IAC-FH-CK-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05698/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th January, 2016	**On 27th January 2016**
Given extempore	

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAJA HASSAN ABBAS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clark, Home Office Presenting Officer
For the Respondent: Mr R Solomon, Counsel instructed by Polpitiya & Co Solicitors

DECISION AND REASONS

1. In this appeal the appellant is the Secretary of State for the Home Department and to avoid confusion, I shall refer to her as being "the claimant".

2. The respondent is a citizen of Pakistan, born on 15th January, 1962. He arrived in the United Kingdom in January, 1995 and claimed asylum. His claim was refused on 8th October, 1997. He was served with form IS.82E

on 31st May, 1997 and he remained in the United Kingdom without leave. On 5th August, 2014 application was made on his behalf for leave to remain based on his family and private life in the United Kingdom. His application was refused by the claimant and he appealed to the First-tier Tribunal.

3. The appeal was heard by First-tier Tribunal Judge Alan J M Baldwin sitting at Hatton Cross on 17th July, 2015. He noted that there was now DNA evidence from which he subsequently made findings that children the respondent claimed were his were almost certainly related to him as his children and he dealt with an issue which concerned the claimant relating to the use of the name Singh on the birth certificates.

4. The judge refers to the Immigration Rules relating to Article 8, but then proceeded to consider the appeal outwith the Immigration Rules and he purported to allow the respondent's appeal on the basis that the appellant could not meet the requirements of the Immigration Rules, because he did not have sole responsibility for his children and his immigration status and the use of aliases weighs against him. He found that the interests of the appellant's children were such that it would be disproportionate to remove the respondent.

5. Dissatisfied with that decision the claimant sought and was granted permission to appeal to the Upper Tribunal. The claimant points out in her grounds that the judge had failed to consider the respondent's case under the Immigration Rules prior to making an assessment under Article 8 outside those Rules.

6. In addressing me today Mr Clark suggested that the whole approach of the judge was wrong and fell foul of the guidance given in *SSHD v Bossade* [2015] UKUT 00415 and *SSHD v SS (Congo)* [2015] EWCA Civ 387. Judge Baldwin should, he suggested, have first considered whether or not the respondent could bring himself within the Immigration Rules and then considered whether there were any compelling circumstances such as would permit the judge to allow the respondent's Article 8 appeal outside the Rules. The proportionality consideration undertaken by the judge was flawed, he suggested, because the public interest needs to be considered in the light of the Rules.

7. Mr Solomon urged me to find that there was no error and suggested that the judge had considered the Immigration Rules at paragraphs 16 and 25 of the determination and was entitled to conclude at paragraph 25 that the respondent could not satisfy the Rules and to go on to find that the respondent's removal would be proportionate. He suggested that there is a muddling of the consideration of the Article 8 proportionality, but the judge has nonetheless undertaken a proportionality exercise and noted that the respondent and his wife have not only different nationalities, but also different religions such that he is a citizen of Pakistan and a Muslim and cannot live in India and his wife is a Sikh and a citizen of India and cannot therefore live in Pakistan. It would be impossible for them to live

elsewhere. They have two children aged 4 and 10 who are both British subjects and the judge was entitled to proceed as he did.

8. Counsel relied on the decision of the President sitting with Upper Tribunal Judge Frances in *Treebhawon and others (section 117B(6))* [2015] UKUT 674 (IAC) and suggested that what the judge had done complied with that decision although that decision had not been promulgated at the date of the judge's determination.

9. In response to Mr Clark suggested that the judge had erred and pointed out that in *Treebhawon* the Tribunal were considering the situation where the First-tier Tribunal had applied the Immigration Rules. The circumstances not covered by the Rules had not been considered because the judge had simply taken Section 117B(6) to enable him to consider the matter outside the Rules. However, the Rules must first be considered to identify those matters which need to be taken into consideration in considering whether there are compelling circumstances such as would justify a grant of leave outside the Immigration Rules.

10. I find that the judge did err in law for the reasons clearly given by Mr Clark and that his error cannot be said not to be material. It may well be that if the appellant's appeal is considered correctly by first considering his entitlement under the Rules that the same conclusion may result. Nonetheless I believe that in dealing with the matter in the way in which Judge Baldwin did he has erred and I am minded to remit to the First-tier.

Notice of Decision

I therefore remit this appeal to be heard by the First-tier Tribunal by a judge other than Alan J M Baldwin.

No anonymity direction is made.

Upper Tribunal Judge Chalkley