Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/28955/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th May 2017	**On 31st May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

MR SALEEM BUTT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R. Manning (Counsel)
For the Respondent: Mr Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Heatherington sitting at Birmingham on 7th October 2016. The matter relates to an application to remain in the United Kingdom on the basis human rights grounds pertaining to a marriage that the Appellant had with a British citizen. The grant of permission in this case by Deputy Upper Tribunal Judge Sheridan noted that the majority of the grounds appeared to be weak. Nonetheless, because the grounds of appeal arguably showed that the First-tier Tribunal Judge had applied the wrong test by referring to the Appellant's presence in the United Kingdom

"not being conducive to the public good", then permission was granted on all grounds.

2 At the hearing before me today, Ms Manning relied on her detailed grounds of appeal dated 28th February 2017 and she also amplified those grounds at the hearing during her submissions. She said that there was an unlawful finding at paragraph 8.4 of the judge's decision. There was no question of deportation in respect of this case and so the incorrect legal test had been applied and therefore the whole decision fell to be set aside. She submitted that the matter ought to be remitted to the First-tier Tribunal. She said there were additional matters which were there for the judge to take into account as well. This was obviously a matter relating to Article 8 but there were matters in respect of the Appellant's Article 8 rights when taking into account the Appellant's wife's personal circumstances. She referred to the judge's decision which seemed to accept that the financial requirements would be met and indeed would the English language requirements if there had to be an application for entry clearance. There was a fear from the Appellant's wife of being left alone as she was the salary provider. She could not accompany the Appellant to Pakistan whilst he made an application for entry clearance.

3. It was submitted that the House of Lords decision in **Chikwamba** [2008] UKHL 40 should have been taken into account. It was submitted that the factual matrix had not been properly considered. The judge's starting point was that this was a hopeless application and he had applied the wrong test. It may have tainted the judge's decision.

4. In reply, Mr Wilding said that there was no material error of approach or error in respect of the findings or indeed in respect of the conclusions reached by the judge. The Appellant's difficulties notwithstanding the "non-conducive" phrase was that here there was no sufficient basis upon which it could be said that it would be disproportionate for the Appellant to be removed. Mr Wilding said there was no real analysis to show an identification of an error of law. It was an attempt really to give additional reasons as to why it would be disproportionate to remove the Appellant. When one reads the whole of paragraphs 8.1 to 8.4 it was said there was more than sufficient here with the judge's decision. The judge has squarely focused on proportionality and the correct test had been applied for a non-deportation case. It was submitted that the judge was well aware that this was not a deportation case requiring consideration of Rules 399 or 398 or the like. It was submitted that at its highest paragraph 8.4 of the judge's decision was not a material error of law but it was submitted it was not even an error.

5. Insofar, as the other aspect of the grounds in relation to the House of Lords decision in **Chikwamba** at that date when this application had been brought at that date the Appellant and his wife had not been married and therefore this was the basis upon which the matter had to be considered. The legal marriage happened after the application had been made. The bulk of the challenge complained about the **Chikwamba** aspect but in reality, there was no real challenge, if any, to the insurmountable obstacles to the Appellant and his wife going to Pakistan together. It was

suggestive of there being nothing disproportionate with the decision. It was submitted that the Appellant and his wife could go to Pakistan and an application for entry clearance could be made. It was a proportionate response factoring in the Appellant's own immigration history. It was a choice of the Appellant and his wife rather than a disproportionate interference with their Article 8 rights. It was submitted that there was no material error of law and that the judge's decision should stand.

6. In reply Ms Manning said that if the Appellant has to make an application he would have a prejudicial finding against him namely that the Entry Clearance Officer would look at the application and would see the First-tier Tribunal Judge's decision which says that it is not conducive to the public good to have the Appellant in the United Kingdom and that would prejudice the application. In response to my suggestion that that could be corrected by me completing a decision explaining that that would be wrong, Ms Manning quite properly conceded that that was indeed quite possible. What she said though was that her primary submission was that the issues in relation to the Appellant's wife were not taken into account when undertaking the balancing exercise. There had to be consideration and assessment of the Appellant's wife's family and indeed her private life. The Appellant's wife worked as a nurse in the role of a discharge officer. The Appellant's wife wanted to and was required to continue her work. There was reference to parts of the judge's decision the judge had not made findings in respect of. These were observations that these matters had not been assessed in the overall balancing exercise.

7. I gave the final word to Mr Wilding and he said insofar as insurmountable obstacles are concerned one wanting to carry on with their job gets nowhere near the matters which require protection in terms of protected rights for the purposes of Article 8.

8. Having considered the rival submissions which the parties have made and indeed having considered the documentary evidence, in my judgment the judge was entirely right at paragraph 2.1 to highlight and to note that the Appellant had been an overstayer since 10th July 2011. This appeal was heard by the judge in October 2016 so the overstaying was a long period of time. That factor had to be at the forefront when the judge was considering the appeal before him. It was a very significant factor and there was simply no other way to look at it. Indeed, at around the time of Ms Manning's grounds of appeal, the Supreme Court's decision in **Agyarko and Others** was also relevant. The Supreme Court has made clear that when looking at an overstayer case it is indeed highly pertinent to consider that as a vital issue.

9. The real focus in this case however is in relation whether or not there was a sufficient consideration of insurmountable obstacles or of the public interest in dealing with the overstayer aspect. That overstayer in this case happens to be married to a British citizen who is a nurse and she would have some difficulties, it appears, if she had to live on her own here in the United Kingdom.

10. The focus of the error is what the judge said at paragraph 8.4 of his decision. That states, “Furthermore the presence of the Appellant in the United Kingdom is not conducive to the public good having demonstrated a disregard for the Immigration Rules and the laws of the United Kingdom. It is undesirable to allow him to remain in the United Kingdom”. This was not a deportation case and therefore this was not the correct test.

11. I have reflected on the other parts of the decision and it has been said on numerous occasions Tribunal decisions have to be looked at in totality and not simply by taking out short extracts to the advantage of one side or another. However, in my judgment this particular aspect at paragraph 8.4 of the judge’s decision is of such fundamental importance that it needs to be given prominence when assessing whether the judge applied the correct legal test or not. Therefore, despite Mr Wilding’s persuasive submissions, ultimately I have concluded that the First-tier Tribunal’s decision is such that it does indeed show a material error of law.

12. The error of law is not one which can be disregarded. It relates to a fundamental basis in respect of the case. Although I thought about whether I could correct the error if I dismissed the Appellant’s appeal today by explaining in a decision that the judge had apparently applied the wrong test, but I have concluded that if I was to do that, I would merely be acknowledging that the wrong test had been applied. The fact that the judge applied the wrong test means that the none of the decision can stand. The whole of the findings are tainted as a consequence. The application of the deportation test for a non-deportation case shows the error was a material error.

13. As a consequence the decision of the First-tier Tribunal Judge has to be set aside in its entirety and that therefore there has to be a rehearing. The appropriate venue for the rehearing will be at the First-tier Tribunal. The rehearing will be on all issues. None of the current findings shall stand.

Notice of Decision

The appeal is allowed.
There will be a rehearing at the First-tier Tribunal on all matters.

No anonymity direction is made.

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Signed Date: 8th May 2017

Deputy Upper Tribunal Judge Mahmood