him a husband visa at any time between 4 November 2009, and her death on 11 April 2010. There had certainly been, with the

benefit of hindsight, an injustice both to him and her in not letting him come back here with her and care for her in what was now her own country in her latter days.

8. It follows that I have to consider what prejudice this caused to the appellant, in terms of the decision under appeal in this case, which was not to extend indefinitely the 27 months' husband visa he had been granted on 19 May 2010. That visa was given in the first place for the appellant to wind up his late wife's affairs in this country; and in evidence at the first-tier hearing he confirmed (see paragraph 26 of the decision) that he had not wanted to stay on here at first, but had changed his mind while here. Sad as it was that the appellant hadn't been able to come home with his wife and care for her before she died, I don't think that had anything to do with the Home Office's refusal to let him change his mind, after he had been allowed to come here for a limited time and wind up her affairs.
9. In my view the decision to let the appellant come here and do that was entirely right, and clearly the work of a sympathetic and humane entry clearance officer. That most certainly did not mean that he also needed to be granted the right to stay here indefinitely, after he had done what he had originally wanted and been allowed to do. Of course the appellant has lost a benefit, by way of an opportunity to apply for indefinite leave to remain, to which he would have been entitled if given a visa in November 2009; but that was entirely incidental to the reasons for which refusal to do so was unlawful, in other words his loss of the chance to spend what turned out to be his wife's latter days here with her. While, as the statement of reasons recorded, the first-tier judge's decision was wrong, in my view he reached the right result, for the reasons I have given.

Appeal dismissed

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke at the end.

(a judge of the Upper Tribunal)