Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17281/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 2 June 2015	**On 8 June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JATINDER SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs J Moore, of Drummond Miller, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India, born on 3 July 1981. He applied on 22 October 2012 for leave to remain under Tier 4 of the Points Based System. The respondent refused that application on 3 January 2014 (the delay is unexplained and of no relevance). The appellant submitted this appeal on 9 April 2014. After an adjournment and following a change of agency on 15 January 2015 he relied on additional grounds of appeal, raising the very different issue that he met the requirements of the Immigration Rules Appendix FM and paragraph EX1 as the parent of a child living in the UK,

or alternatively that his appeal should be allowed under Article 8 of ECHR outwith the Rules.

2. First-tier Tribunal Judge Porter dismissed the appellant's appeal by determination promulgated on 3 February 2015.

3. The grounds of appeal to the Upper Tribunal, in summary, are as follows. The judge should not have expressed reservations over whether the appellant had raised further valid grounds of appeal in terms of a section 120 notice. There was evidence from the appellant and from the mother of the child of at least weekly contact between father and child. The judge gave no reasons for rejecting the evidence of the child's mother. The absence of any formal maintenance arrangement was of no significance, when the appellant had at best limited resources. The judge found it adverse to the appellant that he failed to notify the respondent that he ceased his studies and moved address, but there was no obligation on him to do so. The judge wrongly held it against him that he had not made a formal application to the respondent as a partner or as a parent. [An application as a partner would never have been apt, as he does not say there was ever a settled or long term relationship.] The matter was appropriately raised by the section 120 notice. The question under Appendix FM was not whether there were exceptional circumstances but whether it was reasonable to expect the child to leave the UK, and the judge determined that point in the appellant's favour. Under section 117 of the 2002 Act there was no public interest in removal of the appellant and "only one outcome was possible."

4. In a Rule 24 notice the respondent argued that it was incorrect to say that there was no public interest in removal, since the requirement had first to be met that there was a "genuine and subsisting parental relationship with a qualifying child."

5. In submissions Mrs Moore acknowledged that the point in the Rule 24 response is correct in principle. However, she said that all the evidence was of an amicable arrangement between the parties and of very regular contact with the child. There was no reason to reject any of that evidence. The determination contained no assessment at all of what the mother said. The determination should be set aside and a further hearing fixed.

6. Mrs O'Brien acknowledged that the determination errs in law. The core issue was whether there was a genuine and subsisting parental relationship with the child. There were no good reasons in the determination for finding against the appellant thereon.

7. I indicated accordingly that the determination would be **set aside**.

8. As conceded by the respondent, the judge's reasoning is incorrect in several respects. The appellant was entitled to raise the family life ground in course of these proceedings. The judge noted that Appendix FM paragraph R-LTRPT(b) requires the making of a valid application.

However, paragraph GEN.1.9(a)(iii) avoids that requirement when the Article 8 claim is raised "in an appeal". The judge's several references to the appellant's inability to explain his failure to apply separately on the basis of his relationship with his son are misconceived. He was entitled to raise the matter by a section 120 notice and that could not reasonably be held as adverse to his credibility.

9. Parties were unable at the hearing to find their way to resolution of the case based on the evidence which had been led and by reference to the Immigration Rules. They agreed that it would be appropriate to order that no findings of the First-tier Tribunal were to stand and that under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade was such that it was appropriate to **remit the case to the First-tier Tribunal**. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Porter.

10. The appellant is to provide to the First-tier Tribunal and to copy to the respondent not less than 14 days prior to the date of the hearing a written submission on how it is contended that the evidence for the appellant shows that the provisions of Appendix FM are satisfied. The respondent within 7 days of receipt of such submission is to advise whether the appeal is conceded and if not, why not.

11. No anonymity direction has been requested or made.

Upper Tribunal Judge Macleman
4 June 2015