Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07077/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 3rd April 2019	**On 29th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

AJIT [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jas Chhotu (Counsel)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Cary, promulgated on 18th September 2018, following a hearing at Taylor House on 7th September 2018. In the decision, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of India, and was born on 22nd January 1988. He is presently 31 years of age. He arrived in the United Kingdom in February 2010, as a working holidaymaker, but did not leave at the end of his two year period of lawful stay. He went on to marry a lady by the name of [CP] ("Mrs [P]"), who is a British citizen. The Hindu marriage took place on 19th July 2015 and this was followed by a civil marriage ceremony on 11th January 2016. It is a further feature of this appeal that, like Mrs [P], a son born to them subsequently, on 13th May 2017, is also a British citizen.

The Judge's Findings

3. At the hearing before Judge Cary, only Mrs [P] gave evidence. She stated that the Appellant stayed at home and looked after their son, whereas she went to work as a care assistant at the [~] Care Home, where she had been working since 2015, and she initially earned £19,000 per annum but now earned £28,000 per annum gross. In a lengthy decision, where the judge set out the relevant case law, he went on to conclude that, it was not disputed that the Appellant was in a genuine and subsisting relationship with his wife who was a British citizen (paragraph 32), but the main question here was whether there would be insurmountable obstacles to their family life continuing outside the UK, were the Appellant to be required to return, as proposed by the Respondent Secretary of State. The judge went on to consider the mitigating factors, including the medical evidence (paragraph 35), and decided that the Appellant could not succeed. Consideration was then given to Article 8 (paragraph 56) and it was concluded that it would not be disproportionate to require the Appellant to return.

4. Finally, the judge had regard to the child of the Appellant and Mrs [P], who was a British citizen, and the judge concluded that there was nothing to suggest that Mrs [P] would not be able to provide her son with safe and effective care without any input from the Appellant or that his self-development would be impaired, were they to come to an arrangement whereby she would stay in this country and he would have to return (paragraph 40).

5. The appeal was dismissed.

Grounds of Application

6. In prolix and cumbersome Grounds of Application, it was alleged that the judge had erred in law in coming to the conclusions that he did because the judge should have considered old style Grounds of Appeal, amongst other things. The Grounds of Application were rejected by the First-tier Tribunal on 10th December 2018.

7. In the Upper Tribunal, it was held on 25th January 2019, that disregarding the bulk of the grounds that had been raised, there arose, nevertheless, arguable grounds of appeal in three respects. First, consideration of the best interests of the child (at paragraph 40) by the judge was relatively brief, and did not consider the child's

British citizenship or whether the best interests are to remain in the United Kingdom or whether they could be met in India. Secondly, it was arguable that when undertaking the proportionality exercise under Article 8, the Tribunal had not adequately taken into account the medical evidence in relation to the Appellant and the impact of the same on reintegration in India for himself and his family. Third, that although not raised at all in the Grounds of Appeal, which were lodged some time after the Supreme Court's decision in **KO (Nigeria) [2018] UKSC 53**, this was an obvious point that ought to have been considered, when regard was had to Section 117B(6) of the 2002 Act, such that the Tribunal had arguably proceeded on the wrong legal basis.

Submissions

8. At the hearing before me on 3rd April 2019, Mr Jas Chhotu, appearing on behalf of the Appellant, handed up his lengthy skeleton argument. He submitted that he had taken the opportunity to speak with Mr McVeety, the Senior Home Office Presenting Officer, and it was agreed that there was an error of law in the three specific respects that the Upper Tribunal had indicated. For his part, Mr McVeety also submitted that there was an error of law in the decision, but that in remitting this case back to the First-tier Tribunal, the positive findings in favour of the Appellant, such as the fact that he was in a genuine and subsisting relationship with his wife, ought to be preserved.

9. As regards the disposal of the appeal, Mr McVeety submitted that there were a number of issues, such as whether the Appellant was at risk of ill-treatment from wider family members, which may require further evidence, so that this Tribunal ought on that basis to remit this case to the First-tier Tribunal, so that any new evidence could be considered in relation to that.

Notice of Decision

10. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. My reasons are those that had been agreed between the parties. They comprise the three specific issues raised, of its own volition, by the Upper Tribunal, in granting permission on 25th January 2019, which do require further consideration. In particular, I should add that the Immigration Directorate Instruction – Family Migration, which has been interpreted by the Upper Tribunal in **SF [2017] UKUT 00120**, should be considered. This makes clear in relation to Section 117B of the 2002 Act, that if the Appellant is not liable to deportation, then provided it is not reasonable to expect the British citizen child to leave the UK the Appellant succeeds in the appeal (see paragraphs 11 to 13). In the same way, although **KO (Nigeria) [2018] UKSC 53** makes clear that whether it is "reasonable to expect" a qualifying child to leave the UK, the focus must be exclusively upon the position of the child, the immigration status of a parent may nevertheless be relevant in assessing, "in the real world the impact a parent's removal may have on a child's best interests", but the focus must be on the position

of the child. Subject to this, the findings in favour of the Appellant should be preserved intact from the Tribunal below. Insofar as any further evidence is to be called, such as the risk to the Appellant from family members, this should be properly raised below on due notice to the Respondent Secretary of State, if it is to be pursued any further.

11. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Cary pursuant to Practice Statement 7.2(b) of the Practice Directions.

12. No anonymity direction is made.

13. This appeal is allowed.

Signed   Date

Deputy Upper Tribunal Judge Juss   25th April 2019