**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/23519/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22 March 2018** | **On 12 April 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**DEVJI MURJI PATEL**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER – NEW DELHI**

Respondent

**Representation:**
For the Appellant: Mr R Claire, Counsel, instructed by Fernandes Vaz Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Appellant to the decision of First-tier Tribunal Judge O'Malley (the judge), promulgated on 26 September 2017, in which she dismissed the Appellant's appeal against the Respondent's refusal of entry clearance dated 13 September 2016.

2. The Appellant, a national of India, had sought entry clearance to rejoin his British citizen spouse in the United Kingdom, the application having been made on 7 July 2016. The Appellant had previously resided in the United

Kingdom but had left voluntarily in 2008 before the expiry of his leave. His departure also followed a conviction of sexual assault against a minor, for which he was given a sentence of two years' imprisonment, suspended for four years, and a consequent requirement to sign the Sex Offender's Register.

3. In refusing the Appellant's application to re-enter the United Kingdom the Respondent relied on a single ground under Appendix FM, namely S-EC.1.5. of the suitability provisions. This requirement states:-

> "... that the exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance".

## The judge's decision

4. Having confirmed that there was a single issue in the appeal, namely that of the particular suitability requirement, the judge goes on to make a number of findings adverse to the Appellant. These are set out in [39]-[55]. In essence the judge finds that: the Appellant had in fact been convicted of indecent assault against a minor; that on the basis of a pre-sentence report the Appellant had displayed attitudes and behaviours giving rise to real concerns; that there had been no material rehabilitative steps undertaken by the Appellant; that he had failed to sign the Sex Offender's Register before leaving the United Kingdom in September 2008; that his conviction was not spent; and that certain other aspects of the evidence were found to be wanting.

5. The judge goes on to look at the Appellant's overall personal circumstances and finds that the Appellant had lived apart from his wife for a significant period of time, that the couple's three children were all adults, and that there were no exceptional or compelling factors in the case.

6. In making his findings and in reaching his overall conclusions, the judge on a number of occasions stated that the burden of proof rested with the Appellant.

## The grounds of appeal and grant of permission

7. As I noted at the hearing, and with due respect to their author, the grounds are in places intemperate in their use of language. It seems to me as though however much one disagrees with a decision there is no need to use terms such as "arrogance", "pomp", and "comical" when describing any judge or their approach to a case.

8. Putting that to one side, the substance of the grounds can be summarised as follows. First, it is said that the judge erred in reversing the burden of proof. Second, it is said that the judge should not have placed significant

weight on the pre-sentence report and should not have purported to put himself in the position of the sentencing judge. Third, the judge was wrong to have asserted that the Appellant's Counsel had provided information about the Appellant's failure to have signed the Sex Offender's Register. Fourth, the judge failed to have regard to a wider balancing exercise under Article 8, having regard to all relevant factors in the Appellant's case. At the end of the grounds it is suggested that certain findings were irrational.

9. Permission to appeal was initially refused by the First-tier Tribunal on 7 November 2017. Upon renewal, Upper Tribunal Judge Lindsley granted permission on 16 January 2018.

## The hearing before me

10. Having regard to the assertion in the ground that the judge wrongly attributed a submission to Counsel, Mrs H Price, who had represented the Appellant before the judge, has provided a witness statement confirming her recollection of the hearing. Mrs Price attended the hearing before me and I am grateful to her for that. In the end this point has been rendered immaterial. Mr Claire (now representing the Appellant) confirmed at the outset that as a matter of fact the Appellant had not signed the sex offenders register between May and September 2008. Insofar as what the judge has said in paragraph 45 of his decision, this was accurate. The judge had not suggested that Mrs Price had provided any further information by way of explanation for the Appellant's failure.

11. The representatives provided me with additional materials. Mr Clarke gave me a copy of the suitability requirements under Appendix FM, together with the Respondent's guidance on exclusion from the United Kingdom, dated 13 April 2017, which had been apparently relied on before the judge and cited in the grounds of appeal. Mr Claire provided me with the Respondent's guidance on the general grounds for refusal, dated 11 January 2018. Mr Clarke helpfully confirmed that there had been no changes in this guidance since the version which would have been in existence at the time of the hearing before the judge. I raised a concern that this particular guidance had apparently not been brought to the judge's attention by the Home Office Presenting Officer, as it should have been. Mr Clarke acknowledged that this was regrettable.

## Submissions

12. As regards the burden of proof issue, Mr Clarke rightly accepted that the judge had erred by apparently reversing it. It was clear that in fact the burden of making out the suitability assertion rested with the Respondent. However, Mr Clarke submitted that this error was not material to the outcome.

13. Given Mr Clarke's position, I asked Mr Claire to address the question of the materiality of the error. He submitted that if the correct approach had

been adopted it was clear that the Respondent would have failed to discharge even the initial evidential burden resting upon her. With reference to pages 70, 73, and 76 of the general grounds guidance, Mr Claire submitted that the suspended sentence imposed upon the Appellant should be treated as non-custodial. In turn, this would not have engaged S-EC.1.5 in respect of criminality. Therefore the Respondent's case would not have got off the ground, as it were. I asked Mr Claire to make submissions on the hypothetical basis that the evidential burden had been discharged by the Respondent, as the question would then arise as to whether the Appellant had provided a plausible rebuttal. Mr Claire acknowledged that a number of facts found by the judge were not disputed, including those contained in [49] (relating to the lack of evidence of rehabilitative programmes undertaken by the Appellant, either before he left the United Kingdom or in India).

14. Mr Clarke submitted that the evidential burden would have been discharged. I was asked to consider the way in which the Appellant's case had in fact been put before the judge. The exclusion guidance was inappropriate. In respect of the general ground guidance I was referred back to page 73. Mr Clarke suggested that the Appellant's situation would have come under the ambit of "Unacceptable Behaviours" in general terms, and not simply based on the fact of the conviction. I was then referred to page 74 of the guidance. This was said to be highly relevant. Mr Clarke submitted that the scope of S-EC.1.5 was intentionally broad. The matters set out in the guidance were by way of example only. The judge had been entitled to place weight on the pre-sentence report (a point which at that point was recognised by Mr Claire). The sexual assault was clearly a very serious matter. The judge was entitled to find that the Appellant had presented no evidence to suggest that any steps had been taken to rehabilitate himself or allay concerns. Although Mr Clarke acknowledged that there had apparently been no evidence about the processes relating to signing the Sex Offender's Register, this was not strictly speaking relevant in this case: it was a fact that the Appellant had not signed before leaving the United Kingdom. Taken as a whole, Mr Clarke submitted that the Appellant had simply failed to provide any plausible rebuttal to the reasonable *prima facie* case raised by the Respondent.

15. By way of reply Mr Claire submitted that the types of behaviours cited at page 87 of the general grounds guidance did not include the Appellant's circumstances. It was submitted that the judge would only have been entitled to go against the Respondent's guidance if clear reasons had been given, and this had not been done.

16. I then asked for some additional observations from the representatives on the general grounds guidance. On one view it would appear as though the guidance narrowed down the scope of S-EC.1.5. Mr Clarke submitted that this would not be the intention and that the specific points set out were indicative only. Mr Claire submitted that the guidance was very significant. He submitted that good reasons would be needed if reliance

was being placed only on a single non-custodial sentence. Having asked the representatives about the appropriate course of action should I find there to be material errors of law, Mr Claire suggested that I should allow the appeal outright because the Respondent could not discharge the evidential burden resting upon her. Mr Clarke submitted that I should remake the decision on the evidence before me and dismiss the appeal.

17. At the end of the hearing I reserved my decision.

## Decision on error of law

18. Having given very careful thought to this case I conclude that there are no material errors of law.

19. It is clear that the judge was wrong to have placed the legal burden of proof upon the Appellant. This error has been acknowledged by Mr Clarke. The real question is whether this error is material, having regard to the evidence as a whole and the judge's findings thereon.

20. As a matter of pure fact-finding, I conclude that the judge was fully entitled to find as she has done at [38] to [55]. None of these findings are in any way close to being perverse, and it is quite clear that the judge was faced with unreliable evidence and, to a large extent, a complete lack of relevant information from the Appellant's side. The judge was fully entitled to place significant weight upon the pre-sentence report and its contents. The judge was entitled to find that the Appellant had not, in fact, signed the Sex Offender's Register and that he had provided no explanation for this. She was entitled to find that the conviction was not spent for the purposes of the entry clearance application and the appeal. It was clearly open to her to find that there was no evidence of any rehabilitative activities having been undertaken by the Appellant at any time. The judge was entitled to find that no weight should be placed upon the Appellant's assertion that he would in fact sign the Sex Offender's Register if he did re-enter the United Kingdom. It is also clear that the judge took account of wider circumstances relating to Article 8 such as the Appellant's relationship with his wife and the couple's three adult children.

21. Having regard to the findings, the relevant guidance, and the natural and ordinary meanings of the words used in S-EC.1.5, it is clear enough to me that the judge would have, on any view, found the evidential burden to have been discharged. This is so for three primary reasons.

22. First, neither the Entry Clearance Officer nor the judge had relied solely upon the fact of the conviction, although this was clearly a significant factor.

23. Second, as S-EC.1.5 itself states, important considerations include, "for example", conduct, character and any other relevant reasons. "Unacceptable behaviours" would be an example of a relevant factor to be

considered. On the simple basis of the nature of the conviction, the failure to have signed the Sex Offenders Register before removal without any explanation whatsoever would of itself in my view discharge the relatively low evidential burden resting upon the Respondent. I say this even bearing in mind the fact that the sentence imposed was suspended, that being an indication that the offence was not at the higher end of the relevant scale.

24. Third, in cases such as this the Respondent's guidance is of course relevant. The judge was unfortunately not provided with a copy of the guidance in question (an all too common occurrence). Even if she had been, the general grounds for refusal guidance makes it very clear that the contents of the relevant section provides a "non-exhaustive" list of factors (page 73). At page 87, the particular bullet points listed are expressly said to be "indicative rather than exhaustive". It seems to me that this is entirely consistent with the broad ambit of the wording of the provision itself, and to this extent I agree with Mr Clarke's position. The term "conducive to the public good" is linked, by way of example only, to conduct, character or other reasons. Therefore, even within the body of the particular provision its non-exhaustive nature is made explicit. Given the content and scope of the judge's findings of fact (all of which were open to her), she would have been bound to have concluded that the evidential burden had been discharged. Thus, Mr Claire's principle submission on materiality fails.

25. The next question is whether (on the basis that the judge had approached the burden issue correctly) the Appellant had provided a plausible rebuttal of the concerns raised. Again, in light of the judge's findings I conclude that she would have almost certainly found that no such rebuttal had been advanced.

26. The absence of relevant evidence from the Appellant (all, or much of which, could have quite reasonably have been obtained in preparation before the appeal) was clearly very significant in the judge's assessment, as was the Appellant's attitude towards the sentence itself (in particular the signing of the Sex Offender's Register) and her view as to what he would do if he re-entered the United Kingdom (with particular reference to [52]). All of this, combined with the contents of the pre-sentence report, and notwithstanding the fact of the suspended statement (which is acknowledged at [48]), goes to show that the Appellant would simply not have met, even to a plausible threshold, the serious concerns raised by the Respondent. In the absence of a plausible rebuttal, the Respondent would have been able to discharge the legal burden resting upon her by default, as it were.

27. Even if it could be said that a plausible rebuttal could or would have existed, I nonetheless conclude that the judge would have gone on to find that the Respondent had discharged the legal burden upon her. All of the factual findings made would have been taken into account: the nature of the offence itself; the deep concern as to whether the Appellant would

even comply with his obligations to sign the Sex Offender's Register if he returned to the United Kingdom; and the inherently serious nature of the offence itself. On a cumulative view, this would have been more than sufficient for the judge to have concluded that the Respondent had made out her case against the Appellant.

28. Although the grounds raised other matters (as summarised previously), there is nothing of substance to them whatsoever. The sole focus of the submissions before me has been on the burden issue. There has been no suggestion by Mr Claire that the judge should have allowed the appeal notwithstanding the suitability issue. In summary, there are no additional errors of any kind in the decision.

29. In light of the above, there are no material errors and the decision of the First-tier Tribunal shall stand.

30. If it were thought that I have been too generous to the judge in concluding that the agreed error is immaterial, I would add the following observations. On the alternative scenario that I had set aside the decision and re-made it for myself (as both representatives suggested that I should if the error was material), I would have no hesitation in adopting the judge's findings of fact and concluding that the Respondent had discharged the evidential burden. I would then have concluded, based both on the judge's findings and my own judgment as to how they sat within the overall Article 8 assessment, that the Appellant had been wholly unable to provide a plausible rebuttal of the suitability concerns raised. His character and conduct clearly bring him within the scope of S-EC.1.5 and, in my view, the Respondent's guidance. In this way, the Respondent would have discharged the legal burden by default.

31. For the sake of completeness, I would have also considered the position if the Appellant had been able to shift the burden back to the Respondent. My conclusion would be that on the totality of the evidence and the findings made thereon, the legal burden would have been discharged in any event.

32. It is unarguable (and has not in fact been argued) that there are any remotely compelling or particularly significant factors in the Appellant's case which could permit him to succeed in the Article 8 notwithstanding the suitability issue.

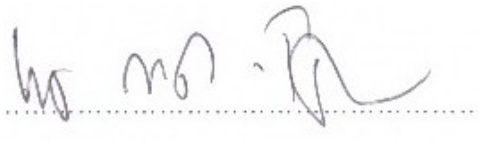
**Notice of Decision**

**There are no material errors of law in the judge's decision.**

**The Appellant's appeal to the Upper Tribunal is dismissed.**

**The decision of the First-tier Tribunal shall stand.**

**No anonymity direction is made.**

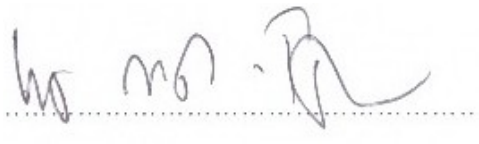
Signed  Date: 10 April 2018

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**

**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed  Date: 10 April 2018

Deputy Upper Tribunal Judge Norton-Taylor