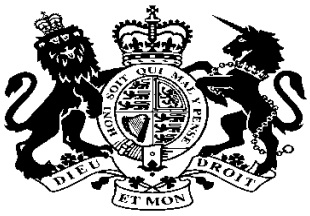

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/11603/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2nd October 2015	**On 14th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr MANDEEP SINGH SANDHA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C H Bexson (counsel) instructed by Sriharans Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. Despite what is said in the instance of the decision promulgated on 12 June 2015, 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. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Howard promulgated on 12 June 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 30 September 1977 and is a national of India.

4. On 11 December 2014 the respondent decided to remove the appellant from the UK. The appellant claimed that he has established family and private life UK and that the respondent's decision is a breach of his article 8 ECHR rights.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Howard ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 8 July 2015 Judge Lever gave permission to appeal stating inter alia

> *"….. The judge had concluded that the interference with family life would be of sufficient gravity to pass the earlier stage in Razgar. He appears to have looked little further in terms of proportionality than the contents of s. 117B and arguably by looking at family life rather than simply private life in that context may arguably have made an error of law."*

The Hearing

7. Ms Bexson, for the appellant adopted the terms of the grounds of appeal, and argued that the judge had focused entirely on section 117B and failed to carry out an adequate assessment of proportionality. She told me that although the judge accepts that a relationship exists between the appellant and his British citizen partner and her child, the judge failed to take proper account of the role the appellant plays in the life of his partner's child. She argued that the judge conflated private life and family life, and in so doing failed to properly carry out the balancing exercise required when considering article 8 ECHR. She relied on ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 and told me that inadequate consideration was given to section 55 of the Borders, Citizenship and Immigration Act 2009 had been; she argued that conflicts in the judge's findings had not been properly resolved. She urged me to allow the appeal.

8. Ms Everett for the respondent adopted the terms of the rule 24 response dated 30 July 2015. She told me that the decision does not contain a material error of law, and relied on the cases of AM (S 117B) Malawi [2015] UKUT 260 (IAC), Dube (ss.117A-117D) [2015] UKUT 00090 (IAC), and Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC). It was her position that, on the evidence presented to the judge, he had manifestly carried out an adequate balancing exercise. She urged me to dismiss the appeal and allow the judge's decision to stand.

Analysis

9. In Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC) it was held that (i) For courts and tribunals, the coming into force of Part 5A of the Nationality, Immigration and Asylum Act 2002 (ss.117A-D) has not altered the need for a two-stage approach to Article 8 claims; (ii) . Ordinarily a court or tribunal will, as a first stage, consider an appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations. Such considerations have no direct application to rules of this kind. Part 5A considerations only have direct application at the second stage of the Article 8 analysis. This method of approach does not amount to according priority to the Rules over primary legislation but rather of recognising their different functions.

10. In Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) it was held that (i) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following: (a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "*have regard*" to the specified considerations. (b) these provisions are only expressed as being binding on a "*court or tribunal*". It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself, but she is not directly bound to do so. (c) whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase "*in particular*" in s.117A(2): " *In considering the public interest question, the court or tribunal must (in particular) have regard* – ". (d) section 117B enumerates considerations that are applicable "*in all cases*", which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out "*additional*" considerations that must mean considerations in addition to those set out in s.117B. (e) sections 117A-117D do not represent any kind of radical departure from or "*override*" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in Razgar [2004] UKHL 27. Sections 117A-117D are essentially a further elaboration of Razgar's question 5 which is essentially about proportionality and justifiability. (ii) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

11. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "*unlawfully*", and any period of time during which that person's immigration status in the UK was merely "*precarious*"; those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is "*precarious*" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave; in some circumstances it

may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "*precarious*" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious.

12. Between [12] and [17] the judge analyses the evidence and find that because of the financial requirements the appellant cannot fulfil the requirements of appendix FM. At [18] and [19] the judge considers paragraph 276 ADE and concludes at [19] that the appellant cannot meet the requirements of the immigration rules.

13. Between [20] and [22] the judge finds that there are grounds for considering the appellant's article 8 ECHR rights out-with the immigration rules. The judge then considers the five-step test contained in Razgar before setting out section 117A and 117B of the 2002 act. He then correctly finds that there are more factors weighing against the appellant then weigh in his favour.

14. The judge's findings at [16] & [23] indicate that he accepts that family life exists within the meaning of article 8 for the appellant in the UK. It is clearly implicit in the decision that the judge accepts that private life within the meaning of article 8 ECHR exists for the appellant in the UK.

15. It would have been helpful if the judge had clearly separated his consideration of family life and private life, but that is no more than a stylistic criticism. The content of the decision when read with a fair, objective & impartial eye indicates that considerations of both family and private life were at the forefront of the judge's mind. It is true that the judge used section 117 of the 2002 Act as the prism through which he focused his assessment of proportionality, but that does not amount to an error of law.

16. A fair assessment of proportionality was carried out by the judge with a careful eye on statutory considerations.

17. 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.

18. It is argued that the interests of the appellant's child not been adequately considered, but the findings of the judge indicated that he was not satisfied that the appellant is *in loco parentis*. The effect of the respondent's decision would separate the appellant from his partner and her child, but the child would remain with his mother. The child's life would be changed by the absence of a regular visitor to his home, but

the arrangements for his care, well-being, education and health would remain the same.

19. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

20. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. I find that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

21. I therefore find that no errors of law have been established and that the Judge's determination should stand.

DECISION

22. The appeal is dismissed.

Signed

Deputy Upper Tribunal Judge Doyle