Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/18475/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2015	**On 20 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AHSAN UDDIN AFSAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr M Biggs, Counsel, instructed by Berkleys Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State (hereafter the Respondent, as she was before the First-tier Tribunal) against the decision of First-tier Tribunal Judge Keane (the judge), promulgated on 25 June 2015, in which he allowed the appeal of Mr Afsar (hereafter the Appellant, as he was before the First-tier Tribunal) on Article 8 grounds outside of the Immigration Rules. The Appellant's appeal had been brought against the

Respondent's decision, dated 17 March 2014, refusing to vary his leave to remain in the United Kingdom and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant had initially applied to the Respondent on 2 April 2013 on the basis that he was the spouse of a British citizen to whom he was married on 13 September 2012. That application was initially refused on 6 June 2013. That decision was said to be a refusal to grant leave to remain and therefore did not carry a right of appeal. The Appellant challenged the lawfulness of this decision by way of judicial review. In due course a Consent Order was agreed and then sealed by the Upper Tribunal on 25 January 2014. It is said in this Order that the Respondent would reconsider the Appellant's case and issue him with an appealable immigration decision. As I have already mentioned, this was done on 17 March 2014.

3. At the hearing before the judge, at which a Presenting Officer did not appear on behalf of the Respondent, the Appellant's representative conceded that he could not meet the provisions of the relevant Article 8 Immigration Rules, in particular Appendix FM. On that basis the judge proceeded to consider the Article 8 claim outside of the Immigration Rules. In doing so he made a number of favourable findings of fact in respect of the relationship between the Appellant and his wife, Ms Ahmed. The judge found that there was family life, that removal would constitute an interference with that life, and, coming on to the fifth question in the Razgar approach, that in all the circumstances of this case removal would be a disproportionate breach of the family life. On this basis the appeal was allowed.

4. The Respondent sought permission to appeal, her grounds asserting that the judge had failed to take into account the relevant fact that the Appellant had not met the requirements of the Immigration Rules. The now well-known decision in SS (Congo) [2015] EWCA Civ 387 was cited in the grounds. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 21 September 2015.

The hearing before me

5. At the outset of the hearing Mr Biggs brought to my attention a bundle apparently served by those instructing him on the Upper Tribunal and the Presenting Officers' Unit on 1 December of this year. This bundle included what are termed to be grounds of appeal but what are in reality an extended Rule 24 notice including a "cross-appeal". It is said in this document that the judge was wrong not to have considered the Article 8 case within the context of the Rules, in particular Appendix FM. This was because the Appellant had never in fact been in this country unlawfully and he could therefore satisfy a relevant eligibility criteria within Appendix FM. On this basis it was said that the concession by the Appellant's representative before the judge (not Mr Biggs) was wrongly made. Mr

Clarke had not seen this document and so I gave him time to read and consider his position.

6. When the hearing resumed I asked both representatives whether they had discussed the issues and whether any views could be taken as to how to proceed. For his part Mr Biggs agreed, on a pragmatic basis, that it seemed as though the judge had indeed erred in his consideration of Article 8 outside the Immigration Rules as alleged in the Respondent's grounds of appeal. Mr Clarke could see the force in the point that if indeed the Appellant had been in this country lawfully throughout he may potentially have been able to satisfy the requirements of the Immigration Rules. If the decision of the judge was to be set aside on the basis of the error of law already identified then he would be content for the matter to be remitted to the First-tier Tribunal where all the relevant matters could be fully addressed in due course.

Decision on error of law

7. In my view the judge did materially err in law in his consideration of the Article 8 claim outside of the Immigration Rules. Whilst he clearly made reference to section 117B of the 2002 Act and various other relevant factors, unfortunately he said nothing whatsoever to the significant fact that on the concession as made before him the Appellant had not been able to satisfy the requirements of the Immigration Rules, in particular Appendix FM, but also paragraph 276ADE. It is well-settled that a failure to meet the Immigration Rules in Article 8 cases is a significant point and one which must be addressed (see, for example, Haleemudeen [2014] EWCA Civ 558 and SS (Congo). Given the significant weight which ought to be attached to a failure to meet the Immigration Rules, in my view the error of the judge was material: it cannot be said that the outcome would inevitably have been the same had the error not been committed.

8. Therefore I set aside the decision of the Judge.

Disposal

9. There was a discussion with the representatives as to what should happen next with this appeal. The usual course of action is to retain the matter within the Upper Tribunal and to remake the decision on the basis of the evidence already before me. However in this case I propose to take the unusual step, having full regard to paragraph 7 of the Practice Statements, of remitting this case to the First-tier Tribunal. The Article 8 claim needs to be considered again both under the Immigration Rules and potentially without. It is likely that additional documentary and oral evidence will be required, particularly as specific requirements of Appendix FM were not of course considered by the judge, given the concession made before him.

10. In respect of preserved findings, the judge has made a number of clear findings of fact favourable to the Appellant. Mr Clarke confirmed at the

hearing before me that the genuineness of the relationship had never been in dispute. Therefore I preserve the findings of fact made by the judge at paragraphs 7, 17 and 18 of his decision. There is one specific factual issue that remains at large and required to be determined by the First-tier Tribunal on remittal. It is contained at the very end of paragraph 13 of the judge's decision. It is said there that the Appellant had been unlawfully in this country since 20 January 2013. Now on the face of it that finding would appear (and I put it no higher) to be wrong given the nature of the judicial review proceedings in this case, the Consent Order, and the fact that the Respondent thereafter issued an appealable immigration decision on the basis of a refusal to vary leave. Such a decision could not have been properly made unless there was extant leave to vary in the first place. I do not make a finding of fact on this particular point and it will be left to the First-tier Tribunal to resolve the matter.

11. The ability of the Appellant to satisfy the financial requirements under Appendix FM (and with reference to Appendix FM-SE) also needs to be addressed on remittal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the parties

1. **The findings of fact in paragraphs 7, 17, and 18 of First-tier Tribunal Judge Keane's decision are expressly preserved;**
2. **The question of the Appellant's lawful status in the United Kingdom from 2013 is to be resolved on remittal;**
3. **The Appellant's ability to satisfy the financial requirements of Appendix FM to the Immigration Rules must be considered;**
4. **Further evidence may be adduced by either party in accordance with standard directions issued by the First-tier Tribunal.**

Directions to Administration

1. **This appeal is remitted to the Taylor House hearing centre, to be listed on a date arranged by that centre;**
2. **The remitted hearing shall not be reheard by First-tier Tribunal Judge Keane.**

No anonymity direction is made.

Signed Date: 18 January 2016

Deputy Upper Tribunal Judge Norton-Taylor