Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16967/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 September 2021	**On 14 October 2021**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

CHARANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lewis, Kidd Rapinet Solicitors (Harbour Exchange)
For the Respondent: Mr Stephen Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Kudhail promulgated on 25 March 2021. In that decision the judge dismissed his appeal against the decision of the Secretary of State made on 8 October 2019 to refuse him leave to remain in the United

Kingdom on the basis of his family and private life with his parents and wider family outside the Immigration Rules.

2. The appellant is a citizen of India. His case is that he has, despite his age, retained a family life with his parents and that it would be a breach of his Article 8 rights to require him to return to India. It is also his case that he has a partner who is a Russian citizen who had been recognised as a refugee in Germany and with whom he has a child. It is also said, reliant on medical reports from Dr Dhumad, that he has particular mental health problems such that he suffers from separation anxiety and panic attacks caused by being separated from his parents. The Secretary of State did not accept this and although the issue of the child was not raised in the refusal letter permission was later given at a Case Management Review or at the time of the Case Management Review at which a Visa Application Form was also produced relating to an earlier application and the appeal was proceeded on the basis that the Secretary of State had permitted the consideration of a new matter.

3. The Secretary of State was not represented at the hearing, which took place remotely, although the judge was based in Taylor House at the time. After directing herself with respect to the law paragraphs 30 to 32 the judge then set out how she wanted to approach the medical report at paragraph 34 and then in the remainder of the decision analysed the evidence making adverse inferences from a number of matters including first the failure of the Dr Dhumad to refer to whether he had considered in his first report whether the appellant might be feigning his ill-health. The judge also drew inferences adverse from the appellant's father's absence in India and also from the lack of evidence regarding his relationship with his partner and the mother of his child.

4. The judge also took note at paragraphs 45 and 46 of the chronology which had been given for the appellant's travels and where he had been in the years prior to coming to the United Kingdom, it was set out in the Visa Application Form and what he had said in his other evidence. The judge also noted at 47 that Dr Dhumad's account of the appellant's panic attacks and agoraphobia before he came to the United Kingdom was somewhat inconsistent with the chronologies put forward. She found on the evidence the appellant's witness had been inconsistent and contradictory and that he had feigned to embellish his condition to facilitate remaining in the United Kingdom with his family. She did not accept that he was the father of the child as claimed, noting that there was no witness statement from the partner and no other evidence of their relationship and that there were discrepancies regarding when the child had been born. The judge then concluded, turning to Article 8 outside the Rules, that although there was a family and private life in existence and that this was of such gravity to engage Article 8 that the proposed interference was, having regard to a balancing exercise set out at paragraphs 61 and 62, proportionate.

5. The appellant sought permission to appeal on four grounds. First that there had been procedural unfairness, in that the judge had relied on Dr Dhumad failing to state whether he had considered whether the appellant was feigning or exaggerating his symptoms, yet this was not a point which had been raised with the appellant, nor had it been put in issue by the respondent. Further, in the alternative, it is argued that this should have been seen that the omission of the phrase in the light of the second report from Dr Dhumad, which did contain the correct phrase, that this was simply an error. It is said that this is material as Dr Dhumad could have been asked to provide an additional report or to confirm why he had reached his conclusions. It is averred that this affected every aspect of the judge's findings.

6. The second ground is that the judge failed to have regard to relevant evidence which was not considered in that she noted that it was unclear why the parents would go back to India to stay in a hotel at the time of the pandemic, particularly given their age and claim that they have no family or business. The judge had made no reference to the explanation given in the appellant's father's witness statement of 6 March 2021. This averred that the judge ought to have dealt with this explanation if she rejected it. In not doing so that error undermines her decision.

7. The third ground is that it was not put to the appellant any doubts as to the credibility of the explanation for the father's visit to India.

8. The fourth ground of the judge fails to have regard to evidence from the appellant's partner stating it is averred incorrectly that she had no witness statement from his partner.

9. The fifth ground is that the judge failed properly to apply the correct legal test in assessing the Article 8 claim in failing properly to state whether he had established family life with his parents rather than simply private life.

10. The Secretary of State has responded to the grounds and the grant of permission by First-tier Tribunal Judge Parkes, by way of a letter pursuant to Rule 24. In short it is said that any errors, if there be errors, are not material.

11. Before going on to consider the grounds and the submissions that were made today it is I think sensible to record that it would appear that, for whatever reason, the judge had not had sight of the supplementary bundle which had been served on the First-tier Tribunal. It is evident that it was served on the Secretary of State and I have no reason to doubt that it was served on the First-tier Tribunal.

12. Turning then to the grounds in order. The question to my mind in respect of Ground 1 is twofold. Was the error material and, as the respondent submitted before me today, is this just simply a case of the appellant saying that I should have been put on the notice of the shortcomings in my case. It is correct that the judge did take a substantial amount of adverse

inference from the differing chronologies of the appellant's life as identified in her decision and comparing them also with the report of Dr Dhumad.

13. Is this then a case where credibility was put in issue such that the appellant should have been alert to that question? I consider that it was. It would have been evident from the chronology set out in the Visa Application Form sent to the appellant or his advisors that there were significant differences between what he said there about his movements in the past, where he had lived and where, and what was said elsewhere in his statement and the reports drawn up by Dr Dhumad. In that context it is harder to show that the reference to Dr Dhumad failing to deal with feigning was relevant or material but the point taken is not so much that Dr Dhumad's report was unreliable because it contained references to facts which were now in dispute, particularly the chronology but was a failure to deal with something with reference to feigning the illness in the report. That does not however mean that that is a material error of law.

14. Turning then to Grounds 2 and 3. I have some sympathy for the Secretary of State's submission that the evidence that the judge is said not to have considered, which was set out in the appellant's father's witness statement is relatively thin and it is fair to say that it does raise difficult points about why he would have gone on a business trip within the current circumstances of the COVID pandemic and equally, as Mr Whitwell submitted, what one might have thought that the fact that he was also suffering from another illness unrelated to COVID affecting his lower limbs would also have raised an issue; but I do not consider that the point could have been taken fairly without attention being drawn to it by the judge. Whether it is material is again more difficult to discern. The judge was not bound to accept the inference the evidence put forward but equally she needed to have a basis on which to reject it. She did not do so.

15. Ground 4. It is accepted that the judge erred in saying that she had no witness statement from the partner, but the evidence regarding the partner is to say the least problematic for a number of reasons given by the judge. There is a lack of other supporting evidence at paragraph 52 and it appears that the child is not mentioned on the birth certificate. But the difficulty I find here is in assessing materiality is that the judge has gone on to draw inferences from the absence of a witness statement per se, not just the content and that it is not sustainable.

16. Pausing there before going on to consider Ground 5, I consider that viewed together the errors identified are such that there was a procedural error which was material in this case. It is always difficult to conclude when there is a procedural error that it is not material and, viewing the decision as a whole and cumulatively, whilst perhaps no one of the grounds might in and of itself have succeeded, I am reluctantly driven to the conclusion that the grounds 1 to 4 are as a whole made out, that the decision was affected by procedural error and for these reasons has to be set aside.

17. In the circumstances therefore it is unnecessary for me to consider ground 5 and whilst I note that the judge does appear to have accepted that there was family life it seems a rather odd conclusion to have reached without having directed herself to the relevant case law given the age of the appellant, but I say no more about that.

18. In summary therefore the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. Bearing in mind the nature of the error in this case, that is the procedural error, it follows from that that what the appellant did not receive is a fair hearing. On that basis I consider that the only sensible course of action to be done is with regards to the relevant presidential guidance to remit the appeal to the First-tier Tribunal on the basis that none of the findings reached by the judge are preserved. Accordingly, the appeal would be remitted to the First-tier Tribunal to be reheard at a future date.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues; none of the findings of fact are preserved.

No anonymity direction is made.

Signed Date 15 September 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul