



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/41764/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20 November 2015**

**Decision & Reasons Promulgated
On 3 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**S A P
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr I. Graham, Counsel instructed by Robinson Ravani & Co Solicitors

For the Respondent: Mr S. Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) the Upper Tribunal makes an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This prohibition applies to, amongst others, all parties.
2. The appellant is a citizen of India born on 2 June 1983. He is appealing against the decision of the First-tier Tribunal ("FtT") to dismiss his appeal against the decision of the respondent to refuse him leave to remain in the

UK. The appellant claims that requiring him to leave the UK breaches Article 8 of the ECHR.

3. The appellant was granted leave to enter the UK as a Tier 4 (General Student) on 14 September 2009 with leave until 17 April 2012. Several subsequent applications for leave to remain were refused. On 5 November 2013 he was officially recorded as an overstayer.
4. The essence of the appellant's case before the FtT is that in July or August 2012 he met his current partner who, along with her 7 year old daughter, is a British Citizen. They are in a close and loving relationship and have been cohabiting since December 2013. His partner had been the victim of very serious domestic abuse from her former husband (from whom she was divorcing when the appellant met her) and both she and her daughter have been traumatised by the experience. The appellant has developed a close bond with his partner's daughter and become a part of her life, assisting her in day to day matters, such as homework and collection from school, and also helping to build her self confidence.
5. The appellant does not believe his partner and her daughter could realistically be expected to travel with him to India. He has given three reasons: first, they are both British; second, his partner's daughter is the subject of a residence and prohibited steps order pursuant to which she cannot be taken outside of the UK for a period in excess of one month without the consent of a High Court Judge; and third, his partner, as a divorcee and someone cohabiting outside of marriage, would be subjected to taunting and in a difficult position in India.
6. It is the appellant's case that if he were removed from the UK, leaving his partner and her daughter without him, the daughter would suffer considerably. A report was obtained on this issue by Chartered Psychologist Dr Saima Latif. Following a detailed assessment, Dr Latif reached the following conclusions:
 - a. The partner's daughter has developed a positive attachment to the appellant and separation from him is likely to have an impact which may continue for some time, resulting in separation anxiety and psychological distress.
 - b. If the appellant is removed from the UK, the daughter is likely to experience further difficulties and there will be a greater strain on the parental and child relationship in the future
 - c. She will find it very difficult to cope with the appellant's absence which will detrimentally impact on her well-being
 - d. It is likely she will suffer psychological difficulties such as depression, anxiety, sleep difficulties and nightmares and will go through a grieving process and her academic performance will deteriorate.
7. Dr Latif also opined on what would happen if the partner's daughter were brought to India. Dr Latif asserts that she would be unable to go to live in India because of the cultural and language barriers.

Decision of the First-tier Tribunal

8. The FtT first noted that this was not a case that could succeed under the Immigration Rules. It then carried out an assessment under Article 8, following the structured and sequential approach set out in *Razgar* [2014] UKHL 27.
9. It found that there was family life between the appellant and his partner and partner's daughter that was sufficient to engage Article 8. It also found that removal of the appellant from the UK was consistent with the legitimate aim of maintaining immigration control. The FtT then turned to the question of whether removing the appellant from the UK would be proportionate.
10. In so doing, the FtT considered the public interest by reference to Section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and made the following findings:
 - a. the relationship was formed at a time when the appellant did not have valid leave and therefore little weight should be given to his private life and relationship with his partner
 - b. the appellant is unable to bring himself within the Immigration Rules
 - c. the appellant's English is at a level that required him to use an interpreter at the hearing
 - d. the appellant has not demonstrated financial independence.
11. The FtT made reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 ("Section 55") and made the following findings which concern the partner's daughter:
 - a. there is no evidence of the daughter having any contact with her natural father and it may be that her best interest is to not have contact with him
 - b. she has been brought up in the UK and exposed to its language and culture
 - c. she is relatively young and could adapt to new situations, although it would be better for her to stay in school in the UK
 - d. The restriction on the daughter travelling outside the UK could be the subject of an application to the High Court to allow her to move to India
 - e. The appellant's and his partner's families would likely provide support and assistance in India.
12. The FtT concluded that there was nothing unique, different or exceptional in this appeal that would indicate a decision outside the Immigration Rules was appropriate and dismissed the appeal.

Grounds of appeal and submissions

13. The grounds of appeal assert that the FtT failed to give weight to the evidence showing the appellant's partner was the victim of extreme domestic abuse and that the daughter has suffered psychologically. They further submit that there was a failure to give weight to the trauma suffered by the partner and her daughter and to the strong bond of dependency they have formed with the appellant and the reliance they place upon him.
14. At the error of law hearing, the arguments focused on whether the FtT had failed to consider and apply Section 55 and the welfare of the partner's daughter correctly.
15. Mr Graham, on behalf of the appellant, argued that the FtT had failed to engage with the overwhelming evidence concerning the psychological impact on the partner's daughter including in particular the report of Dr Latif. He submitted that the appellant plays an important part in her life. He is known to the school as a "relevant person" who collects her from school. Mr Graham also commented that the FtT had speculated that the High Court would allow the daughter to leave the UK but there was no basis for this finding.
16. Mr Staunton argued that the grounds of appeal and Mr Graham's submissions amount to no more than a disagreement with findings the FtT was entitled to make. The FtT set out at paragraph [21] a summary of the psychological report. It even identified an error in the report (the FtT states that the report writer was in error when it stated she had never been to India) which highlights that the report was engaged with fully. The best interests of the partner's daughter were not ignored and the FtT made a clear reference to Section 55. The FtT has considered all of the relevant facts and formed a view on proportionality having considered all aspects of the case including the trauma suffered by the partner and partner's daughter.

Error of Law

17. For the reasons set out below, I find that the FtT erred in law by failing to properly consider the best interests of the appellant's partner's daughter.
18. The Supreme Court in *Zoumbas v Secretary of State for the Home Department* [\[2013\] 1 WLR 3690](#) considered the interplay between the best interests of a child and Article 8 ECHR. It set out seven principles:
 - a. The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;
 - b. In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
 - c. Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

- d. While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
 - e. It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
 - f. To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and
 - g. A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.
19. I have kept the above listed seven principles in mind when considering the approach taken by the FtT in this appeal to the appellant's partner's daughter.
 20. This is a case in which there is a well evidenced and important relationship between the appellant and his partner's daughter. It is also a case in which, if the appellant is removed from the UK, it is unlikely that his partner and her daughter will follow him to India as they are both UK citizens and there is a Court Order preventing the partner's daughter leaving the UK for more than 28 days.
 21. In considering the best interests of the partner's daughter, the relevant question therefore is the affect on her if the appellant is removed and she and her mother remain in the UK without him. The FtT erred in law by failing to address this question or indeed to formulate with any degree of specificity or clarity, and with reference to the evidence before it, what in fact were the best interests of the daughter.
 22. There was a psychological report before the FtT, the conclusions of which were not challenged, advising that the daughter would suffer considerably if separated from the appellant (the psychologist refers, inter alia, to the daughter being at significant risk of depression, anxiety, sleep difficulties and nightmares and going through a grieving process). Even though the FtT, in the body of its decision, made reference to this report, it was not given any weight or consideration in the context of forming a view on the best interests of the daughter. This too amounts to an error of law.

Remaking the decision

23. As recognised by the parties and the FtT, this is a case that cannot succeed under the Immigration Rules and which turns on the proportionality of removal under Article 8.
24. In considering proportionality my starting point is the partner's daughter's best interests. Relevant to this is that:

- a. she has been the victim of extremely traumatic events in her early life and she feels close to and supported by the appellant;
 - b. she would suffer significantly if separated from the appellant (as set out in a psychological report the conclusions of which have not been challenged);
 - c. she is not allowed to leave the UK for more than 28 days without a Court Order; and
 - d. she is a British Citizen.
25. Taking these factors into account, I find that the daughter's best interests are served and promoted by (a) her remaining in the UK; and (b) the appellant remaining in the family unit with her and her mother in the UK. Accordingly, it is my finding that it is in the best interest of the daughter for the status quo to be preserved; i.e. for the appellant to remain in the UK.
26. Having made this finding in respect of the daughter's best interests, I now turn to the public interest in the appellant's removal. In so doing, I consider Section 117 of the 2002 Act.
- a. Section 117B(1) states that maintenance of effective immigration control is in the public interest. In considering this requirement, I bear in mind that the appellant is unable to satisfy the Immigration Rules and overstayed his leave to remain in the UK. It is clearly in the interest of effective immigration control that a person who cannot meet, and who has intentionally disregarded, the Immigration Rules (becoming an overstayer) should be removed.
 - b. Section 117B(2) states that it is in the public interest for a person to speak English. The FtT noted that the appellant required an interpreter. Mr Graham submitted that the appellant had studied in English and a negative inference should not be drawn from the appellant preferring to use his native language in the stressful setting of a hearing. That may be the case, but the appellant has failed to provide evidence to support that he is able to speak English.
 - c. Section 117B(3) stipulates that it is in the public interest for a person to be financially independent. The appellant has not provided any evidence to show he is financially independent.
 - d. Section 117B(4) requires that little weight be given to a private life established when a person is in the UK unlawfully. By the time the appellant met his partner he was in the UK unlawfully.
27. Given the appellant's poor immigration history, failure to satisfy the Immigration Rules and failure to satisfy any of the public interest considerations stipulated in 117B there is a strong public interest in his removal.
28. There is, however, a strong countervailing interest in his remaining in UK because his doing so is in the best interests of his partner's daughter. In


the balancing exercise I treat the daughter's interest as a primary interest but one that it is not paramount and can nonetheless be outweighed by other considerations.

29. It is important to bear in mind that this is not a case where removal of the appellant will result in a UK child having to leave the UK. The appellant's partner's evidence, as set out in her witness statement, is that it would be impossible for her and her daughter to live anywhere other than the UK. The daughter cannot, in any event, leave the UK without a Court Order. Accordingly, removing the appellant from the UK will more likely than not result in the separation of a family unit but not in a UK child having to move abroad.
30. The effect on the partner's daughter of this separation is discussed in detail by the expert psychologist Dr Latif, who concludes that it will result, *inter alia*, in anxiety and psychological distress. Dr Latif sets out in her report a range of psychological difficulties she believes the daughter will face if the appellant is removed, including depression, anxiety and sleep. She refers to there being long term consequences. The conclusions made by Dr Latif have not been challenged by the respondent. Although there are some minor errors in the report (at paragraph [19] of the report, for example, Dr Latif mistakenly states that the daughter has never been to India) and some of the conclusions could be open to challenge, in the absence of any such challenge having been made, I accept Dr Latif's conclusions.
31. This is a case where the scales in the proportionality exercise weigh heavily on both sides. On the one hand, there is a clear and weighty public interest in the appellant, whose relationships were formed whilst in the UK unlawfully and who has intentionally breached immigration law, being removed. On the other hand, the uncontested expert evidence is that the appellant plays an important role in the life of a young girl who has a very traumatic background (because of her natural father) and that the appellant's removal could have serious negative implications for her. Weighing these interests, and bearing in mind the weight that must be attached to the welfare of a child, I find that, on balance, and taking all the evidence that was before the FtT into consideration, removing the appellant from the UK would not be proportionate and would be contrary to Article 8.

Decision

- a. The appeal is allowed.
- b. The decision of the First-tier Tribunal involved the making of a material error of law.
- c. I remake the decision of the First-tier Tribunal by allowing the appellant's appeal.
- d. An anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 29 November 2015