Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19261/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 April 2018	**On 18 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANUELL

Between

Mr SATISH KUMAR PARMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Malhotra, Counsel (instructed by SZ, Solicitors)
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Andrew on 31 January 2018 against the determination of First-tier Tribunal Judge G Jones QC who had dismissed the appeal of the Appellant seeking settlement on Article 8 ECHR family life grounds. He is married to a British Citizen by whom he has a British Citizen child. The decision and reasons was promulgated on 3 January 2018.

2. The Appellant is a national of India. The Appellant had entered the United Kingdom illegally in December 2006, somehow supporting himself thereafter. On 24 September 2014 the Appellant was arrested for the possession of indecent images of children. He was sentenced to 6 months imprisonment, suspended for 42 months, to perform 180 hours of unpaid work and to appear on the sex offenders' register for 7 years. On 29 June 2017 he married his British Citizen wife with whom he had earlier undergone a religious wedding. The appeal was dismissed on the basis that there were no exceptional circumstances. The British Citizen wife knew from almost the start that the Appellant had no right to be in the United Kingdom. The British Citizen child was not a trump card. The Appellant could return to India and make an entry clearance application. Article 8 ECHR proportionality required him to do so. Chikwamba [2008] UKHL 40 did not apply. The wife's ill health was outweighed by the need for immigration control.

3. Permission to appeal was granted because it was considered arguable that the judge had erred by ignoring Home Office guidance concerning British Citizen children, with reference to section 117B(vi) of the Nationality, Immigration and Asylum Act 2002, and had not considered the impact of the Appellant's removal on his wife and child.

4. Standard directions were made by the tribunal. There was no rule 24 notice.

Submissions

5. Ms Malhotra for the Appellant relied on the grounds of onwards appeal and grant. The best interests of the British Citizen child had not been considered. The judge had failed to engage with the Home Office policy which SF and others (guidance, post 2014 Act) Albania [2017] UKUT 120 (IAC) showed was necessary. The judge paid close attention to the Appellant's criminality but the threshold had not been crossed. The judge had speculated about other possible criminal offences. The evidence showed exceptional circumstances in relation to the Appellant's wife's serious ill health. The Appellant played an important role in the family life. The determination should be set aside and remade.

6. Mr Tarlow for the Respondent submitted that there was plainly no material error of law, even if the judge had expressed himself very freely. The evidence had not been misunderstood. The Appellant had not met the Suitability requirement of Appendix FM. The child was not a trump card as the judge had said. The Appellant could apply for entry clearance. The onwards appeal should be dismissed.

7. In reply, Ms Malhotra emphasised that entry clearance might not be available for the Appellant. The refusal was a disproportionate interference with the Appellant and his family's family life. It was not reasonable to expect him to leave the United Kingdom.

No material error of law finding

8. In the tribunal's view the grant of permission to appeal was somewhat generous, and failed to reflect the fact that the evidence in the appeal was weak and had been sufficiently addressed by the judge in the decision and reasons. Unfortunately it is typical of many appeals seen in the First-tier Tribunal and again in the Upper Tribunal involving couples seeking to rely on Article 8 ECHR grounds. Had the Appellant returned to India before the religious marriage as he should have done, the current uncertainty could have been avoided. There was no evidence that the provisions of Appendix FM could not with appropriate efforts be complied with, subject of course to the Suitability issue arising from the Appellant's conviction. The current unhappy situation was created by the parties. Compliance with the law is not a matter of individual choice.

9. The judge's finding that there were no exceptional circumstances was supported by the evidence before him. The Appellant's British Citizen wife was well aware of his lack of status before their religious wedding, yet went ahead. There was no medical evidence before the judge to show that her unfortunate illness (which is progressive) could not be adequately treated in India, where of course as is well known alternative therapies are also available. The result of the Secretary of State's decision did not require the Appellant's wife or child to leave the United Kingdom, as they are British Citizens. The Home Office Guidance discussed in SF (above) was thus not relevant, as the child would not be left behind in the United Kingdom while the rest of his family were

removed. Moreover, the child was under two years of age, so section 117B(vi) was also inapplicable. His best interests were plainly to remain with his mother, wherever she might be living. The location of family life was a question of choice for the parents. There was no suggestion that the child's best interests could not be equally served in India, where his father's family lived according to the evidence. There was no evidence before the judge that the Appellant and his wife (who share the same religious allegiance) could not live in India safely and happily. He has close family there who are supportive. He would be able to work lawfully to provide for his family. She is unable to work, wherever she might live.

10. The judge accepted and specifically took into account the fact that the Appellant is involved in looking after his wife and their child (see [24] of the decision and reasons), but found in effect that they could manage in his absence and that the effect of his absence was outweighed by the public interest in maintaining immigration control. The Appellant's wife's own evidence (see her witness statement) was that her parents and sister provide help and support with childcare. The Appellant's immigration history was a bad one as was plain. The judge thus applied MA (Pakistan) [2017] EWCA Civ 180 correctly.

11. The tribunal finds that the onwards appeal has no real substance and that there was no material error of law in the decision challenged. The judge's best interests assessment for the child as required under section 55 of the Borders, Citizenship and Immigration Act 2009 was carried out and sufficient reasons were given for the conclusions reached.

12. The Appellant and her husband have several reasonable options open to them for the continuation of their family life, i.e., to live together in India or to travel there together on a visit while entry clearance is sought or to separate on a temporary basis while the Appellant obtains entry clearance on the terms prescribed by the Immigration Rules.

DECISION

The onwards appeal is dismissed

The making of the previous decision did not involve the making of a material error on a point of law. The decision stands unchanged.

Signed Dated 11 April 2018

Deputy Upper Tribunal Judge Manuell