**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/26696/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 28 January 2019** | **On 31 January 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MAGANBHAI ZAVERBHAI PATEL**
**(Anonymity Direction Not Made)**

Respondent

**Representation:**
For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Ms S Iengar (counsel) instructed by Paul John & Co, solicitors

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal.

This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Sweet, promulgated on 16 March 2018 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant is a citizen of India who was born on 1 March 1945. On 24 November 2016 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Sweet ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 3 May 2018 Judge L Murray gave permission to appeal stating

> "1. The respondent seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Sweet who in a decision and reasons promulgated on 16 March 2018 dismissed the appellant's human rights appeal.
>
> 2. The grounds assert that the Judge erred in allowing the appeal under the immigration rules when the appeal was on human rights grounds only and failing to carry out a proportionality exercise addressing section 117B of the 2002 Act. It is also argued that the Appellant did not, in fact, meet the requirements of the Immigration Rules as specified evidence of income was not provided of the financial requirements.
>
> 3. The First-tier Tribunal arguably erred in allowing the appeal under the Immigration Rules and failing to address the public interest considerations under s.117B. It is also arguable that the Judge erred in finding that the requirements were met in view of the fact that specified evidence had not been provided."

The Hearing

5. For the respondent Mr Tarlow moved the grounds of appeal. He told me that at [19] the Judge finds that the appellant meets the immigration rules, but that that finding is unnecessary and irrelevant because the only competent appeal is on article 8 ECHR grounds. He told me that the Judge has only considered the immigration rules and that his proportionality assessment was fundamentally flawed because it failed to consider the public interest under section 117B of the 2002 Act. He told me that, in any event, the Judge's finding that the appellant meets the immigration rules is unsafe, arguing that the specified evidence required by appendix FM-SE had not been produced. He urged me to set the decision aside.

6.(a) For the appellant Ms Iengar adopted the terms of the rule 24 response. She told me that the decision does not contain an error of law. She took me to the terms of the respondent's decision to refuse the appellant's application and told me that the respondent has never suggested that the appellant has not produced the evidence required by appendix FM-SE. She argued that it is conceded that appendix FM-SE

requirements were met, reminding me that the appellant's partner's income is assessed as the income of a self-employed person.

(b) Ms Iengar said that the respondent's challenge to the decision relies on an argument that [19] of the decision contains errors of fact, which, she said, it does not. Ms Iengar told me that a fair reading of [7] and [11] of the decision demonstrates that the Judge considered section 117B of the 2002 Act. She told me that the fact that the appellant meets the requirements of the immigration rules is a weighty consideration and argued that the grounds of appeal are misconceived. She asked me to dismiss the appeal and allow the decision to stand.

Analysis

7. At [17] the Judge finds that the appellant meets the requirements of appendix FM of the immigration rules. At [2] of the decision the Judge correctly focuses on the financial threshold as being a relevant consideration in this appeal. At [12] he summarises the evidence and at [17] gives reasons for finding that in the year ending April 2017 the appellant's wife's income was £19,555.

8. The respondent's decision is dated 24 November 2016. The respondent's decision clearly focuses on the financial threshold and although reference is made to appendix FM-SE, the reasons for refusal letter falls short of saying that the appellant does not produce the specified evidence. What the decision maker actually says is, that having considered the evidence, the decision maker finds that the appellant's partner did not understand the questions posed at interview. No transcript of that interview is produced.

9. It was open to the Judge to consider the evidence at the date of hearing and to make findings about the evidence produced to the respondent's decision maker. It was open to the Judge to analyse that evidence and draw the conclusion that the appellant's partner's income exceeds the financial threshold. It was open to the Judge to make a finding that the appellant's partner's earnings in the financial year ending April 2017 were £19,555. That is what the Judge did.

10. Having made those findings the Judge is correct to find at [19] that the appellant meets the requirements of the immigration rules.

11. The problem with the decision is that the Judge stops there. It is common ground that a competent appeal can only be brought on article 8 ECHR grounds. What the Judge should have done is go on to an assessment of the proportionality of the decision using the finding that the immigration rules are met as a foundation.

12. The absence of a proportionality assessment is a material error of law. I set the decision aside but I preserve the Judge's findings of fact, and use those to substitute my own decision.

The facts

13. The appellant is an Indian national born on 1 March 1945. The appellant has two children from a prior marriage. They are both adults and live in India. The appellant's wife arrived in the UK in 1997. She is a British citizen of Indian origin. The appellant's wife became a British citizen on 5 July 2016. She has two adult children from a previous relationship.

14. The appellant entered the UK in April 2014 with leave to remain until 13 December 2016. He was granted entry clearance as the spouse of his British citizen wife. On 24 November 2016 the appellant submitted an application for leave to remain in the UK as the spouse of his British citizen wife.

15. The appellant's British citizen wife has been self-employed since 2010 as a domestic cleaner. In the tax year ending April 2017 she had gross earnings of £19,555. Her earnings have increased since then.

16. The appellant lives with his British citizen wife. He has a number of medical conditions including diabetes and dementia. He struggles to look after himself independently and depends on his wife for assistance with the ordinary activities of daily living.

17. Family life within the meaning of article 8 exists between the appellant and his wife. The appellants wife's accountants wrote a letter on 23 November 2016 confirm that the appellants wife's gross earnings from self-employment for the year ending 5 April 2016 was £22,500. According to her tax return for the year ended April 2017 the appellants wife's income was £19,555. The appellant's wife has savings in a Santander bank account of £5000. The appellant's wife normally banks her income in a Halifax bank account.

The Immigration Rules

18. In the reasons for refusal letter reference is made to an interview between the decision maker and the appellant's wife. No transcript of that interview, nor any other evidence of that interview, is produced. It is clear from the reasons for refusal letter that the respondent's decision is based on the fact that the appellant's wife did not understand questions she was asked at interview.

19. What is beyond dispute is that the appellant's wife has been self-employed since 2010. The relevant part of appendix FM-SE is paragraph (A1)(A)(3)(n) - which provides that the gross amount of cash income for a self-employed person can be taken into account.

20. The documentary evidence produced included bank statements, forms SA 302, SA 100, HMRC tax payments and self-employed tax returns. The letter from the appellant's wife's accountants confirms income. Tax returns to the year ending April 2017 confirm the appellant's partner's income. The application was submitted on 24

November 2016 and was refused on the same day. It is the appellant's partner's income to the tax year ending April 2016 which is relevant.

21. The evidence before the decision maker shows that the appellant's partner has income of more than £18,600 in the tax year to April 2016. The evidence before the First-tier Tribunal demonstrates that in the tax years to April 2016 and April 2017 the appellant's partner's income was more than £18,600. At the date of decision and the date of appeal hearing the appellant's partner had sufficient income to meet the requirements of appendix FM.

22. On the facts as both the First-tier Tribunal and I find them to be, the appellant meets the requirements of the immigration rules.

Article 8 ECHR

23. 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…"

24. In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

25. 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?

26. Section 117B of the 2002 Act tells me 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.

27. The weight of reliable evidence indicates that the appellant has established article 8 family in the UK. The weight of reliable evidence tells me that the appellant meets the requirements of the Immigration Rules. In SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120(IAC) it was held that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.

28. The respondent's position is that all article 8 ECHR considerations are embraced by appendix FM. The fact that I find that the appellant meets the substantive requirements of the immigration rules indicates that if the respondent had followed his own guidance, this application would have been successful. That is an indication that the respondent has a willingness to grant leave to remain to this appellant. The refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life. The respondent's own rules indicate that the decision is a disproportionate interference with the right to respect for family life.

29. The impact of the respondent's decision would be to separate the appellant from his wife. The appellant's wife is a British citizen who has established a business in the UK.

30. Family life within the meaning of article 8 is established for the appellant in the UK. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control. On the facts as I find them to be the appellant meets the substantive requirements of appendix FM of the immigration rules. The respondent's own rules & the public's interest in immigration control indicate that there is no need to separate the appellant from his wife. The respondent's rules indicate that interference with the appellant's family life is disproportionate.

31. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) it was held that the decision in Shamin Box [2002] UKIAT 02212 is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision.

32. As the appellant meets the substantive requirements of the immigration rules. The respondent's decision must be a disproportionate interference with his article 8 rights.

33. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not

determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

34. I find that this appeal succeeds on article 8 ECHR grounds.

**CONCLUSION**

**35. The decision of the First-tier Tribunal promulgated on 16 March 2018 is tainted by a material error of law. I set it aside.**

**36. I substitute my own decision.**

**37. The appeal is allowed on article 8 ECHR grounds.**

Signed Date 29 January 2019
Deputy Upper Tribunal Judge Doyle