



IAC-FH-NL-V1

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

Appeal Number: IA/02522/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4 January 2016**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR TAJINDER SINGH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr B Singh Counsel instructed by The Sethi Partnership

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Lal who sitting at Hatton Cross on 10 July 2015 and in a determination subsequently promulgated on 22 July 2015 allowed the appeal of the Respondent (hereinafter called the Claimant) against the decision of the Secretary of State dated 24 December 2014 to refuse his application for leave to remain on human rights grounds and to remove him from the United Kingdom.

2. The basis of the Claimant's claim to remain in the United Kingdom was due to his family life with his spouse and his three children. The Claimant claimed to have entered the United Kingdom sometime in March 2004, clandestinely with the help of an agent. On 16 February 2005 he married his wife in India whilst he was in the UK, a marriage that was provided. The Claimant's partner claimed to have illegally entered the UK sometime around April 2005. Their three minor children were born in the UK in 2006, 2008 and 2010 respectively. On 22 November 2011 the Claimant's children were placed into the care of Social Services following instances of domestic violence by the Claimant against his spouse.
3. On 19 December 2011 the Claimant was convicted at Isleworth Crown Court of Actual Bodily Harm and Battery against his wife and was sentenced to five months' imprisonment.
4. On 15 February 2012 the Claimant submitted an application for leave to remain outside of the Immigration Rules (OTR) claiming that he enjoyed family and private life with his spouse. On 9 March 2012 the Claimant's spouse submitted an application in her own right for indefinite leave to remain on domestic violence grounds and their three children were linked to her application as dependants. On 16 March 2012 the Claimant's children who had been left in the care of Social Services were returned to the care of their mother. On 13 June 2012 the Claimant's spouse's application for leave to remain on the grounds of domestic violence was approved and the Claimant's spouse and their three children were all granted indefinite leave to remain.
5. On 20 May 2013 the Claimant's OTR application was refused with no right of appeal as he was evidently no longer residing with his wife or children. His request for reconsideration of this application was refused on 4 July 2013. The Claimant requested further reconsideration on line in September 2013. On 8 August 2014 the Claimant was provided with an opportunity to notify the Secretary of State of any additional grounds he might have to remain in the UK to which he responded on 22 August 2014. On 18 September 2014 a referral was made to Ealing Social Services following the Claimant's claim that he had returned to the family home of his wife and children. Ealing Social Services were not aware of this development and due to the Claimant's violent history they were now re-assessing his case due to obvious safeguarding concerns.
6. In her letter of refusal dated 24 December 2014, it was noted inter alia, that in all the circumstances it was considered reasonable for the Claimant to return to India without his children. This was considered to be proportionate to the legitimate aim of maintaining effective immigration control and in accordance with the Secretary of State's Section 55 duties. It was considered that there were no exceptional circumstances in the Claimant's case and that refusal to grant leave outside of the Immigration Rules would not result in unjustifiably harsh consequences for the Claimant and his family.

7. On appeal before the First-tier Tribunal Judge, he recorded the Claimant had given evidence and adopted his witness statement and further, that in considering the written material before him the Judge had taken account of a statement from the Claimant's wife in which "she confirmed her desire to reconcile with the (Claimant) and that she hoped this would be possible in the future". It would appear that the Claimant's wife did not attend in person to give oral evidence and there was nothing in the decision that provides a reason for her absence in support of the Claimant's appeal.
8. The Judge continued to record over paragraph 7 and 8 of his determination the following:
 - "7. The Tribunal was also provided with a letter from Ealing Social Services dated 7th July 2015 from the allocated social worker. In this she wrote '*As part of my involvement with the children I was required to ascertain their wishes and feelings with regards to their having contact with their father ... From my individual meetings with the children ... it is clear they wish to have contact with their father*'."
 8. She has also observed contact and the children were observed to spontaneously hug their father and indeed one of them asked when he was coming back to live with the. The Social worker confirms that supported unsupervised contact has been arranged through a contact Centre for 5 weeks after which contact will be reviewed."
9. It was further recorded that the Presenting Officer was content to rely on the Reasons for Refusal Letter and further she referred to the "relatively recent contact and the (Claimant's) immigration history".
10. It is well to record at paragraphs 10 to 12 of the Judge's decision as follows:
 - "10. The Tribunal first considered the Appellant to see whether he could succeed under Appendix FM R-LTRPT1.1. The Tribunal finds that the Appellant does qualify under this provision as he has submitted official documentation of current ongoing supervised contact with his three children at least two of whom are over 7 years of age having been born in the UK.
 11. In respect of breach of immigration law, maintenance and accommodation and English language the Tribunal turns to the provisions of EX.1. The Tribunal accepts that the Appellant does have a genuine and subsisting parental relationship with his children as the evidence from social services was compelling of reciprocal feelings and that two of the children had been in the UK for 7 years. Significantly the Tribunal accepts that it would not be reasonable to expect the children to leave the UK. The Tribunal accepts and indeed it was not disputed that the family unit as a whole has some work to do to return to a situation of normality and that such work must be focused and gradual and will no doubt address the issue of parenting responsibility, attitude to domestic violence and some level of after care. The Tribunal is not satisfied that it is in the best interests of the children to be in India with their father in those circumstances. The Tribunal is also not satisfied that the fact of the children operates as a 'trump

card' for the father as in some cases one can envisage a situation where it is in the best interests of the children not to have contact with their natural father. However on the facts of this particular case the Tribunal is satisfied that what happened in 2011 must be seen in the context of a family life before that time and subsequent to that time. The Appellant therefore succeeds under Appendix FM, namely that this was a family life interrupted in 2011.

12. The Tribunal in any event turned to a consideration of Article 8 of the ECHR because the jurisprudence concerned sheds valuable insight into the competing considerations in this case. The Tribunal has had at all times regard to the provisions of Section 117 of the 2002 Act as amended. Public interest considerations apply in all cases and these are set out in Section 117B. The Tribunal has therefore considered the matter in the light of the above and notes that it is a qualified right. It is normally for an appellant to establish that he or she has family and/or private life that will be interfered with on return to his or her own country, and the burden then shifts to the Respondent to establish that any such interference is not only legitimate but is also necessary and proportionate.”
11. At paragraph 15 the Judge cited the guidance in Mundeba (s55 and para 297) [2013] UKUT 00088 that included head note (v) that states, inter alia, *“As a starting point the best interests of a child are usually best served by being with both or at least one of their parents”*. Whilst such guidance has been approved in a subsequent decision of the court, it should be pointed out that Mundeba was an entry clearance case where Entry Clearance Officers were not obliged to consider the provisions of Section 55 or were advised to consider them although they were under no statutory duty to do so. It only applies to children within the UK.
12. The Judge concluded over paragraphs 17 and 18 as follows:
 - “17. The Tribunal considered the matter with some care. On the particular facts of this case it is prepared to accept that such compelling circumstances exist. [There is] the evidence from both the children and testimonial evidence confirmed by the social worker that the Appellant does enjoy a close and loving relationship with his children and that they miss him and want him home. Coupled to this is the evidence of the spouse that she also wants a reconciliation with the appellant.
 18. Perhaps most significantly the family life was in existence from 2005, was interrupted because of the events in 2011 and has resumed again but this time with social services input. The Tribunal is satisfied that on the particular facts of this case this is not either a newly discovered family life or one that needs to be instigated as part of an attempt to stay in the UK. The ages of the children are also important in that they have a developed relationship with the appellant as opposed to very young children.”
13. In consequence the Judge allowed the Claimant’s appeal both under the Immigration Rules and under Article 8 of the ECHR. The Secretary of State successfully obtained permission to appeal the grounds of which pointed

out that relying on the Respondent's refusal letter it followed that the Presenting Officer was submitting that there were "*clear issues with the timing of the contact orders initiated by the (Claimant) and taking into account his immigration and criminal history. These were factors that the First-tier Tribunal Judge was required to consider.*"

14. It was further contended that the Judge allowed the appeal under the Immigration Rules:

"Solely on the basis that the (Claimant) has submitted documents that he is having ongoing supervised contact with his children. The First-tier Tribunal has made no findings and has entirely failed to make any findings regarding the intentions of the (Claimant) and the nature of the timings of the attempts to re-establish contact".

15. Further and whilst the Judge appeared to place great weight on the social services' report which dealt with the interaction from the children and their father, it was submitted that the report only appeared to have commented on the feelings of the children but there "*was no indication contained within the report regarding the father's intentions*".

16. It was submitted that the Claimant had served a prison sentence for ABH and his wife had thus been subsequently granted indefinite leave to remain on the basis of being a victim of domestic violence and that it was incumbent upon the Judge to address the submissions made by the Presenting Officer regarding the Claimant's immigration history and the timing of his attempts to re-establish contact with the children. Reliance was placed on RS (immigration and family court proceedings) India [2012] UKT 00218 (IAC) and in particular head note (iii) namely:

"In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reasons to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare."

17. The Secretary of State's grounds further submitted that although the Judge dealt with Section 117 of the Nationality, Immigration and Asylum Act 2002 at paragraph 12 of his determination, "*... he clearly has had no regard to any of the public interest considerations*" and simply recorded that Section 117B was a "*qualified right*" : "*the correct test for assessing Article 8 was articulated by Lord Bingham*" and it was submitted that the Judge was required to consider and take into account all relevant sections of Sections 117 and that his failure to do so was "*a clear material error of law*". In that regard I note with interest that the provisions of Section 117 were not referred to in the decision letter under appeal.

18. Thus the appeal came before me on 4 January 2015, when my first task was to decide whether the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

19. Mr Tufan relied upon the Secretary of State's grounds of challenge. He maintained that the Judge failed to take account of the guidance in RS "at all" and the situation was that the Social Services' report confirmed that the appellant was now in a relationship with the children. He went on to state there was no proper consideration of Section 117B and that whilst the Judge made reference to the seven year requirement, this was intended as a matter of determining reasonability and it was not clear on what basis that it would be unreasonable for the Claimant to be removed.
20. Mr Singh for the Claimant, referred me to his Rule 24 reply and in so doing he maintained that contrary to the assertions of the Secretary of State, the First-tier Tribunal Judge did not err in allowing the appeal under Appendix FM and that he had clearly set out at paragraph 10 of his judgment, that the Claimant could succeed under Appendix FM R-LTRP1.1. In any event, the Claimant had submitted official documents of current ongoing supervised contact with his three children at least two of whom were over 7 years old having been born in the UK. Further, the Judge had found that EX.1 was met as the Claimant had a genuine and subsisting relationship with his children. This was evidenced from the social services' report who confirmed that the children reciprocated that genuine and subsisting relationship. Mr Singh continued that clearly the Judge had balanced this alongside the submission of a child not being a "trump card".
21. Mr Tufan had referred me in exemplifying a lack of reasoning, to the fact that the Judge had made the following reference in the penultimate sentence at paragraph 11 of his determination:

"However on the facts of this particular case, the Tribunal is satisfied that what happened in 2011 must be seen in the context of a family life before that time and subsequent to that time."

Mr Tufan submitted that it was not clear as to exactly what was meant by this conclusion.
22. In response, Mr Singh pointed out that the Judge had made himself perfectly clear as to his reasoning in that regard. It was self-evident on a natural reading of the sentence concerned.
23. In any event I would observe that at paragraph 18 of his decision, the Judge had said, inter alia, "*Perhaps most significantly the family life was in existence from 2005, and was interrupted because of the events in 2011 and has resumed again but this time with social services input*". I find therefore it cannot be said that the Judge's reasoning in that regard was unclear or inadequately reasoned.
24. Much of Mr Singh's submissions were based upon the Rule 24 reply that he had himself settled and it would suffice for me to say at this stage, that most helpfully not only did Mr Singh set out the entire head note of the detailed guidance of the Tribunal in RS (India), but in so doing he was able to identify at each stage, the way in which contrary to the assertions of

the Secretary of State, the Judge had clearly applied that guidance even though he may not specifically have referred to the case by name.

Assessment

25. I am not persuaded by the Section 117 challenge. Firstly it is acknowledged in the grounds, that the Judge did make reference to its provisions at paragraph 12 of the determination. I have also reminded myself of the guidance in Dube (ss.117-117D) [2015] UKUT 00090 (IAC) in which it was held inter alia, that Judges were required statutorily to take into account a number of enumerated considerations and that Section 117A-D were not therefore an a la carte menu of considerations and that it was at the discretion of the Judge to apply or not apply. Judges were duty-bound to “*have regard*” to the specified considerations, for example Section 117B, that enumerated the considerations that were applicable in all cases but they did not represent “.
26. In particular they did not disturb the need for Judges to ask themselves the five questions set out in Razgar. Sections 117 were essentially a further elaboration of Razgar question 5, which was essentially about proportionality and justifiability.
27. I note that in that regard and in terms of the present case, the Judge did indeed make reference to the step-by-step approach of Razgar at paragraph 13 of his determination and indeed continued at paragraph 14 to say that he was satisfied that the appellant had a family and private life with his wife and children and indeed continued:

“The impression given was of a supportive family unit providing a degree of care and support for each other but needing social services support in order to do so at this point in time. The Tribunal is in no doubt that the operation of Article 8 considerations is engaged and that any such potential interference is lawful.”
28. Mr Singh quite rightly pointed out in that regard and indeed in general terms reliant in some part on his experience in family law matters, that in a case such as this, where the father has been convicted of offences involving domestic violence, it was essential that there be a careful and indeed prolonged step-by-step approach on the part of social services in terms of allowing the father supervised contact with his children over a sustained period, before it could be considered safe for the children to resume life with him and their mother and that indeed in the context of the present case, there had been five such supervised contacts by the Claimant and his children prior to the hearing of this appeal before the First-tier Tribunal Judge.
29. Dube further held that it was “*not an error of law to fail to refer to Sections 117A-117D considerations if the Judge had applied the test he or she was supposed to apply according to its terms*” and continued “*what matters is substance not form*”. It is apparent to me upon a reading of the

Judge's reasoning as a whole, that his approach was wholly in accordance with that guidance.

30. Dube also held, that whilst the provisions of Section 117 were expressed as being binding on a "court or Tribunal" it might be that the Secretary of State would consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels, to have express regard to Sections 117A-D considerations herself, although she was not directly bound to do so. As I have earlier observed, no reference to the provisions of Section 117 were made in the Secretary of State's refusal letter in relation to this appeal.
31. As to the Secretary of State's challenge to the Judge's reasoning at paragraph 10 of his determination, I find that he was entitled to take account of the official documentation of current ongoing supervised contact between the applicant and his three children and the fact that two of them were born in the UK.
32. The grounds make no mention of paragraph 14 to which I have referred above, but the Judge was clear that "*the impression given was of a supportive family unit providing a degree of care and support for each other but needing social services support in order to do so at this point in time*". Further, at paragraph 17 the Judge was clear that he had considered the matter "*with some care*" and he was prepared to accept that compelling circumstances existed and continued in that regard:

"The evidence from both the children and testimonial evidence confirmed by the social worker shows that the Claimant does enjoy a close and loving relationship with his children and that they miss him and want him home. Coupled with this is the evidence of the spouse that she wants reconciliation with the appellant."
33. The grounds also fail to refer to paragraph 18 of the determination (above) where the Judge was clear that he was:

"... satisfied on the particular facts of this case that it is not either a newly discovered family life **or one that needs to be instigated as part of an attempt to stay in the UK**. The ages of the children are also important in that they have developed relations with the Claimant as opposed to very young children" [Emphasis added].
34. I am also reminded that in Budhathoki (reasons for decisions) [2014] UKUT 00341 Haddon-Cave J stated inter alia, that it was necessary for Judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons so that the parties could understand why they had won or lost and that it was generally unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in the case. I find that this was precisely the approach taken by the First-tier Tribunal Judge in his consideration of the present case.
35. The grounds assert in summary that the determination discloses inadequate reasoning and that the First-tier Tribunal Judge failed to make

findings of fact in every issue arising and generally expressed disagreement with the findings made but it is entirely clear from the determination read as a whole why the appeal was allowed. The reasoning of the First-tier Tribunal Judge cannot be said to be irrational nor his conclusions perverse. The Judge was required to explain why he reached his conclusions but was not required to assemble and set out in the determination everything that was capable of supporting contrary view – see also Mukarkar at paragraph 40.

36. It is apparent to me that the First-tier Tribunal Judge reached findings that were supported by and open to him on the evidence and thus sustainable in law. For this reason the appeal to the Upper Tribunal is dismissed.

Decision

37. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

38. No anonymity direction was made.

Signed

Date: 23 January 2016

Upper Tribunal Judge Goldstein