Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/15834/2014**

THE IMMIGRATION ACTS

Appeal without a hearing **Decision and Reasons Promulgated**
On 25th June 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Mahamedanish Pirmahamed Shaikh
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Chana promulgated on 25 July 2014, dismissing the Appellant's appeal against a decision dated 21 March 2014 to refuse to vary leave to remain as the dependent of a Tier 4 (General) student and to remove him pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006..

Background

2. The Appellant is a national of India born on 29 May 1983. The Appellant was previously granted leave as the partner of a Tier 1 (Post Study Work) Migrant valid until 7 March 2014. This was on the basis of his relationship with Ms

Nazneen Shaikh (date of birth 29 May 1986). On 5 March 2014 both the Appellant and Ms Shaikh applied for variations of leave to remain: Ms Shaikh sought further leave as a Tier 4 (General) Student, and the Appellant sought further leave as his wife's dependant.

3. Ms Shaikh was granted further leave to remain from 21 March 2014 until 14 April 2017. The Appellant's application, however, was refused with reference to paragraphs 319C(i)(1), (2), and (3) of the Immigration Rules; a consequent decision was also taken to remove the Appellant pursuant to section 47 of the 2006 Act; a combined 'reasons for refusal' letter and Notice of Immigration Decision was issued accordingly.

4. Essentially, the Respondent considered that the Appellant did not meet any of the pre-requisites to the grant of leave as the dependent of a Tier 4 (General) Student specified in paragraph 319C(i), expressing the decision in the following way in the notice of Immigration Decision:

"*Your partner is not a government sponsored student and is not undertaking a course of study with a sponsor who is either a Recognised Body or a higher education institution. Your partner's previous leave was not as a Tier 4 (General) Student or Student. Your previous leave was not as the partner of a Tier 4 (General) Student or Student undertaking a course of study longer than 6 months. As such, and fail to meet the requirements of paragraph 319C(i) of the Immigration Rules.*"

5. The Appellant appealed to the IAC. On his Notice of Appeal he indicated that did not wish to have his appeal considered at an oral hearing and wanted it to be decided 'on the papers' without a hearing. He paid the appropriate fee accordingly. The Tribunal issued Directions on the basis that the appeal was to be decided 'on the papers'.

6. The Appellant's Grounds of Appeal appended to the Notice of Appeal were in general terms. There was an assertion that the Appellant met the requirements of paragraph 319 C (i), without any particularisation or other detail. It was also asserted that "the Secretary of State has failed to have regard to the Appellant's unique circumstances. Her decision is contrary to the provisions of the European Convention of Human Rights Act", again without particular rising such an assertion any further. There were further generalised assertions such as 'misdirection', consideration of the irrelevant and an exclusion of consideration of the relevant, and a failure to exercise discretion.

7. Pursuant to Directions issued by the Tribunal the Respondent filed an Appeal Bundle. The Appellant forwarded documents for consideration by the Tribunal under cover of letters dated 11 June 2014 and 13 June 2014. The contents of the documents forwarded under the separate cover letters are substantially similar

save that the latter includes amplified Grounds of Appeal (pages 1-11). In addition to again asserting that the Appellant met the requirements of paragraph 319C(i) of the Immigration Rules – (although again without any real attempt at particularisation or engagement with the requirements of the Rules) – the amplified Grounds also included a submission based on the case of **Zhang [2013] EWHC 891 (Admin)**; a submission in respect of 'inconsistency'; and a submission pursuant to Article 8 of the ECHR. In this latter context in addition to the relationship with his wife it was identified that the couple had a daughter born in the UK on 27 February 2014 (birth certificate at page 20). There was no witness statement from either the Appellant or his wife. Nonetheless it seems to me that it would be appropriate to address any factual assertions contained in the amplified Grounds of Appeal on the basis that such a document could be read as if it were the Appellant's statement.

8. The First-tier Tribunal Judge dismissed the appeal for reasons set out in her determination. She identified the nature of the appeal, directed herself as to the burden and standard of proof, outlined the basis of the Respondent's decision, and outlined the Appellant's case as set out in the amplified Grounds Appeal. The Judge then set out her findings, from paragraph 8 onwards. She concluded that the Appellant did not meet the requirements of the Immigration Rules (paragraph 13), and also concluded that there would be no breach of Article 8 if the Appellant were to be removed in consequence of the Respondent's decision (paragraph 23).

9. The Appellant sought permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge White on 17 September 2014.

10. Judge Wright granting permission to appeal essentially on the basis that it was arguable that the Judge had proceeded on a misconception of fact so fundamental as to amount to an error of law. In particular Judge Chana had concluded that there was no evidence that the Appellant's wife had been granted variation of leave as a Tier 4 Student (paragraph 10). It appeared that she had done so by reference to documents included in the Appellant's Bundle that related to a person other than his wife (his sister), whereas there was also included in the bundle evidence of the grant of leave to his wife (page 18).

11. It is not made overt in the Appellant's Grounds of Appeal, or otherwise, as to why documents in relation to his sister (and indeed in relation to two further individuals) were included in his appeal bundle. It may perhaps be inferred that it was either or both: in support of the contention that he enjoyed a wider family/private life in the UK than merely that with which he enjoyed with his wife and child; and/or, on the assumption that the two further individuals are the Appellant's sister's husband and child, to suggest an inconsistency between the way in which the Appellant and his wife have been treated compared with a similar family.

12. Be that as it may, it is clear on the face of the documents that Judge Chana was indeed in error in her approach to the available evidence, and as such reached a conclusion based on a misconception of the materials before her.

13. The Respondent has filed a Rule 24 response dated 30 September 2014. The author of that document states that he does not have access to the documents that were before the First-tier Tribunal, and as such is not in a position to concede the appeal. However, it is acknowledged that the Respondent's records confirm the grant of leave to the Appellant's wife, and accordingly "*that the Judge may have misunderstood the facts in this case*".

Consideration

14. As indicated above, it is clear that the Judge misconceived the facts in relation to the grant of leave as a Tier 4 student to the Appellant's wife from 21 March 2014 to 14 April 2017.

15. However, this in and of itself is not material to the basis of the Respondent's decision under paragraph 319C(i) – which is rooted in the nature of the previous leave.

16. It might be said, in such circumstances, that the misconception of fact is not material to the basis of refusal. In this context Judge Chana addressed her mind to the requirements of paragraph 319C(i) as specified in the Respondent's decision letter (paragraph 11).

17. The error is, however, potentially material both to the Appellant's submission pursuant to **Zhang**, and his case under Article 8. The Judge did not engage with the submission pursuant to **Zhang**, and as regards Article 8 expressly took into account that on her evaluation of the evidence the Appellant had not "*demonstrated that his partner has leave to remain in the United Kingdom or that she is currently in this country*" (paragraph 17). Moreover, as regards the Appellant's child the Judge found that what she considered to be "*inconsistencies in the name of his partner*" were such that she could "*place no reliance on [the] birth certificate to demonstrate that the appellant has a child in this country*" (paragraph 18).

18. Moreover, although this is not a matter that has been expressly raised by the Appellant, it appears that the version of the Rules applied by the Respondent was that which existed prior to the amendment to paragraph 319C(i) from 1 July 2013 introduced by HC 244. As such, the Respondent's initial decision was not in accordance with the law because it applied the wrong Rules.

19. In all such circumstances I conclude as follows. The decision of First-tier Tribunal Judge Chana was in error of law in that it proceeded on a fundamental misconception of fact. The decision of the First-tier Tribunal is set aside accordingly. I remake the decision in the appeal. I find that the decision of the Respondent was not in accordance with the law because the wrong Immigration Rules were considered.

20. In consequence the decision on the Appellant's application remains outstanding with the Respondent, and now requires to be determined in accordance with the law. In doing so, the Respondent will need to apply the correct version of paragraph 319C(i), and should also give consideration to the extent to which the decision in **Zhang** is of analogous application to the Appellant's circumstances.

21. I make a fee award in my capacity as a First-tier Tribunal Judge. I make a full fee award because the appeal is ultimately allowed on the basis that the Respondent has not applied the correct Rules to the Appellant's application.

Notice of Decision

22. The decision of the First-tier Tribunal Judge involved a material error of law and is set aside.

23. I remake the decision in the appeal. The Respondent's decision was not in accordance with the law and the appeal is allowed to the extent that the case is remitted to the Respondent to make a decision on the Appellant's application in accordance with the law.

Deputy Judge of the Upper Tribunal I. A. Lewis 23 June 2015

To the Respondent
Fee Award *(This is not part of the determination)*

I have allowed the appeal, and in all of the circumstances make a fee award in favour of the Appellant in the sum of £80.

Judge of the First Tier Tribunal I. A. Lewis 23 June 2015