Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07571/2016**

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**
On 26 January 2018 **On 5 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HITESH MALHOTRA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Mr A Maqsood, Counsel, instructed by Lamptons Solicitors

DETERMINATION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge S D Lloyd promulgated on 15 May 2017. The appeal is brought by the Secretary of State but for convenience I shall refer to Mr Hitesh Malhotra as the appellant for the purposes of this determination as that was his status in the First-tier Tribunal.

2. The appellant is a national of India born on 5 September 1988 who arrived in the United Kingdom on 16 October 2010 with entry clearance as a student. That expired on 30 November 2013. The appellant made an application for leave to remain which was granted until 16 October 2015 but was subsequently curtailed prior to that date.

3. The proceedings concern a further Tier 4 application which was refused by the Secretary of State on 8 January 2015. There was then a further

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application made on 8 December 2015, referring to the appellant's wife, Kiranjit Kaur Kundal. There was an evidential dispute as to whether or not the appellant and the sponsor were in a genuine and subsisting relationship. At paragraph 18 of the determination, the judge came to the conclusion that they were. There is no appeal from this finding.

4. The judge then proceeded to consider whether in the particular circumstances of this case there would be insurmountable obstacles preventing the appellant from returning to India, noting his immigration history and that, as is conceded today by Mr Maqsood on his behalf, throughout the currency of his relationship with the sponsor the appellant's immigration status was precarious.

5. The judge then found as follows:

> "27. My task is to weigh all these matters up. With the Immigration Rules satisfied there is a much reduced public interest in refusal. I can see little or no advantage or public interest in the appellant having to return to make entry clearance application, that being the respondent's most weighty argument.
>
> 28. Having considered all of this together, I find that the decision made by the respondent was not proportionate and accordingly I allow the appeal on human rights grounds."

6. The Secretary of State's grounds of appeal raised two matters. In granting permission to appeal, Judge Pullig took the view that there was little in the first ground, namely the judge referring to a reduced public interest on the basis. This was an infelicitous form of words rather than an error of law.

7. On the second ground, however, permission was granted, namely failure to give proper consideration to balancing the public interest in respect of a temporary separation and the impact of that on family life were the appellant to return to India and make an out of country application.

8. On this discrete issue there is considerable judicial comment, not least the case of **R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – Chikwamba – temporary separation – proportionality) [2015] UKUT 00189**, which addresses how a tribunal should properly balance the various state and personal interests which come into play when proportionality is being assessed.

9. The judge did not refer expressly to **Chen** and the proportionality analysis (such as it is) is very briefly expressed. It became plain to me from an early stage of oral argument that there was a self-evident error of law on the face of this determination and that a reader could not be satisfied that the legal principles were properly applied. It seemed to me inevitable that this decision must be set aside and I indicated as much.

10. Both Mr Staunton, acting for the Secretary of State, and Mr Maqsood, acting on behalf of the appellant, were content that I remake this decision and they each made submissions in this regard.

11. There being no cross-appeal, I proceed on the basis (i) that there is in existence a genuine and subsisting relationship between the appellant and the sponsor; (ii) that the financial evidence is such as to demonstrate beyond argument that the sponsor is more than sufficiently well placed to satisfy the minimum prescribed under the Immigration Rules; (iii) that there would be no insurmountable obstacles to the appellant returning to India and making an application out of country; and (iv) that all other things being equal, any out of country application would succeed.

12. Mr Maqsood took me to the head note of the decision in **Chen**, which reads as follows:

> "Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to rejoin family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the United Kingdom but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40**.

13. In reaching his conclusion that there would not be insurmountable obstacles to the appellant returning to India there are a number of factual findings made by the judge which self-evidently play into the proportionality assessment. One of these, which is a weighty consideration, is the judge's acceptance that the appellant had become estranged from his family due to his inter-faith marriage with the sponsor. One is of the Sikh religion and the other a Hindu. Although the judge took the view that this would not of itself amount to an insurmountable obstacle, it is still a factor which sounds in the proportionality assessment.

14. I give full regard to the public interest in maintaining proper immigration control. Throughout his relationship with the sponsor the appellant's immigration status has been precarious but I also bear in mind that the application under human rights grounds was made as long ago as 2015. The lengthy period which these proceedings have taken to reach a conclusion is in no way down to the fault of the appellant.

15. It would be disproportionate in circumstances where the appellant is well-settled with a sponsor whose financial resources are sufficient to pay for his day-to-day living expenses to compel him to return to India where there will be difficulties, (albeit not insurmountable obstacles) arising from his interfaith marriage in circumstances where there would be something approaching an inevitability to an out of country application being granted.

16. Applying the principles of **Chikwamba,** as expanded in **Chen,** leads to the proportionality balance coming down in the appellant's favour. The appeal is therefore allowed on human rights grounds.

Notice of Decision

(1) The decision of the First-tier Tribunal promulgated on 15 May 2017is set aside by reason of the error of law identified herein;
(2) The decision is remade allowing the appeal on human rights grounds.

No anonymity direction is made.

Signed *Mark Hill* Date 23 February 2018

Deputy Upper Tribunal Judge Hill QC