



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/48833/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 January 2016

Determination Promulgated  
On 5 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

KM  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Haji (for Marks and Marks Solicitors)

For the Respondent: Mr P Duffy (Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of KM, a citizen of India born 25 March 1975, against the decision of 14 November 2014 to refuse her application for leave to remain and to set removal directions against her under section 47 of the Immigration Asylum and Nationality Act 2006. The appeal having been dismissed by the First-tier Tribunal, she now appeals to the Upper Tribunal with permission.

2. Her appeal arises from an application that she made for leave to remain. Its basis is best found in the decision of Judge Flynn following a hearing on 27 June 2014. She claimed to have entered the United Kingdom illegally on 31 November 1998 with an agent and false passport, and based on that length of residence applied on 27 January 2010 applied to remain here. That application was refused and in June 2010 her subsequent appeal was allowed on the basis of the same-sex relationship into which she had entered in the latter part of 2007. The Home Office implemented the result of that appeal by granting her further leave until 27 September 2013. She applied for an extension of leave, admitting she was no longer in that relationship, though emphasising that she was now the mother of a British child born 6 August 2012 for whom she had sole responsibility. That application was refused on 15 November 2013. She now argued that she had no social or family background in Kashmir, her parents and husband having died; she had no siblings. Her daughter's birth certificate did not bear her father's name which would expose them to risk there, as would her gender preference if it came to light. She had strong connections in this country by way of her circle of friends and had worked here, though she was now on a benefits package totalling some £1,000 monthly.
3. The appeal before Judge Flynn did not determine the Appellant's case conclusively as he found that the Secretary of State had inadequately addressed the best interests of her child in the November 2013 decision which was therefore not in accordance with the law. He otherwise accepted her history as claimed, and noted that the country evidence before him by way of the Home Office Country of Origin information report of March 2012 did not suggest the Appellant would be at risk back in Kashmir because of her gender preference or her daughter's illegitimacy.
4. The reconsideration of her case resulted in a further refusal on 14 November 2014 because, having spent her formative years in India, she could not demonstrate a lack of social, cultural or family ties there. Outside the Rules, her resourcefulness in successfully making a life for herself in the United Kingdom indicated that she could similarly succeed in relocating within India; there was no reason to think that the authorities would discriminate against her because of her gender preference given that she would not have to reveal it to them. Her child could be raised by her and there was no reason to anticipate an unjustifiably harsh lifestyle abroad.
5. The First-tier Tribunal found that she could not satisfy Rule 276ADE(vi), on the basis that she could not establish that she lacked cultural ties in India, albeit that she had no family or social ones there. It found that there was a compelling case for departure from the Rules given that she had genuine friendships in this country that went beyond economic ties, and had no family or friends in India: this would make it difficult for her, as a member of the lesbian and gay community, to form relationships, and that as a result she would suffer an element of hardship and societal discrimination. That appears to be the totality of the reasoning: although there are several paragraphs under the heading *Analysis of the evidence and my findings*, it is very difficult to accept that this is the concluded reasoning of the Judge, given that much of the text appears to be a rehearsal of the evidence that was given combined with the submissions made below.

6. Permission to appeal was granted on 31 October 2015, in line with the grounds of appeal, on the basis that the failure to consider section 117 of the Nationality Immigration and Asylum Act 2002 was an arguably material error of law.
7. Before me Mr Duffy contended the decision was flawed for its failure to specify and consider the statutory criteria relevant to judicial decisions made outside the Rules. Ms Haji responded that the decision was legally adequate and that the matters within section 117 had been dealt with, and thus the lack of express citation of that provision was not fatal.

### **Findings and reasons**

8. The relevant parts of the Immigration Rules are

**“Requirements to be met by an applicant for leave to remain on the grounds of private life**

**276ADE**

  - (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application ...
    - (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
    - (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or ...
    - (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK.”
9. Having considered the competing submissions before me, I am driven to the conclusion that the decision of the First-tier Tribunal represents an inadequate determination of the issues that were before it.
10. Firstly, there was no recognition of the factors that via section 117B of the Nationality Immigration and Asylum Act 2002 have received the imprimatur of Parliament as a statement of the public interest. There is no discernible reasoning in that short portion of the decision which can reasonably be read as amounting to findings upon the evidence, as opposed to a mere exposition of the materials and arguments, which grapples with the questions of her precariousness of residence or the burden she represents on public funds.
11. Secondly, the First-tier Tribunal referred to “an element of hardship and also societal discrimination”. The Country Guidelines decision of *MD (same-sex oriented males: risk) India CG* [2014] UKUT 65 (IAC) notes that

“d. Same-sex orientation is seen socially, and within the close familial context, as being unacceptable in India. Circumstances for same-sex oriented males are improving, but progress is slow.

e. It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.

f. India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities.”

12. Those findings, whilst clearly raising concerns as to the difficulties that might be faced by lesbians (who are apparently, unlike men, not facing an improving prospect), they clearly countenance the possibility that gay individuals might be able to make a life for themselves in India. At [191](4) the Tribunal noted, on the one hand, that “the existence of [legislation criminalising same-sex sexual activity undertaken in private]legislation would, upon the appellant’s return to India, constitute[s] an arbitrary interference with his privacy, this being irrespective of the rarity of prosecutions brought under it”; on the other, it held out the possibility that LGBTI groups might provide significant levels of support to returnees. The Appellant’s case demands more nuanced consideration having regard to these various strands in the country evidence than it has so far received. Next time it is put her advisors will doubtless assist her to address these themes.
13. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Signed:

Date: 20 January 2016



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Deputy Upper Tribunal Judge Symes

**ANONYMITY ORDER**

I note that the Appellant's case has, understandably given the sensitive issues involved, previously been subject to an anonymity order. I consider it appropriate to follow that approach. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 20 January 2016

A handwritten signature in black ink, appearing to read 'MAS', with a long, sweeping underline that extends to the left and then curves back towards the right.

Deputy Upper Tribunal Judge Symes