



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/39699/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 November 2015

Decision & Reasons Promulgated  
On 8 December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE APPEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

MR JAGMOHAN SINGH DHESI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr S Kandola, Home Office Presenting Officer

For the Respondent: Mr D Balroop, Counsel

**DECISION AND REASONS**

1. This is a respondent appeal but I shall henceforth refer to the parties in the original terms detailed in the decision of Judge of the First-tier Tribunal Bird following a hearing on 20 January 2015 and 11 February 2015. That decision was promulgated on 31 March 2015.

2. The appellant is a citizen of India who appealed under Section 82 of the Nationality, Immigration and Asylum Act 2002 against the decision of the respondent dated 17 September 2013 seeking to remove him from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999.
3. The appellant's immigration history was found to be one of entering the United Kingdom in 2001 and then making an application for asylum which was refused. He appealed that decision which was dismissed and he became appeal rights exhausted on 7 August 2002. It was found at the First-tier Tribunal hearing that there was some confusion regarding the appellant's immigration history at that time and whether or not another application for asylum was made and/or refused.
4. On 27 May 2010 a letter was submitted by solicitors representing the appellant making further submissions on his behalf.
5. Judge Bird records in her decision that the appellant's solicitors made an application under the legacy programme stating that the appellant's asylum claim remained outstanding. They stated that he had arrived in the United Kingdom on 1 June 2002 and had made an application for asylum on 28 June 2002. Since arrival the appellant has continuously been in the United Kingdom and his asylum application was pending since June 2002 and hence he qualified for a grant of leave to remain under the legacy arrangement. It was further asserted on his behalf that the appellant had established close and intimate links with the local community resulting in the establishment of private life and a submission that to remove him would breach his rights under Article 8 of the European Convention on Human Rights (ECHR). The solicitors once more wrote to the respondent on 9 September 2010 "chasing" their earlier letter of May 2010.
6. The respondent finally wrote to the appellant on 17 September 2013 refusing the application made in May 2010. The appellant's immigration history was set out therein and the respondent referred to a statement made by the appellant on 17 February 2011 which contained further information not contained within his solicitor's letters of May and September 2010. The appellant gave information about his wife and children in India and also about a relationship that he had with a British citizen in the United Kingdom with whom he had been cohabiting since 2004.
7. The respondent did not accept that the relationship with his British citizen partner was genuine or that Appendix FM was engaged. In considering whether or not the appellant had established private life in the United Kingdom the respondent noted that the appellant had no business or property and further that he did not have any permission to work and was not a student. He was 53 years old and had spent the majority of his life in India and remains fluent in his native tongue. The appellant could return to his native country and re-establish both family and private life there. The appellant's application was also refused under paragraph 276ADE of the Immigration Rules HC 395 (as amended).
8. The appellant appealed that decision resulting in the above-mentioned hearing in the First-tier Tribunal before Judge Bird. In her decision she allowed the appellant's appeal under the "Human Rights Convention".

9. The judge accepted the evidence before her from the appellant, his partner and her daughter to the effect that the appellant had been with his partner and cohabiting since 2005 having met at the home of the appellant's aunt. The appellant has no ties in India since his divorce from his first wife in 2005. The appellant's partner works and the appellant provides support by looking after the home. He also looks after his partner's daughter and attended to any matters arising in relation to her schooling. The partner could not go to India to live because her daughter would be unable to accompany her there.
10. The nub of the judge's findings can be seen at paragraph 28 of her decision which states:-

"28. Whilst the appellant has been cohabiting with his partner for a number of years, they are not married but have been living in a relationship akin to marriage for nearly ten years. The appellant has also been a father figure in the life of his partner's daughter who has not had any contact with her own biological father since 2005. The appellant therefore can in the circumstances be said to enjoy a family life with his partner and her daughter. Even if this were not the case I find that substantial private life has been established by the appellant since his arrival in the United Kingdom in 2002 and Article 8 is therefore engaged."

11. The judge also found at paragraphs 31 and 32 of her decision the following:-

"31. From this the respondent concluded that the appellant had an appeal dismissed on 19 September 2002 and that the appellant was appeal rights exhausted sometime in 2003. This certainly is true for the application made in 2001 but not for the application made in 2002. From Annex F it is clear that the Adjudicator's decision of 16 October 2001 in relation to the appellant's appeal dated 3 August 2001 was set aside on appeal and J Barnes Vice President decided that the appeal should be heard afresh (see paragraph 2 on page 2 of Annex F2). The appeal was heard afresh on 9 September 2002 and dismissed. This appeal was against the respondent's refusal of 19 July 2001.

32. The appellant appears to have made another application which was considered and refused on 12 May 2003 (see Annex H to the respondent's bundle). From this information I have before me there is no indication that the refusal was ever served on the appellant. If there was no effective service then that application remains outstanding. The other relevant factor in the appellant's immigration history is the application made by Malik Law Solicitors on 27 May 2010 for the appellant to be allowed to remain on the basis of his private life. A letter asking for an update was sent on 9 September 2010. No response was received from the respondent until his application was refused on 17 September 2013 and a decision to remove him taken under Section 10 of the Immigration and Asylum Act 1999. There was therefore some delay between 2010 and 2013 that could not be attributed to the appellant."

12. At paragraph 38 of her decision the judge stated:-

“38. The appellant’s partner has been living in the United Kingdom for a number of years and has her own home which she bought in 2005 and is in gainful employment. Her daughter is completing a university degree. Any removal to India would be an extreme upheaval given these circumstances. Whilst the appellant’s partner has lived in India in the past, her daughter has not. The appellant from the evidence that I heard because of his relationship severed contact with his ex-wife and as a consequence his relationships with her family and his own family have been compromised. The appellant’s evidence is that he has low employment prospects and has no accommodation. His partner will similarly have difficulty in finding employment there. Given these circumstances I find that it would be unreasonable to expect his partner with her daughter to accompany him to India to an uncertain future.”

13. Finally she dealt with the issue of delay in the appellant’s application to be processed at paragraph 39 which states:-

“39. The balance is between the appellant’s rights and that of the requirement to maintain an effective immigration control in the interests of the general public. Given the particular circumstances of this appellant’s claim I find that the public interest would not be best served in the removal of this appellant. Although it is claimed that the appellant has been in the UK without lawful authority since 2003, I have seen no evidence to show that the appellant was ever served the letter of 12 May 2003. For all intents and purposes from the appellant’s point of view that application remained outstanding. The appellant could of course be criticised for not chasing the matter up but he had placed it in the hands of his legal representatives. There is no information before me to say that they were ever served with the refusal. When the appellant applied in 2010 that application was not decided on until 2013.”

14. The respondent sought permission to appeal the judge’s decision which was granted by Upper Tribunal Judge Smith in a decision dated 17 July 2015 which states:-

“1. The appellant appeals against the respondent’s decision dated 17 September 2013 to remove him from the UK. The appeal was allowed by First-tier Tribunal Judge Bird in a decision promulgated on 31 March 2015 (“the Decision”). The respondent now seeks permission to appeal.

2. The Judge allowed the appeal on the basis of Article 8 ECHR finding in the circumstances of the case that removal would be a disproportionate interference with the appellant’s family life with his British citizen partner and her daughter and the appellant’s private life (the appellant has been in the UK since about 2001). The Judge also took into account the respondent’s delay in dealing with the appellant’s case.

3. Ground 2 raises the issue of whether the Judge has engaged with the provisions of section 117 Nationality, Immigration and Asylum Act 2002. Although section 117 is not specifically mentioned in the Decision, there is reference to the need to maintain immigration control [39]. However, the Judge's findings in relation to the proportionality of removal in relation to the interference with the appellant's private life at [39] are unclear. It is not clear whether the Judge accepts that she is required to give limited weight to the private life on the basis that this was formed when the appellant was in the UK unlawfully and it is not clear whether the Judge considered that the failure to serve the letter of 12 May 2003 had any effect on the weight to be accorded to the private life and if so why. Similarly, the Judge finds at [38] that it would be unreasonable to require the appellant's partner and her (adult) child to return with the appellant to India. She does not, however, consider the public interest or reach any finding that the removal would therefore constitute a disproportionate interference with that family life.
  4. The Article 8 analysis in this case was considered against the backdrop of the Article 8 case law and not the Immigration Rules ("the Rules"), it having been found that the Rules did not apply [11]. Notwithstanding the concession made by the respondent [11], there is also an arguable error of law in that approach in light of the judgment of **Singh v SSHD [2015] EWCA Civ 74**. Although the judgment post-dates the hearing of the appeal (by one day), it pre-dates the promulgation of the Decision.
  5. There is therefore an arguable material error of law in relation to the approach taken to Article 8 ECHR - whether that should be within or outside the Rules, and whether the Judge has properly taken into account the public interest in maintaining effective immigration control and the other factors in section 117 when reaching her conclusions as to the proportionality of interference with the appellant's private and family life. Although Ground 1 appears to amount to no more than a disagreement with the Judge's findings, I do not confine the grant of permission to Ground 2 since some of those findings may need to be revisited when considering Ground 2."
15. Thus the appeal came before me today.
  16. Mr Kandola relied upon the grounds seeking permission to appeal. He urged me to accept that the judge erred in assessing the appellant's circumstances by placing determinative weight upon the delays that have occurred in his case and whilst this may be a relevant and a potentially weighty factor it is not one that is determinative. The material to be considered is the continuation of those rights protected under Article 8 and whether those rights could be continued in comparative terms outside the United Kingdom. It was the appellant's evidence that he would have low employment prospects and no accommodation were he to return to his country of origin because his relationship with his family has been compromised. Mr Kandola argued that the relevant factor is in fact the appellant's ability (and his family

members) to reintegrate into Indian society. There was nothing within the appeal to suggest that the appellant, his partner or her child would be unable to so integrate. The appellant could have had no legitimate expectation of remaining in the United Kingdom and his presence has been wholly precarious (or potentially unlawful). The relationships that the appellant has developed whilst in the United Kingdom have been entered into with the knowledge that his initial claim for asylum had been refused. It was open to the appellant to make an application for entry clearance on the basis of his relationship with his partner should he wish to do so.

17. Further the judge's decision and reasons disclose limited engagement with the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002. He relied on the authority of **Dube (ss117A-117D) [2015] UKUT 90 (IAC)** in asserting that Section 117 is not "an à la carte menu for consideration that it is at the discretion of the judge to apply or not apply". It was incumbent upon Judge Bird to fully express the public interest in this case and in light of the factual matrix found the public interest factors weigh in favour of removal. Further having concluded that the public interest would not demand the appellant's removal the judge has failed to state why this is the position and any delay in the processing of the appellant's claim, relating to administrative issues, does not dissolve the public interest in maintaining effective immigration control. The judge has failed to establish why it does.
18. Moreover, the judge failed to deal with issues relating to financial independence and the appellant's ability to speak English. There is no reason why the appellant should not in due course make an application for entry clearance. I was invited to remake the decision here on the basis of the factual matrix and it was urged upon me that a proper application of the law should result in this appeal being dismissed.
19. Mr Balroop urged me to accept that the judge had given adequate reasons for coming to the decision that she did and was entitled to conclude that there had been no effective service of a decision following his application which was refused on 12 May 2003. The appellant developed his private and family life whilst awaiting the outcome of his application and the judge was entitled to rely on the authority of **VW (Uganda) [2009] EWCA Civ 5** and **EB (Kosovo) [2008] UKHL 41**. There was no error in the judge's assessment of the public interest although he acknowledged that from his consideration of the evidence there was no evidence provided to the Tribunal to show that the appellant satisfied the English language requirement.
20. I have deliberately set out at some length, earlier in this decision, the grounds upon which the respondent relies in contending that the First-tier Tribunal's decision contains a material error of law such that it should be set aside.
21. On my own analysis of those grounds and the First-tier Tribunal's decision I am satisfied that material errors have arisen and that I should move to remake the decision in this appeal.
22. I appreciate that the judge referred to the public interest within her decision but she has erred by failing to carry out an adequate analysis in this regard. The "compelling" factors identified by the judge were that the appellant's partner has been living in the United Kingdom for a number of years and has her own home

which she bought in 2005 and that she is in gainful employment. Her daughter is completing a university degree and any removal to India would be an extreme upheaval for them both given the circumstances. Whilst the appellant's partner has lived in India in the past her daughter has not. The relationships the appellant has with either his former wife's family or his own family in India have been compromised and that he has low employment prospects and no accommodation in his country of origin. His partner will similarly have difficulty in finding employment there. For these reasons the judge concludes that it would be "unreasonable" to expect the appellant's partner and her daughter to accompany him to India to an uncertain future.

23. In reaching these findings the judge carried out either no analysis, or an inadequate analysis of the public interest considerations and failed to apply the authority of **Dube** as referred to in the respondent's grounds.
24. I also find that the judge erred in the weight that she gave to the issue of "delay" in this appeal. The issue is not determinative of the appellant's appeal and it is plain that having placed the matters in the hands of solicitors the appellant, over a substantial period of years, was not proactive in pursuing his application. Moreover, the judge has failed to attach proper weight to his precarious status in the United Kingdom during which time he developed the private and family life ties that he has.
25. There was no evidence that either his partner or her daughter could not integrate within Indian society. I also note that albeit throughout the judge's decision there is reference to the appellant's partner's daughter (and also the fact that she has had no contact with her own biological father since 2005). The evidence from her witness statement is that she was born on 1 February 1994 so is an adult aged 21 years.
26. Accordingly I find with regard to the substantive appeal on Article 8 grounds and in relation to the issue of Section 117B the judge has erred in failing to take into account the public interest considerations applicable and in failing to carry out an adequate analysis with regard to the same.
27. Accordingly I set the decision of the judge aside and proceed to remake the decision on the basis of the factual matrix found.
28. The judge concludes at paragraph 38 of her decision that whilst the appellant's partner has lived in India in the past her daughter has not. However, as I say above this does not take account of the fact that her daughter is an adult. I do not accept that the fact that the appellant's partner in the United Kingdom both works and has her own property makes the respondent's decision here disproportionate. The appellant looks after the home whilst his partner works. I appreciate he may be supported by his partner.
29. Even if he were not, little weight can be attached to the private life and the relationship with his partner as both has been established by him at a time when he is subject to a precarious immigration status. There is no evidence that he satisfies the English language requirement. There is nothing within the factual matrix which identifies relevant, weighty matters rendering the respondent's decision

disproportionate. The maintenance of effective immigration control is in the public interest and I am not persuaded that the issue of delay within this appellant's application process is at all weighty. It is certainly not determinative. Likewise the employment prospects of either him or his partner and any uncertainty about their future together in India.

30. I appreciate that as the public interest considerations are now contained in primary legislation they override, existing case law and while Section 117A(2) requires me to have regard to the considerations listed in Section 117B and (where applicable 117C) there is no duty upon me to reach any specific conclusions or findings as the factors listed are the ones which normally have always been taken into account. I am though conscious of my statutory duty to take these factors into account when coming to my conclusion. I am also aware that Section 117A(3) imposes upon me a requirement to carry out a balancing exercise where an appellant's circumstances engaged Article 8(1) in deciding whether the proposed interference is proportionate in all the circumstances. In so doing I remind myself of the guidance contained within **Razgar (On the application of) v SSHD [2004] UKHL 27**.
31. Not only have I reminded myself of the above-mentioned authority of **Dube** but also **Forman (ss177A-C considerations) [2015] UKUT 412 (IAC)** where it was held, amongst other things, that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely.
32. I have also borne in mind the authority of **R (On the application of Chen) v SSHD IJR [2015] UKUT 189 (IAC)** and the light it throws on the authority of **Chikwamba v SSHD [2008] UKHL 40**. In short it was for this appellant to place before the Secretary of State evidence that a temporary separation from a family member, to enable an individual to apply for entry clearance abroad, will be disproportionate. There is in this appeal no such evidence.
33. In all the circumstances I find that there is nothing disproportionate in the respondent's decision to remove this appellant.

### **Conclusions**

34. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
35. I set aside the decision.
36. I remake the decision in the appeal by dismissing it.

Signed

Dated: 30 November 2015

Deputy Upper Tribunal Judge Appleyard



**TO THE RESPONDENT**  
**FEE AWARD**

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

Signed

Dated: 30 November 2015

Deputy Upper Tribunal Judge Appleyard