Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/30917/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 8th July 2016

Decision Promulgated
On 19th July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAVITABEN KANUBHAI PATEL
(Anonymity Direction not made)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Absent

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 Howard, promulgated on 20 November 2015 which allowed the Appellant's appeal on Article 8 ECHR Grounds.

Background

3. The Appellant was born on 8 December 1934 and is a national of India.

4. On 19 May 2014 the Appellant applied for variation of leave to remain on article 8 ECHR grounds. On 16 July 2014 the Secretary of State refused the Appellant's application.

The Judge's Decision

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

6. Grounds of appeal were lodged and on 29 April 2016 Judge Cruthers gave permission to appeal stating inter alia

> The grounds on which the respondent seeks permission to appeal of arguable. In particular, it seems to me that:
>
> The judge may not have made sufficient findings in relation to "family life" (see paragraph 9 of R(Iran) [2005] EWCA Civ 982, 27 July 2005
>
> The judge may not have sufficiently factored in the "public interest matters" specified in part 5A of the nationality immigration and asylum act 2002.
>
> The "Compelling circumstances test" from SS (Congo) and others 2015 EWCA Civ 387, 23 April 2015 may not have been sufficiently addressed.
>
> And it is not clear to me that the judge factored in the appellant's own evidence that when she came to the UK as a visitor she had intended respondent returned to her country of nationality, India (even though she was already living alone in India by that stage) -the judge's paragraph 27(1)

The Hearing

7. The Appellant did not attend the appeal nor was she represented at the appeal. Enquiries were made with the appellant's solicitors, who said that they knew about today's diet, but would not attend as they were without instructions. I am satisfied that due notice of the appeal was served upon the Appellant at the address that was given. 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.

8. For the respondent Mr Walker simply moved the grounds of appeal.

Analysis

9. The first ground of appeal is a challenge to the proportionality assessment carried out by the Judge. The respondent argues that the Judge failed to give proper consideration to section 117B(1) of the 2002 Act, and gave inadequate weight to the public interest in effective immigration control.

10. The second ground of appeal is a challenge to the Judge's finding that family life within the meaning of article 8 exists between the appellant and her adult daughter. The third ground of appeal is a challenge to the adequacy of the proportionality balancing exercise carried out by the Judge when considering this case both within the immigration rules and out-with the immigration rules.

11. There is considerable force in each of the grounds of appeal. The Judge appears to commence his findings of fact at [15] of the decision, but in reality only [17] and [18] of the decision (containing 28 paragraphs) contain any findings of fact. At [19] of the decision, the Judge finds that the appellant cannot meet the requirements of the immigration rules. Within [27] of the decision the Judge sets out the terms of section 117B of the 2002 Act, but then immediately states that the public interest relied on by the respondent is that

> …. To remove this appellant is economic

12. That statement by the Judge ignores entirely section 117B(1) of the 2002 Act, which creates the presumption that the maintenance of effective immigration control is in the public interest.

13. It is in the closing paragraph of [27] of the decision that the Judge deals with family life, but he does not adequately set out why he finds that article 8 ECHR family life is engaged.

14. In Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 28 (a dependent relative case) the First-tier Tribunal finding that there was family life as between an 85-year-old and his daughter and two grandchildren of 17 and 16 was upheld. The Appellant in that case had visited his daughter's family in England almost annually since 2007 for periods of between three and five months and had developed a strong close relationship with his grandchildren. The Upper Tribunal in Dasgupta found that the decision of the First-tier Tribunal that there was a family life was one open to the Tribunal (although the Upper Tribunal noted that family life had not been in dispute and the Upper Tribunal did not find in Dasgupta that an alternative finding would not have been open to the Tribunal). In Dasgupta the Tribunal held that the question of whether there is family life in a child/grandchild context requires a finding of

something over and above normal emotional ties and will invariably be intensely fact sensitive.

15. In Gupta, JR Petition from UT [2015] CSOH 9 the Indian claimant entered on a visitor's visa, stayed with her son and his children and sought to remain on the basis of medical difficulties. It was held that in immigration cases there was no presumption that a person had a family life, even with immediate family members: Kugathas [2003] INLR 170 applied. The First-tier Tribunal considered there was an absence of evidence that the Claimant required help with personal care; that she did not require financial support; that she had lived in India whilst her son lived in the UK for several years from 2006; that there was an absence of evidence that she had enjoyed a family life with her daughter in law and the children between 2006 and 2010; and that she had lived alone in India after her daughter in law moved to the UK in 2010. The appeal was dismissed - in effect upholding the First-tier decision that there was no family life.

16. It was also held in Gupta, JR Petition from UT [2015] CSOH 9 that a host state's positive obligation to respect family life in terms of Article 8 of the ECHR did not generally extend to reuniting families separated by voluntary relocation (paras 18 – 19).

17. The decision contains a misdirection of law because the Judge has approached section 117B of the 2002 Act incorrectly, and so infected the overall proportionality balancing exercise. The Judge's finding that family life exists between adult relatives is not supported by adequate findings of fact. Those are not just errors of law; they are material errors of law. I must therefore set the decision aside.

18. The Judge's decision cannot stand and must be set aside in its entirety. All matters must be determined of new. I consider whether or not there is sufficient material before me to enable me to substitute my own decision. Because of the paucity of findings of fact in the decision and because of the nature of the fact-finding exercise required by Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 28, I find that I cannot substitute my own decision. This case requires to be determined of new.

REMITTAL TO FT

19. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

> *(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. I find that this case should be remitted because of the nature and extent of the judicial fact finding which will be necessary to make a just decision in this case. In this case none of the findings of fact are to stand.

21. I remit the matter back to the First-tier Tribunal sitting at Hatton Cross, before any First-tier Judge other than Judge Howard.

Decision

22. The decision of the First-tier tribunal is tainted by material errors of law.

23. I set aside the decision. The appeal is remitted to the First Tier Tribunal to be determined of new.

Signed Date 18 July 2016

Deputy Upper Tribunal Judge Doyle