Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/41466/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 20 October 2015

Decision and Reasons Promulgated
On 28 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr RISHI KALIA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: absent
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Wilson promulgated on 26 May 2015, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 4 September 1986 and is a national of India.

4. On 31 January 2013 the Appellant applied for leave to remain as the spouse of a person present & settled in the UK. On 6 October 2014 the Secretary of State refused the Appellant's application.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Walker ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 27 August 2015 Designated Judge of the First tier Tribunal McCarthy gave permission to appeal stating inter alia

> "In paragraphs 13 and 15 Judge Wilson made findings that the appellant has a genuine parental relationship with his children and that some sort of marital relationship was subsisting. The fact that the appellant is facing removal meant the immigration decisions had the potential of severing those relationships and given relevant case law any judge was bound to find article 8(1) was engaged. Yet Judge Wilson made no finding on this. Nor did he undertake a proportionality assessment as required by law, wherein he would have had to balance the appellant's circumstances with the statutory public interest considerations listed in s. 117B of the 2002"

The Hearing

7. The Appellant did not attend the appeal nor was he represented at the appeal. I am satisfied that due notice of the appeal was served upon the Appellant at the address that was given. I am therefore satisfied that having been served notice of the hearing and not attended it is in the interests of justice to proceed with the hearing in the Appellant's absence as I am entitled to do by virtue of paragraph 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

8. I explained to Ms Everett that I had before me the grounds of appeal together with a copy of the grant permission to appeal dated 27 August 2015, and I will take account of both.

9. Ms Everett for the respondent relied on the rule 24 response and argued that, notwithstanding the terms of the grant permission to appeal, the appellant could not succeed because findings of fact can only be made on the basis of evidence presented. She argued that a fair reading of the decision demonstrates that the appellant did not lead sufficient evidence to discharge the burden of proof and that the judge could not make findings of fact which favoured the appellant because of the paucity of evidence before him. She told me that the decision does not contain a material error of law and urged me to dismiss the appeal and allow the decision to stand.

Analysis

10. Between [3] and [11] the judge summarises the evidence placed before him. At [12] and [13] the Judge effectively says that there are unresolved conflicts between the evidence of the appellant and that of his wife. It is at least implied that the judge found neither the appellant nor his wife to be either credible or reliable witness.

11. However it is there that the decision really peters out. It is hard to discern what if any findings of fact the judge made on the basis of the evidence placed before him. It is clear that the Judge finds that the appellants cannot succeed under the immigration rules, but the Judge makes no findings of fact in relation to appendix FM. The judge does not mention appendix FM, and does not appear to have considered it.

12. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

13. The grounds of appeal in this case clearly focused the issue on the appellant's article 8 ECHR rights. The Judge acknowledges that that was the focal point in this appeal in the last sentence of [1] of the decision. What the Judge has manifestly failed to do is to consider whether or not article 8(1) is engaged. The Judge has not then considered the five stage test set out in Razgar. If the Judge had followed that course is likely that he would then have to address the question of proportionality. The decision does not contain any consideration of proportionality nor any mention of the factors set out in section 117B of the 2002 Act. The words "*proportionate*" and "*proportionality*" do not appear anywhere in the decision. The word "*disproportionate*" appears in [1] only, when the Judge summarises the grounds of appeal.

14. The notice of decision simply records "*I dismiss the appeal*". The appellant is not told whether the appeal is dismissed under the immigration rules or on article 8 ECHR grounds.

Finding on Material Error

15. I find that the decision is tainted by material errors of law. There is no finding that article 8(1) is engaged, despite findings that family relationships exist. There is no analysis of the appellant's potential article 8 ECHR rights. The assessment of proportionality is wholly lacking.

16. The failure of the First-tier Tribunal to address and determine the engagement of article 8 ECHR constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply. The decision must be set aside in its entirety.

REMITTAL TO FT

17. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

18. In this case I have determined that the case should be remitted because of the extent of the fact finding exercise which is still necessary to ensure the Appellant has an opportunity to put his case to the First tier Tribunal. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.

19. I consequently remit the matter back to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Immigration judge other than Judge AA Wilson.

Decision

20. The decision of the First-tier tribunal is tainted by material errors of law.

21. I set aside the decision. The appeal is remitted to the First Tier Tribunal to be determined of new.

Signed

Date 27 October 2015

Deputy Upper Tribunal Judge

Doyle