Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11034/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th July 2017	**On 2nd August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR JIGNESHKUMAR JASHBHAI PATEL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Arayn, Legal Representative
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India whose appeal was dismissed on human rights grounds and under the Immigration Rules by First-tier Tribunal Judge Solly in a decision promulgated on 10th November 2016. A part of the Appellant's case was if he was returned to India he would be killed by his father. Likewise his wife would also be killed by her family. The judge did not believe that the account was credible and went on to dismiss the appeal.

2. Unfortunately the judge said that the standard of proof is on the balance of probabilities. That obvious error resulted in grounds of application being lodged and permission to appeal granted. A Rule 24 notice was lodged submitting that even if the correct standard had been applied that given the glaring inconsistencies in the Appellant's and his partner's account even on the lower standard it was not arguable that the judge could have come to any different conclusion.

3. Thus the matter came before me on the above date.

4. Before me Mr Arayn submitted that the error was material and there may well have been different findings by the judge if she had applied the correct standard of proof. He emphasised that the difference in the standard of proof namely the balance of probabilities and the reasonable degree of likelihood was considerable. He argued that the decision should be set aside and remitted to the First-tier Tribunal. He accepted that the Grounds of Appeal to the First-tier Tribunal did not include Article 3 but the Appellant had said in his statement that he was "scared and apprehensive". It was clear from what the Appellant had said in oral evidence that there was an obvious human rights point which the judge was duty-bound to take.

5. For the Home Office Ms Isherwood emphasised the clear factual findings made by the judge. Accordingly, even though the judge did fall into error in not applying the correct standard of proof this had made no difference to the outcome of the appeal.

6. I reserved my decision.

Conclusions

7. The parties agreed before me that the judge fell into fundamental error in treating the Appellant's claim that he would be killed if he was returned to India as a claim which correlated to proof on the balance of probabilities. As the grounds of application say the Appellant had raised issues which were to be considered through the prism of an Article 3 assessment, which the judge did not do. As such the judge fell into material error.

8. Ms Isherwood put forward a strong argument that, irrespective of the standard of proof, the evidence between the Appellant and his wife was simply not reconcilable (judge's finding at paragraph 31). The Appellant had not even answered a question in cross-examination (paragraph 32). Nevertheless it seems to me unarguable that the error made by the judge was a fundamental one. The grounds of application are entirely correct to say that the judge should have made factual findings through the prism of Article 3. By not doing so it seems to me that the Appellant has not had a fair trial and of course the Upper Tribunal must be the guarantor of that. If there is any doubt in the matter (and there is a doubt here given the material evidential discrepancies) that doubt is to be resolved in favour of the Appellant who complains of the error. It seems to me that the factual findings made by the judge cannot be relied on because they are tainted

by the fact that she used the wrong standard of proof in determining those facts. As such this judgment is not safe and cannot stand.

9. It therefore seems to me that the appropriate course of action is to set aside the decision in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of the judicial fact-finding necessary for a decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. In that connection Ms Isherwood told me that the Appellant's wife has an entirely similar claim to that of the Appellant and under reference to file number HU/01459/2017 an appeal in respect of the Appellant's wife's case has been set down for a full hearing at Birmingham on 26th September 2017. It would seem appropriate that consideration be given to consolidating these appeals in terms of the Procedure Rules.

Notice of Decision

10. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

11. I set aside the decision.

12. I remit the appeal to the First-tier Tribunal.

13. I see no need for an anonymity order at this time.

Signed *JG Macdonald* Date 1st August 2017

Deputy Upper Tribunal Judge J G Macdonald