Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18775/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th July 2018	**On 2nd August 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KASHIF KHURSHID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr A Maqsood, Counsel; instructed by iConsult Immigration
For the Respondent: Ms A Everett, Senior Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal but I will refer to the parties by their original status before the First-tier Tribunal for ease of comprehension.

2. The Secretary of State appeals against the decision of Judge Sweet promulgated on 4th January 2018 allowing the Appellant's appeal on the basis of his Article 8 family life. The Secretary of State appealed against that decision and was granted permission to appeal by Judge Lambert in the following terms:

> "The grounds contend inadequate reasoning supporting the judge's conclusions that the Appellant satisfied the insurmountable obstacles test in paragraph EX.1 and that it was disproportionate to require him to make an entry clearance application from Pakistan. They are rendered arguable by the very brief content of paragraph 29 of the decision. The judge refers to 'the fact that it would not be reasonable to expect family life to continue in Pakistan', and goes on to state that 'there are indeed insurmountable obstacles to family life … continuing outside the UK' without any indication of the evidence or reasoning on which those conclusions are based. Nor is there any reference to Section 117B considerations. There is therefore an arguable error of law disclosed by the application."

3. I was not provided with a Rule 24 response by the Appellant but was given the indication that the appeal was resisted.

Error of Law

4. Heaving heard submissions from both representatives, I do find that there is a material error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

5. In respect of the Grounds of Appeal as drafted, Ms Everett embellished upon them to a degree, which was sensible given that the grounds appeared to me to constitute on widespread disagreement with the decision of Judge Sweet.

6. Ms Everett directed her submissions towards the judge's construction of the decision in that there was an inadequacy of reasons, most clearly displayed by the findings at paragraphs 28 and 29 and exemplified by the fact that the judge stated that it would be "very difficult to continue to support the Appellant if he returned to Pakistan in order to make an application from that country" in terms of the Sponsor's financial situation and her schedule of outgoings as seen.

7. In addition, the judge also stated succinctly that there are "indeed insurmountable obstacles to family life with his spouse continuing outside the UK", however, without any reasons supporting that.

8. In my view, these submissions and the errors outlined above are indeed correct. The decision does display an inadequacy of reasoning which makes it difficult to know why the Appellant won his appeal and why the Respondent lost.

9. In light of the decision of the Supreme Court in *R, (on the application of Agyarko & Ikuga) v Secretary of State for the Home Department* [2017] UKSC 11, albeit that the judge can and should take into consideration whether an application can be made from abroad and the likelihood of it being successful (see *Chikwamba*), it would still be necessary for an Appellant to show that they were otherwise certain to be granted leave to

enter if an application were made from outside the UK as that would result in there being "no public interest" in the person's removal. However, I cannot see any analysis by the First-tier Judge of whether the specified evidence or other requirements of Appendix FM governing entry clearance applications would be met by the Appellant were he applying from abroad and consequently, it has not been shown that the entry clearance application would be satisfied in theory.

10. Similarly, the judge has not take into account the stated public interest in its statutory form under Section 117B(1) of the Nationality, Immigration and Asylum Act 2002 in reaching his decision under Article 8 ECHR outside the rules.

11. For these reasons, in my view, the judge's decision does show an inadequacy of reasoning and does not assist an objective reader in understanding why the appeal was successful against the facts and evidence in play.

12. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

13. The appeal to the Upper Tribunal is allowed. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

Directions

14. I make the following Directions for the further administration of this appeal upon remittal.

    (1) The appeal is to be remitted to Hatton Cross for its remitted hearing.

    (2) A Mirpuri interpreter is required.

    (3) There are said to be three witnesses but of course that may be subject to change.

    (4) The time estimate given is two hours.

    (5) No special directions have been requested by either party. However, I have given an indication to the parties that attempts should be made for the Appellant's passport to be returned to him so that he may attempt to take his English language test prior to the remitted hearing before the First-tier Tribunal.

    (6) No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge