Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: HU056602015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 21 June 2017	**Decision and Reasons promulgated on 21 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JOGA SINGH
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mrs R Petterson Senior Home Office Presenting Officer.

ERROR OF LAW DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Parkes ('the Judge') promulgated on 3 November 2016 in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain as a spouse.
2. On the 2 June 2017, the Birmingham Employment Tribunal received a letter from the appellant's representatives on behalf of the Upper Tribunal (Immigration and Asylum Chamber) confirming the date of the Initial hearing

of this matter and stating "The above named attended my offices today and states that he does not have the funds for the reconsideration appeal and is happy for the Upper Tribunal to determine his appeal in his absence".

3. A letter signed by the appellant is attached to the representative's letter asking for the attendance of the representative to be excused in light of his instructions and confirming that he is content for the appeal to be determined in absence.
4. Whether a person attends an appeal hearing is a matter for them. The Tribunal understands that legal representation can be expensive and that not everybody is able to afford to pay a solicitor to represent them, although it is often the case that a substantial number of parties attend Tribunals without representation to present their own cases. No doubt the appellant was advised of the options available to him. The Tribunal accepts the request to determine the appeal in the appellant's absence.

Background

5. The Judge considered the evidence made available in support of the appeal together with the parties' respective positions following which findings were made which can be summarised in the following terms:

   i. The respondent does not dispute the length of time the appellant claims to have been in the UK although supporting evidence to show he has is almost "non-existent". The decision is not to be taken as finding the appellant has been here as long as he stated but that is not an issue that needs to be decided in the appeal [7].
   ii. Whenever the appellant arrived in the UK he did so illegally and has remained here illegally since. The appellant is clearly an adaptable and resourceful individual and during his time in the UK has acquired the ability to speak English in addition to his other skills which he could use to support himself on return to India [8].
   iii. The appellant maintains he has been disowned by his family. The Judge notes an affidavit from the appellant's father. The Judge surmises it is bizarre that a person who is sufficiently angry with the appellant for his marriage to the sponsor to disown him would "have been kind enough to make it available to the appellant for use in this appeal" [9].
   iv. Swearing an affidavit in the terms provided and then making it available is contradictory. The Judge accepted the document does exist but does not believe it genuinely represents the views of his father or whoever actually produced the document, such that the Judge attached no weight to it [10].
   v. If wrong about the affidavit and that it does genuinely reflect the appellant has been disowned by his family, the Judge states it does not advance his case. The appellant's circumstances on return to India would be the same as those when he came to the UK. His claim he could not return and support himself in India has no merit. He has demonstrated

abilities and established himself in life in the UK with skills that are entirely transferable [11].

vi. That the appellant has no convictions does not alter the fact he has lived in the UK illegally. Everything he has established has been against that background [12].

vii. EX.1 arises in this case because the sponsor does not earn sufficient to show she meets the maintenance requirements. The UK is entitled to set requirements for non-nationals to meet to be allowed to live in the UK. Maintenance requirements are not in themselves disproportionate [13].

viii. The Sponsor will experience dislocation if she moved within the UK and so the usual problems of relocation would not in themselves amount to insurmountable obstacles [14].

ix. If the couple moved to India the sponsor would have the support of the appellant who will be returning to the country and culture in which he grew up. The sponsor still speaks Punjabi. Absence of family support has not inhibited the applicant in the past there is no evidence to show, even if it were true, that it would unduly prevent his re-establishing himself or supporting the sponsor there [15].

x. The sponsor has skills that can be applied to the jobs market. The sponsors wish to live in the UK does not show she cannot live in India or adapt to doing so [16].

xi. The test is effectively the same under paragraph 276ADE(vi). The appellant has not shown he has private life of any particular strength or durability as he has not shown that with less than 20 years in the UK he cannot return to India [17].

xii. There are no insurmountable obstacles to the appellant and sponsor living together as husband and wife in India. The provisions of EX.1 and EX.2 and paragraph 276ADE are not satisfied. The appeal under the Immigration Rules cannot succeed [18].

xiii. All that the appellant seeks to rely upon has been formed in the UK whilst he is here illegally. There is nothing exceptional about the circumstances of the case to justify a grant of leave outside the Rules. Given the inability of the sponsor to meet the maintenance requirements they would need to be able to point to something in the circumstances to justify a grant of leave even though the sponsor does not earn enough [19].

xiv. The appellant can leave and reapply. The fact he does not meet the Rules does not improve any argument. There is nothing compelling about the case that would justify a finding they could succeed under Article 8 [20].

6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on the following grounds:

(i) This was an appeal concerning both an application and decision made after 06/04/2015 when all changes in appeal rights under S.82(1) of the Nationality, Immigration and Asylum act 2002 (as amended) came into force, whereby for this Appellant there was only an appeal against a

decision refusing a human rights claim, and his grounds were similarly confined by S.84(2) of the said Act;

(ii) The Judge determined the appeal 'old-style' on the basis that if he did not succeed under the Immigration Rules his appeal "may be considered under Article 8 outside the rules" and that this was "…. not a freestanding exercise…" (3);

(iii) The grounds advanced were brief in the extreme asserting that the Decision was unfair and unreasonable and citing two evidential matters relied upon;

(iv) The Decision disclosed an absence of structured assessment and reasoning of human rights grounds, both private and family life, and to that end, not helped by the permission grounds, there was shown an arguable material error of law, lack a fair assessment and decision making in the appellant's appeal.

7. The respondent opposes the application in the Rule 24 response asserting the Judge directed himself appropriately. It is further asserted the grounds identified by the judge granting permission do not identify any material error as the Judge considered matters outside the Rules adequately.

Error of law

8. The respondent in the Rule 24 response does not disagree with the analysis set out in the grant of permission that in light of the date of application and date of decision this is a matter that is to be considered under the current regime which only gave the appellant a right of appeal against the decision refusing a human rights claim, as no protection or other relevant grounds apply. The effect of the change of the appeal regime is that there is no longer a ground of appeal available to an appellant that the decision is not in accordance with the Immigration Rules.
9. The original grounds of appeal challenge the human rights decision, in accordance with the current regime, of which the Judge was aware and in respect of which the Judge determined the merits of the appeal.
10. Article 8 jurisprudence has evolved over recent years including in 2012 amendments to the Immigration Rules to introduce Appendix FM and paragraph 276ADE. There has been lengthy debate concerning the relationship between the Rules, which were said to set out the Secretary States view on how Article 8 should be applied, and Strasbourg jurisprudence. In 2014 the Secretary of State introduced statutory provisions in the Immigration Act 2014, which have been incorporated into the Nationality, Immigration and Asylum Act 2002 at section 117A-D, giving statutory effect to the Secretary of States view of the relevant factors that need to be considered in an Article 8 appeal.
11. The 'reform' process continued by the amendments to section 82 of the 2002 Act which, on the face of it, limited the grounds on which a person is able to appeal.
12. The Senior Courts have again reinforced the need for a structured approach to be taken when assessing a human rights claim of which the five questions set

out in *Razgar* are the accepted model. The fifth of the *Razgar* questions is whether a decision is proportionate. Assessing proportionality requires the decision maker to take into account all relevant facts and arguments presented by both parties to an appeal, to consider what weight can be given to each element, and then to determine which sides argument carries the greater weight. If it is the appellant's the likely outcome will be a finding the decision is not proportionate. If it is the Secretary of State, the likely finding is that the decision is proportionate. The burden of proving a decision is proportionate falling in the first instance upon the Secretary of State.

13. It is accepted at [2] that the Judge stated the burden of proof lies upon the appellant and that in order to succeed the appellant must show the requirements of HC 395 are made out on the balance of probabilities. To the extent this suggests the Judge was viewing the merits of the appeal through the Immigration Rules only, arguable error may have arisen, although had the matter been considered under the Rules the self-direction by the Judge is arguably correct.

14. In [3] the Judge noted the application was made under Appendix FM and FM – SE and paragraph 276ADE of the Rules. The Judge thereafter writes "in the event that the Appellant does not succeed under the Immigration Rules an appeal may be considered under Article 8 outside the Rules. This is not a freestanding exercise and the Immigration Rules remain relevant to the assessment of the public interest. Also relevant are the provisions of sections 117A and 117B of the 2002 Act". This is a clear indication that the Judge was aware that the Rules were a relevant factor but that an appeal may also be considered under Article 8 ECHR. The self-direction that the Immigration Rules remain relevant to the assessment of the public interest is arguably correct as the Rules set out the Secretary of States view of how Article 8 should be interpreted and applied. The direction in relation to section 117 again informs the reader of the Judges awareness of the Article 8 issue as the statutory provisions only apply when a decision-maker is considering Article 8 ECHR.

15. The Judge thereafter noted the issues and the evidence made available before concluding that the appellant had not established that there were no insurmountable obstacles to the appellant and sponsor living together as husband and wife in India, meaning the provisions of EX.1 and EX.2 and paragraph 276 ADE were not satisfied. The conclusion the appellant was unable to succeed under the Immigration Rules was one properly open to the Judge on the evidence.

16. Notwithstanding the legal technicalities of whether an individual has a right of appeal or not, the appellant applied under the Rules and had not established he could satisfy the necessary requirements to succeed. That is factually correct.

17. The Judge did not stop there, however, for in [19] the Judge states "I cannot see that there is anything exceptional about the circumstances of this case that would justify a grant of leave outside the rules. Given the inability of the Sponsor meets the maintenance requirements the Appellant and Sponsor would need to be able to point to something in the circumstances that justified a grant even though she does not earn enough". The Judge was clearly considering

whether, even though the appellant could not satisfy the requirements of the Rules, this was a case in which the decision could be found not to be proportionate. The conclusion by the Judge that there was nothing to justify a grant of leave outside the Rules is a finding the decision is proportionate.

18. As stated above, the proportionality exercise requires the decision-maker to balance the competing arguments. It would be an arguable error of law for the Judge to ignore the question of whether the appellant was able to satisfy the requirements of the Rule for those rules set out the Secretary of States argument for why, in relation to the issues covered by the Rules, it is a proportionate decision. The Judge was required to consider the provisions of the Rules and the appellant's ability to satisfy the same and then, as stated in [3], to consider the question of Article 8 outside the Rules.

19. The Judge noted the appellant could return to India to make an application to re-enter lawfully. The Judge also finds it [20] "There is nothing remotely compelling about this case that would justify a finding that they could succeed under Article 8". This is, again, a clear statement by the Judge that the appeal was being determined by reference to the only available ground of appeal that of Article 8 ECHR.

20. It is also important to note in [21] the conclusion of the Judge that "For the reasons given this appeal is dismissed". The Judge does not state the appeal is dismissed under the Immigration Rules but rather that it is dismissed for the reasons set out in the body of the determination. Those include rejection of the assertion the decision was not proportionate pursuant to Article 8 ECHR.

21. No arguable legal error is made out in relation to paragraph 2 (i) or (ii) of the grant of permission.

22. Paragraph 2 (iv) asserts the decision discloses the absence of a structured assessment in relation to private and family life but a reading of the decision as a whole shows the Judge followed a structured approach, fairly assessed the evidence made available, and has given adequate reasons for the findings made, however brief.

23. The appellant in his grounds of appeal asserted that at [9] the Judge did not place due weight on the affidavit submitted which made it clear the appellant's side of his family had severed all links with him meaning he would be destitute if returned to India. The Judge specifically notes in the first sentence of [9] "The Appellant maintains that he has been disowned by his family". The Judge notes the affidavits from his father but gives adequate reasons for why little weight was placed upon that evidence to prove the appellant's assertion [9 – 10].

24. The weight to be given to the evidence was a matter for the Judge and it has not been made out that the weight applied is in any way perverse or irrational. The Judge gives adequate reasons for why the weight he gave to the evidence was not as the appellant would have preferred it to have been.

25. It is also important to note [11] in which the Judge sets out findings in the alternative in case he is wrong about the affidavit and that it does genuinely reflect the appellant being disowned by his family. In such circumstances the Judge notes the appellant will be able to re-establish himself and that the appellants claim he could not return and support himself in India was found to

have no arguable merit, as the skills the appellant has demonstrated are transferable.

26. The appellant also refers to the finding at [20] that if he was to reapply from India his wife would not be able to satisfy the maintenance requirements of the Rules which would be a further block to the appellant's chances of ever coming back to the UK. No arguable legal error is made out. The maintenance requirements of the Rules are lawful and there is flexibility within the rules, depending on a person's individual circumstances, that may mean they do not have to satisfy the minimum income threshold. In this case, it is stated that the partner's income is approximately £12,000 a year but specified evidence was not provided to prove this figure or to show that a greater income could not be earned.

27. If the appellant cannot demonstrate an ability to satisfy the minimum income level, if he is required to do the same, that strengthens the argument by the Judge that the decision is proportionate for the minimum income level has been set by Parliament to protect the economic welfare of the United Kingdom which it is accepted as a legitimate aim pursuant to Article 8 (2) ECHR.

28. Reading the decision as a whole, I find the appellant has failed to make out any legal error material to the decision to dismiss the appeal.

Decision

29. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

30. 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 no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson
Dated the 21 June 2017