Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: HU/08427/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
on 8 June 2017	**on 21 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TAMOOR TARIQ
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mrs Petterson Senior Home Office Presenting Officer
For the Respondent: Mr C Bloomer instructed by AMS Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Walker ('the Judge') promulgated on 31 October 2016 in which the Judge allowed the appellant's appeal under the Immigration Rules.
2. The Secretary of State sought permission to appeal on two grounds. Permission was granted by another judge of the First-tier Tribunal on 19 April 2017 in the following terms:

> 2. The respondent seeks permission to appeal against this decision on the grounds that the judge made an arguable error of law in finding that the requirements of Appendix FM (parent route) were met. It is argued that there was no evidence referred to by the judge and no reasoning given to make the finding that the appellant had sole responsibility for any of the children as was required under R-LTRPT 2.3 or 2.4.

3. It is arguable that in failing to make a finding that the appellant had sole responsibility for the children the judge has failed to give reasons why the appellant succeeded under the Immigration Rules.

4. The respondent further argues that in his assessment, the judge has given no indication that the public interest question was part of his proportionality assessment. It is also argued that the judge's approach to the reasonableness test under EX1 is an error given the countervailing public interest was not considered.

5. It is arguable that in finding for the appellant and finding that it would be unreasonable to expect the children and their mother to continue family life with the appellant in Pakistan, the judge has failed to show that he balanced the public interest against the interests of the appellant and his family. An arguable error of law has arisen.

Error of law

3. The Judge sets out a legal self-direction regarding the burden and standard of proof at [6–12] of the decision under challenge including, from [7], in relation to Article 8 ECHR.
4. The findings of fact are set out between [25] and [33] of the decision under challenge noting at [30]:

> 30. The Appellant's partner is a British Citizen, having been born in the UK. Her two children are also British Citizens and as will be the third when born. This is a situation where Section EX.1. of Appendix FM applies. I accept from the evidence today that the Appellant has a genuine and subsisting parental relationship with his stepson and his daughter. They are now aged six and five months.

5. The Secretary of State asserts arguable legal error in that it was not open to the Judge to consider EX.1. The Judge had found at [14] that the appellant lives with his partner, her mother, and her two children. Pursuant to R–LTRPT 1.1 (d) (i) an applicant must not fall for refusal under S – LTR; Suitability leave to remain; and (ii) the applicant meets the requirements of paragraph E–LTRPT.2.2-2.4 and E–LTRPT.3.1 - 3.2.; and (iii) EX.1. applies. The Judge fails to identify evidence referring to, or adequately reason or make findings that would indicate the appellant has sole responsibility for any of the children as required pursuant to E–LTRPT 2.3 or 2.4. As one of the mandatory requirements could not be satisfied paragraph EX.1 could not lead to the appeal being allowed in isolation - *Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)* refers.
6. There was no challenge to the Secretary States assertions on this ground which is properly made out.
7. Ground 2 asserted the Judge focused exclusively upon the matters specific to the appellant's side of the scales and is completely silent in respect of any countervailing public interest when assessing the proportionality of the decision under Article 8 ECHR. It is submitted this is entirely inconsistent with the requirement to undertake a

balanced assessment as confirmed by the Court of Appeal in *MA (Pakistan) [2006] EWCA Civ 705*.

8. Although it was submitted by Mr Bloomer that any error made was not material, as findings had been set out by the Judge in the decision, it was also accepted that what appears to have happened in this matter is that the Judge set out an accurate self-direction in relation to the Article 8 element but then became 'distracted' in considering the matter by reference to Appendix FM without returning to what was required, namely to follow the Article 8 assessment in a structured and adequately reasoned manner which, when considering the proportionality of the decision, required the need to assess the competing interests before determining the proper outcome in accordance with the guidance provided in cases such as *MA (Pakistan)* and *Razgar*.
9. I find the Judge has erred in law in making material misdirection in relation to Appendix FM and also in failing to set out and explain what weight was given to the countervailing public interest as part of the Article 8 assessment. The determination is set aside.

Remaking the decision

10. It was accepted the decision could be remade on the day.
11. The burden was therefore on Mrs Petterson to establish the decision was proportionate to the legitimate aim, the remaining elements of the *Razgar* test not being in dispute.
12. The finding of the Judge that the appellant is in a genuine and subsisting parental relationship with his stepson and daughter, now aged six years and five months, and the existence of a third child born on 11 April 2017 is not disputed. It is also not disputed that the appellant has a genuine relationship with his partner, a British citizen.
13. The Secretary of State did not seek to challenge the Judges finding at [31 – 33] of the decision which are set out in the following terms:

> 31. I find it would not be reasonable to expect either of the children to leave the UK with the appellant. Their mother whilst being of Pakistani heritage is British-born and has spent all her life in the UK. Additionally she is the primary carer for her mother and who lives with them. Her mother suffers ill-health having experienced a stroke and which has left her partially paralysed. The Appellant's partner is very much involved in looking after to include bathing, cooking, washing and transporting. The Appellant's relationship with his partner has led to their estrangement from most of the partner's family apart from her mother. She is the only one providing care for the mother and so she is very much tied to this task. For this reason she cannot leave her mother. Also her eldest child is in school and has started with the education system. She does not want to remove him from this and to unknown circumstances in Pakistan.
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> 32. Also the appellant's stepson is apparently close to him and regards him as his father. He has no contact with his biological father in Pakistan.
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> 33. All of this adds up to a situation where it would not be reasonable to expect either of the children or indeed the Appellants partner to leave the UK. Given that the Appellant, his partner, his stepson and his daughter are a family unit

> they must at all times be regarded as such and remain together. This situation will be further reinforced by the arrival of the further child in May of next year.

14. It was submitted by Mrs Petterson that the children are a family unit and that it had been not been found that the family unit could return to Pakistan together. This is therefore a case in which to remove the appellant from the United Kingdom will be to split this family unit.
15. Section 117 of the Nationality, Immigration Asylum Act 2002 has been considered which sets out matters to which the Tribunal must give due consideration when considering Article 8 ECHR.
16. No countervailing factors were shown to exist in relation to the appellant's conduct that would warrant a finding that his presence in the United Kingdom was not conducive to the public good.
17. The appellant entered the United Kingdom lawfully as a student although such leave was curtailed to expire on 4 July 2012. It is accepted that such a status is precarious warranting little weight being attached to a private or arguably family life formed during such a time.
18. It was not argued before the Upper Tribunal that this meant that no weight should be placed upon the protected rights relied upon by the appellant and it was not submitted that this case is a suitable one in which the appellant should be expected to return to Pakistan to make an application to return to the United Kingdom lawfully.
19. Indeed, Mrs Petterson's closing submission, having analysed the competing interests, was to submit that this is a matter in which it is arguable that the finding to be made is one that any interference with a protected right was not proportionate.
20. Having carefully considered the competing arguments, and in light of Mrs Petterson's submissions and the failure to establish that any interference with the protected rights relied upon by the appellant is warranted in the circumstances of this case, I re-make the decision allowing the appeal pursuant to Article 8 ECHR.

Decision

21. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 20 June 2017