Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08276/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 8 January 2018

Decision & Reasons Promulgated
On 18 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

N
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. To preserve the anonymity order made by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

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2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Miles promulgated on 4 October 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on [ ] 1988 and is a national of India. On 14 August 2017 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Miles ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 7 November 2017 Resident Judge Zucker gave permission to appeal stating

> "2. Insofar as the grounds seek to challenge the Judge's finding that internal relocation is not a viable option, the grounds are very weak. India is a vast country and given the lack of evidence from the appellant [see para 10.14} and the evidence of the lack of interest in the appellant's family by the appellant's husband in the year preceding the appeal, together with the fact that the evidence pointed to difficulty in the police locating an individual in the state in which a particular police force operates, let alone another state, permission to appeal on this ground is refused.
>
> 3. It is arguable however that the judge materially erred in not addressing article 8 ECHR, especially since the same was raised in the grounds. Whether there is merit in this ground may well depend, in the first instance, on whether the points were taken before the Judge. The hearing at first instance is not a dress rehearsal for any onward appeal."

The Hearing

5. The Appellant did not attend the appeal nor was she represented at the appeal. I am satisfied that due notice of the appeal was served upon the Appellant and her representatives. A member of tribunal staff contacted the appellant's representative, who (in response) faxed a letter apologising for not coming to the hearing and asking for the case *"... To be dealt with without hearing [on paper]...."*. I am therefore satisfied that having been served notice of the hearing and not attended it is in the interests of justice to proceed with the hearing in the Appellant's absence as I am entitled to do by virtue of paragraph 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

6. Ms Everett for the respondent moved the grounds of appeal. I told Ms Everett that I had read the Judge's record of proceedings, which indicates that no submissions were made for the appellant's driving at article 8 ECHR, but that at the hearing the appellant's representative adopted the terms of the skeleton argument which makes specific reference to article 8

family life and section 55 of the Borders Citizenship and Immigration Act 2009.

7. Ms Everett invited me to look at the appellant's witness statement which was adopted as the appellant's evidence in chief. She told me that the witness statement does not offer any detailed evidence about article 8 family or private life. She told me that the case had been pled as if article 8 was entirely dependent upon the protection claim. She told me that the decision does not contain an error of law, and that even if there is an error of law it is not material because, on the evidence placed before the Judge, the case could not succeed on article 8 ECHR grounds.

Analysis

8. The Judge's record of proceedings indicates that no separate submission was made on article 8 ECHR grounds. The record of proceedings tells me that the appellant adopted the terms of her witness statement as her evidence in chief, she was then cross examined with a focus on sufficiency of protection and internal relocation. No questions were asked in re-examination.

9. The only manner in which article 8 ECHR was pled for the appellant was in the appellant's representative adoption of the terms of the skeleton argument. The skeleton argument makes reference to article 8 of the 1950 convention under the heading "applicable law". In paragraphs 26, 27, 28 of the skeleton argument a more detailed submission is put forward.

10. The appellant's evidence is contained in her witness statement dated 26 September 2017. The witness statement provides evidence relevant to the protection claim only. The witness statement mentions that the appellant has a child who is now 5 years of age, but the focus is entirely on the protection claim.

11. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, the Court of Appeal indicated that, although Article 8 and section 55 were mentioned in the Notice of Appeal, where no evidence had been adduced or submissions made before the First-tier Tribunal to support a claim under Article 8 of the ECHR, it could be treated as abandoned. The Court of Appeal said that even if that was wrong where there was evidential basis for the First tier Tribunal to find in the appellant's favour in those circumstances the Upper Tribunal could not be said to have erred in refusing to allow permission to appeal on that ground. Additionally, when re-making the decision following the grant of permission to appeal on an unrelated ground, section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007 did not require the Upper Tribunal to carry out a complete rehearing of the original appeal.

12. In BM (Iran) [2015] EWCA Civ 491 the Appellant sought to argue that the FTTJ failed to take into account the Respondent's policy against removal to Iran in the Article 8 exercise. The Court of Appeal held that the

First-tier could not be said to have erred in law by failing to have regard to a point that was not raised before it. It was not an obvious point and there was nothing in the case law to alert the First-tier to it, let alone support it. No evidential foundation had been laid down for it and the material before the First-tier did not even contain the policy on which the argument was based

13. It is hard to find a focus on article 8 ECHR grounds of appeal in the appellant's evidence, but the skeleton argument devotes more than a page to the article 8 ECHR grounds of appeal, which should have been addressed by the judge. That is an error of law. Section 55 of the Borders Citizenship and Immigration Act 2009 create a statutory duty on the Judge to consider the best interests of the appellant's five-year-old child. It is not obvious from the decision that the appellant article 8 ECHR claim has been considered. That is a material error of law.

14. Because the decision is tainted by material error of law I set it aside. There is no criticism of the Judge's findings in relation to the protection claim, permission to appeal on that aspect of the appellant's case has not been granted. The Judge's findings and conclusions in relation to the asylum claim and articles 2 and 3 ECHR are preserved. Because those findings are preserved, and because I have the appellant's witness statement together with the Judge's legible record of proceedings I can substitute my own decision.

My Findings

15. The Judge's findings in relation to the protection claim are preserved. Those findings can only lead me to the conclusion that the appellant's claim must be dismissed on asylum grounds; it must be dismissed on article 2 and 3 ECHR grounds and it must be dismissed on humanitarian protection grounds.

16. What is outstanding as article 8 ECHR appeal. The only evidence offered is that the appellant has a five-year-old child. The appellant's evidence is that her child cannot return to India because of the risk that she faces there. The appellant's protection claim has been refused. It has been judicially determined that the is no real risk to the appellant in India. As there is no risk to the appellant in India, there is no substance in her claim that there is a risk to her child.

17. The appellant is the primary carer for her child. There is no evidence placed before me to indicate that the appellant meets the requirements of either appendix FM or paragraph 276 ADE of the immigration rules. Because of the lack of evidence, I cannot make a finding that the appellant succeeds on article 8 grounds under the immigration rules.

18. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality

(to be found in Razgar) and said "*what has now become the established method of analysis can therefore continue to be followed...”*

19. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

20. Section 117B of the 2002 Act tells us that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

21. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4**.** In Zoumbas v SSHD UKSC it was held that there was no "*irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. ... They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being*".

22. I remind myself of the cases of *Azimi-Moayed and others (decisions affecting children; onward appeals),* [2013] UKUT 00197 and PW [2015] CSIH 36

23. Family life exists between the appellant and her young child but the respondent's decision is not a disproportionate breach of the right to respect for family life because it is not the respondent's intention to separate the appellant from her child. Her child will be returned to India with the appellant. It is in the interests of the child to remain with the appellant. The interests of the appellant's child are properly served by the respondent's decision.

24. After considering all of the evidence I still know nothing of the appellant's home, her habits and activities of daily living, her significant friendships, any integration into UK society, or any contribution to her local community. There is no reliable evidence of the component parts of private life within the meaning of article 8 of the 1950 convention before me. The appellant fails to establish that she has created article 8 private life within the UK.

25. New routines will have to be established for each member of this family, but the appellant's daughter is so young that her focus is entirely on her parents. In Makhlouf (Appellant) v SSSHD [2016] UKSC 59 Lady Hale said "*that children must be recognised as rights-holders in their own right and not just as adjuncts to other people's rights. But that does not mean that their rights are inevitably a passport to another person's rights*".

26. In the light of the above conclusions, I find that the Decision appealed against would not cause the United Kingdom to be in breach of the law or its obligations under the 1950 Convention.

CONCLUSION

27. The decision of the First-tier Tribunal promulgated on 4 October 2017 is tainted by a material error of law. I set it aside.

28. I substitute my own decision.

29. The appeal is dismissed on asylum grounds.

30. The appeal is dismissed on Humanitarian Protection grounds.

31. The appeal is dismissed on articles 2, 3 & 8 ECHR grounds.

Signed Paul Doyle Date 12 January 2017
Deputy Upper Tribunal Judge Doyle