Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08265/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th May 2016	**On 15th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR CAWD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on [ ] 1981. On 18th November 2011 the Appellant was granted discretionary leave to remain in the United Kingdom under Article 8 of the European Convention of Human Rights on the basis of his relationship with [HM], a British citizen. On 13th November 2014 the Appellant applied for an extension of his discretionary

leave on the basis of his private life under paragraph 276ADE(1). In support of the application the Appellant submitted a statement which confirmed he was not in a relationship with [HM] and that the relationship was terminated following horoscopes showing that they were "strongly not compatible". The Appellant's application was refused by the Secretary of State by Notice of Refusal dated 19th February 2015.

2. The Appellant appealed and the appeal came before Immigration Judge Kainth sitting at Richmond on 15th September 2015. In a decision and reasons promulgated on 12th October 2015 the Appellant's appeal was allowed on human rights grounds.

3. On 15th October the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 6th April 2016 Acting Resident First-tier Tribunal Judge Zucker refused permission to appeal. In refusing permission Judge Zucker noted that in essence the grounds submitted that the judge "reviewed" the Respondent's discretion; made inadequate findings in relation to the Appellant's mental health and wrongly looked at the wider application of Article 8 ECHR. He found that the grounds pointed to no material arguable error of law.

4. Renewed Grounds of Appeal were lodged to the Upper Tribunal. They appear to be undated. However they relied on the original grounds submitted in support of the first application for permission to appeal. On 21st April 2016 Upper Tribunal Judge Goldstein granted permission to appeal. He noted that the application demonstrated that the Tribunal may have made an error of law with reference to Section 86(6) of the Nationality, Immigration and Asylum Act 2002 and in consequence in its approach to the Respondent's review of the application for an extension of discretionary leave and Article 8 and in terms of Article 8 of the European Convention of Human Rights and the mental health issues raised in this case. Further in appearing to find that it would be disproportionate to remove the Appellant to Sri Lanka before purporting to apply the statute may also have been a material error of law.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. I note that this is an appeal by the Secretary of State but for the purpose of continuity throughout the appeal process Mr CAWD is referred to herein as the Appellant and the Secretary of State as the Respondent. No Rule 24 response has been filed on behalf of the Appellant. The Appellant appears by his instructed Counsel Mr Briddock. Mr Briddock is familiar with this matter. He appeared before the First-tier Tribunal and he is also the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Wilding.

Submissions/Discussion

6. Mr Wilding relies on the original Grounds of Appeal. He points out that there are three Grounds of Appeal. Firstly the judge's approach to the

Secretary of State for the Home Department's review of the application for an extension of discretionary leave and Article 8 claim outside the Rules disclosed material errors of law. He submits that even though the judge purported to allow the matter with respect to Article 8, the judge has in fact sought to review the Secretary of State's decision outside of the Rules and exercise of her own discretion. He takes me to paragraph 22 of the decision which he contends is the offending paragraph where the judge states:

> "The Appellant does succeed on the basis that the Respondent should have considered the other factors as referred to in paragraph 17 above when looking at whether or not a further period of discretionary leave should have been granted".

7. He submits that that approach is unlawful and that the judge has prevented statute from reviewing the Secretary of State's exercise of discretion outside of the Rules by virtue of Section 86(6) of the Nationality and Immigration Act 2002 and that the judge did not purport to find that the Secretary of State had failed to apply any applicable policy. He submits that only then could the judge have found that the Secretary of State's decision was not in accordance with the law. He further considers that the judge's approach to Article 8 outside the Immigration Rules was contrary to a number of binding authorities, in particularly the *Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387*. He further contends it was incumbent upon the judge to use his own finding at paragraph 21 the terms of Rule 276ADE(1)(vi) as the reference point for whether or not there were compelling features outside the Rules justifying a grant of leave. He points out that paragraph 276ADE is not a part of Appendix FM as asserted by the judge. He takes me back to paragraph 22 of the judge's decision, accepting that the judge has considered the Secretary of State's discretionary leave policy but the judge has not made the final step and said that the decision was unlawful, and thereafter from paragraphs 23 to 25 the judge has failed to give due and proper consideration to the matters he had just mentioned and that paragraph 276ADE cannot be met. The judge has not, as Mr Wilding suggests, "signposted" himself as to how he would address paragraph 276ADE and the fact that the starting point weighed heavily on supporting the public interest as the issue to be considered.

8. He submits that the Article 8 analysis has been made on the basis of the discretionary leave policy and not by undertaking a proper Article 8 analysis. He refers me specifically to paragraph 24 adopting the discretion of the Secretary of State which he submits is not something that the First-tier is entitled to do.

9. Mr Wilding then turns to the second Ground of Appeal, namely that the judge's approach to Article 8 of the European Convention of Human Rights and mental health was wrong and disclosed a material error of law. He notes that at paragraph 24 the judge has concluded that it would be disproportionate to remove the Appellant to Sri Lanka on the basis of the

medical evidence on the basis that there would be a "substantial threat to the Appellant's wellbeing". He notes that it is significant that other than quoting the view of the two psychiatrists, the judge made no actual finding on what risk arises from his return to Sri Lanka other than that he would be able to reintegrate and that failure of finding constitutes a material error. He points out that despite identifying the evidence the judge has made no finding at all regarding the risk on return to Sri Lanka and, given the prominent role of the position regarding the Appellant's mental health, that is an important reason why that should have been addressed. Further he considers there is a conflict in the findings of the judge at paragraphs 21 and 24 as to whether or not the Appellant's mental health would have a material effect on his return. He points out that the judge has failed to give due and proper consideration to the position of paragraph 276ADE of the Immigration Rules when starting this consideration.

10. Finally he turns to the arguments relating to the judge's approach to Section 117B of the NIA 2002, pointing out that the Secretary of State contends that the judge's approach was unlawful. He notes the judge's conclusions at paragraph 24, and thereafter the judge has turned to paragraph 117B but submits that the judge misstates paragraph 117B pointing out that it is not a guide and that the judge describes the position failing to give weight to private life relied upon by the Appellant whilst his position was precarious and that the failure to analyse these issues in themselves constitute a material error of law.

11. In response Mr Briddock accepts that it is not open to the judge to exercise discretion on behalf of the Secretary of State but points out that he has not done that and that the conclusion at paragraph 22 is on the sole issue of acceptance as to whether or not the policy has not been followed. He emphasises that the judge has not said that he intends to allow the appeal on that basis. He then goes on to consider Article 8 which he considers the judge was perfectly entitled to do. He argues that the findings of the judge at paragraph 22 must not be taken in isolation. He says the judge has looked at the position regarding jurisdiction following the amended 2002 Act. He has consequently only allowed the appeal under Article 8 and not by exercising discretion or not by finding the decision is, or is not, in accordance with the law as this would fall outside the jurisdiction of the judge.

12. He turns then to Ground 2 and to the mental health point submitting that this is a non-starter and misleading. He submits that the arguments have to be looked at in the round and not merely restricted to issues of mental health and that he emphasises this was not an attempt to try to persuade the court that there was a breach of Article 3 of the European Convention of Human Rights. He submits that the argument put forward by Mr Wilding and in the Grounds of Appeal on this ground do not assist the Secretary of State at all and that mental health is just one of the factors that a judge has decided upon when looking at the matter under Article 8.

13. So far as paragraph 117B is concerned, he actually adopts the approach adopted by Judge Zucker when refusing permission. He contends that the judge has given sufficient reasons, being the medical evidence taken together with other factors set out, and whilst he concedes that a more structured approach might have been preferable within Section 117B, he contends it is clear that had reference been made earlier the decision would have been no different and in any event the reference to Section 117B forms part of the explanation for the finding that removal would be disproportionate. He accepts that Section 117B is not a guide but that the judge has looked at all the facts.

14. In brief final response Mr Wilding refers me to *SS (Congo)* pointing out that a failure under the Rules is relevant when giving due consideration under Article 8 outside the Rules. He specifically relies on paragraph 33 of *SS (Congo)* and he asks for all the above reasons that I find a material error of law and remit the matter back to the First-tier Tribunal for rehearing.

The Law

15. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

16. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

17. This is a complex appeal. It has a three-pronged approach. The first relates to the judge's approach to the Secretary of State's review of the application for the extension of discretionary leave and Article 8. Reference is made to the alleged prevention to the judge by statute from reviewing the Secretary of State's exercise of discretion by virtue of

Section 86(6) of the 2002 NIA. Section 86(6) was omitted by Schedule 9 of the Immigration Act 2014 with savings within the Statutory Instrument 2014/2771. However the judge has looked at this matter under Article 8 outside the Rules and not as a basis of discretion whether or not the decision was in accordance with the law. What the judge has gone on to do is to look at this matter under Article 8 outside the Rules. The consequent issue is whether or not in doing so he has misdirected himself. It is clear from paragraph 24 of the judge's determination that the judge has addressed his Article 8 analysis by perhaps inadvertently adopting the discretionary leave policy of the Secretary of State rather than by carrying out a detailed Article 8 analysis. This is not an approach that is within the power of the First-tier Tribunal Judge albeit I can appreciate in this instant case how it came about. However I am satisfied that by adopting that approach the error of law is found and that it is material.

18. Secondly, in addition it is fair to say that the judge has made no findings relating to the Appellant's return to Sri Lanka as a result of his mental health and as to whether that in itself constitutes a breach of Article 8. There is consequently a contradiction in paragraph 24 of the judge's decision.

19. Finally I accept the arguments set out by the Secretary of State in that there is a fundamental misapplication of Section 117B of the 2002 Act insofar as the approach to it by the judge is wrong in that the judge has made a finding on proportionality prior to considering Section 117B. When looked at in the round it is therefore quite possible that the judge may have come to a different conclusion with regard to his Article 8 analysis and the Article 8 analysis and findings are inadequate.

20. These factors consequently constitute material errors of law and I am satisfied that the correct approach is consequently to set aside the decision of the First-tier Tribunal and to remit the matter back to the First-tier for rehearing with none of the findings of fact to stand.

Decision and Directions

(1) The decision of the First-tier Tribunal discloses material errors of law and is set aside.

(2) None of the findings of fact are to stand.

(3) The matter is remitted to be reheard before any Immigration Judge other than Immigration Judge Kainth sitting at Taylor House on the first available date 28 days hence with an ELH of three hours.

(4) That there be leave to either party to file an up-to-date bundle of documents, both subjective and objective, upon which they intend to rely at least fourteen days prior to the restored hearing.

(5) That the Appellant do attend the remitted hearing. In the event that the Appellant requires an interpreter it is the responsibility of the Appellant's

legal representatives within seven days of receipt of these directions to notify the Tribunal.

The Appellant has previously been granted anonymity in the appeal procedure. No application is made to vary that status and the previously made anonymity direction is maintained.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge D N Harris