IAC-AH-DP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38999/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th August 2015	**On 3rd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR GURJOTDEEP SINGH
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India born on 6th March 1977. The Appellant claimed to have arrived in the United Kingdom hidden in a lorry on 3rd February 2001 and two days thereafter claimed asylum. His application for asylum was refused on 13th February 2001, his appeal dismissed on 8th February 2002 and his appeal rights became exhausted on 5th April 2002. The Appellant thereafter became an overstayer. It was not until 19th May 2014 that an application for indefinite leave to remain outside the Immigration Rules. The application was refused by Notice of Refusal dated 8th October 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Suffield-Thompson sitting at Newport on 20th January 2015. In a determination promulgated on 27th January 2015 the Appellant's appeal was allowed under Article 8 of the European Convention of Human Rights. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 3rd February 2015. Those grounds noted that the Appellant had a Sponsor who had two children one of whom was the biological child of the Appellant. It was noted that the family were Indian nationals and that none of the family had any legal right to be in the UK and that the appeal was put forward on the basis of a claim pursuant to Article 8 outside the Immigration Rules.

3. On 17th March 2015 Judge of the First-tier Tribunal Levin granted permission to appeal. Judge Levin noted that the judge's decision is recorded at paragraph 13 of her decision to allow the Appellant to assist the Sponsor by interpreting the questions for her albeit into a simplified form of English arguably amounted to a procedural irregularity constituting an error of law. Further it was arguable that the judge's findings at paragraph 35 of her decision that the Sponsor was at risk of persecution in India by reason of an honour killing were inadequately reasoned and speculative. Judge Levin also considered that it was further arguable that the judge had erred in law by failing to have regard to the public interest considerations set out in Section 117B of the 2002 Act and by failing to weigh up the public interest in the Appellant's removal in circumstances against the interference caused thereby to private and family life where neither he nor any member of his family in the UK has any legal right to remain.

4. It is on that basis that the appeal comes before me to determine whether or not there is material error of law. I note that this is an appeal by the Secretary of State but for the purpose of continuity about the appeal process Mr Singh is described herein as the Appellant and the Secretary of State is the Respondent. The Secretary of State appears by her Home Office Presenting Officer Mr Whitwell. Despite allowing a considerable period of time to elapse after the due start time for the appeal neither the Appellant nor his legal representatives attended. I was satisfied from consideration of the file that the Appellant had been properly served with notice of hearing and the appeal proceeded in his absence.

Preliminary Issue

5. Mr Whitwell sought to adduce in evidence two documents which had not been before the First-tier Tribunal. The first was an attendance note by the representative who attended before the First-tier Tribunal and the second was case law in that he sought to rely on the authority of *Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)*. I agreed to the admission of these documents into the proceedings. Mr Whitwell relied on the Grounds of Appeal. However his principal thrust was that the judge had failed to take into account the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 when there was requirement both under

the Statute and supported by case law for her to do so. He submitted that that failure alone rendered the decision unsafe. In addition he submitted that the reasoning with regard to the effect upon the Appellant's private life was inadequate but that as well constituted a material error of law. Further – albeit that he uses this as his last argument rather than his first – he points out the procedural irregularity that took place in the proceedings in that the judge allowed the Appellant's partner to act as interpreter in spite of objection by the Home Office representative and relies on extracts from the attendance note of the HOPO whereby complaints were made to the judge, firstly that the partner was giving evidence rather than interpreting and secondly that she was leading the Appellant in his question and answers when that was completely inappropriate to do so even in the more informal atmosphere of a Tribunal appeal.

6. In all the circumstances Mr Whitwell submits that there are substantial material errors of law and he asked me to set aside the decision and to remit it back to the First-tier Tribunal for re-hearing.

The Law

7. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

8. 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 of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

9. It is not the role of the Upper Tribunal to rehear the proceedings unless there have been specific directions to that effect. In this matter the Appellant albeit that he was successful before the First-tier Tribunal has failed to attend as have his legal representatives. Submissions are

consequently one-sided but I record that I have given due and full consideration to the history of this matter including the findings made by the First-tier Tribunal Judge. Having done this I am satisfied that there are material errors of law in the decision of the First-tier Tribunal Judge. It is clear that the judge was sympathetic to the position of the Appellant and his family and I note at paragraph 28 she would have made a different assessment had the Appellant been a single man but has based her decision on the basis that the Appellant has two children and a partner and he has chosen to enter a family situation that she contends is frowned upon in his culture. The Appellant has on any analysis an appalling immigration history. He overstayed by some twelve years following the exhaustion of his appeal rights in 2002 prior to making any subsequent application. Of course the Secretary of State can be criticised for having taken no steps in the interim to remove him. However there is a requirement upon an Immigration Judge to give due and proper consideration to the factors within Section 117 and in particular the Appellant's immigration history and the requirements of public interest. It is not in itself an error of law to fail to refer to Section 117A-117D considerations providing the judge has applied the test that he or she was supposed to apply according to its terms; what matters is substance, not form. That is the rationale to be found in *Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)*. The judge in this instant case has completely failed to apply that test. I do not criticise the judge for not making reference to *Dube* after all the decision was not published until a week after her determination but the principles in *Dube* held good before then and should have been applied and there is thus a material error of law in the determination.

10. In addition I agree with the Secretary of State's submission that there is inadequate reasoning in the judge's analysis of paragraph 35 of her determination and that she has based her assessment on supposition, that she has not explored or given any written consideration, how the family might be in danger if returned to India, nor has the judge considered relocation, nor made any finding on any other Article other than Article 8. I note that the suggestion regarding an honour killing were not part of the Grounds of Appeal for the First-tier Tribunal and that they only presented themselves during examination-in-chief.

11. Finally I have had the opportunity to give due consideration to the attendance note provided by the Home Office Presenting Officer. I acknowledge that because there is no attendance by the Appellant or her legal representatives that that note cannot be challenged but on the face of it, it seems to me that there is a clear procedural error in the judge allowing the Sponsor (in the light of opposition by the Home Office) to act as an interpreter and that when such interpretation took place the Home Office were entitled to allege that the Appellant was being led by the Sponsor. Consequently when looked at in the round, and certainly not on this basis alone, I am satisfied that there are substantial material errors of law in the decision of the First-tier Tribunal which makes the findings therein unsafe and I set aside the decision, remit the matter back to the

First-tier Tribunal to be reheard and give appropriate directions. I note the original hearing was in Newport. The Appellant appears now to live in London and I therefore remit the matter back to Taylor House.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal is remitted back to the First-tier Tribunal for rehearing and directions are hereinafter given for that rehearing.

Directions

(1) The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal is remitted back to the First-tier Tribunal at Taylor House to be reheard on the first available date 28 days hence to be heard before any First-tier Tribunal Judge other than Judge Suffield-Thompson. None of the findings of fact are to stand.

(2) That there be leave to either party to file an up-to-date bundle of evidence upon which they seek to rely and to serve a copy upon the other party at least seven days pre-hearing such bundle to include any skeleton arguments or authorities upon which the parties seek to rely.

(3) That the estimated length of hearing to be heard at Taylor House on the first available date 28 days hence is three hours.

(4) It is anticipated that the Appellant will in all the circumstances require an interpreter. The Appellant's solicitors must within seven days of receipt of this determination notify the Tribunal as to the language of the interpreter that is required.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris