



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14212/2016  
HU/14214/2016

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 24 August 2018

Decision & Reasons Promulgated  
On: 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS A KAUR  
MASTER POORAN SINGH  
(NO ANONYMITY DIRECTIONS MADE)

Respondent

**Representation:**

For the Appellant: Mr A Fijiwala, Senior Presenting Officer  
For the Respondent: Mr Z Nasim of Counsel

**DECISION AND REASONS**

1. The appellants before the Upper Tribunal is the Secretary of State for the Home Department and the respondents are citizens of India born on 15 May 1969 and the second appellant, her son was born on 18 May 2000. However, for the sake of convenience, I shall continue to refer to the latter as the “appellants” and to the

Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellants, who are mother and her son, appealed to the First-tier Tribunal against the decision of the respondent refusing their applications for indefinite leave to pursuant to Appendix FM and Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Fletcher Hill allowed the appeal pursuant to “Human Rights Grounds”.
3. First-tier Tribunal Judge Lambert found there was an error of law in the decision as the Judge’s findings as the public interest considerations under section 117B of the Nationality, Immigration and Asylum Act 2002 had not been considered in the relatively brief reasoning at paragraph 56 – 69 of the decision where there was no mention of section 117B factors and no consideration of the argument put forward by the respondent.
4. Thus, the appeal came before me.

#### **First-tier Tribunal findings**

5. The first-tier Tribunal made the following findings which I summarise. The first appellant’s evidence is accepted that she and her husband met in 2011 and married in November 2011 and have lived together ever since with the son of the appellant in a family unit. The appellant and her husband are credible witnesses and their evidence is accepted. It is accepted that the appellant no longer has a parental home in India to return to and that her brother in the United Kingdom organised and paid for her travel to the United Kingdom after her divorce and her parents’ death. It is accepted that although the first appellant has other siblings in India they are all married with their own families and none of them appear to be in a position to absorb her into their family units.
6. At the time that the appellants application was made, the first appellant was already married to her husband and had been for some time, but his own immigration status at the time was that he had discretionary leave as noted in the previous reasons for refusal letter of 3 March 2015. At that time his leave was valid until 7 February 2016. The appellant’s husband was subsequently granted indefinite leave to remain on 10 May 2016 prior to the date of refusal of the current application. The respondent however was of the view that the appellant’s husband could relocate to India with the appellants if he chose to do so.
7. In the circumstances of this case there are arguably good grounds for granting leave to remain outside the rules as there are compelling circumstances not sufficiently

recognised under the rules that the removal would be unjustifiably harsh. The decision is a disproportionate interference with the Article 8 rights of the appellant, her husband and son.

8. Having considered the objective evidence, it is stated that women in India fearing gender-based harm/violence and it is accepted that discrimination against women remains a major issue in India, especially in the still extremely patriarchal North of India where women tend to be discriminated against from the very beginning within their families.
9. If the first appellant were to return with the son she would face insurmountable obstacles in attempting to resettle in India and would no longer have a family home to return to or family support. Furthermore, the first appellant's husband's reasons for needing to remain in the United Kingdom is because he is practising and promoting his faith in his community and that would make it unduly harsh to expect him to relocate to a country he left some 20 years ago where he has few remaining ties with family members.
10. The Judge found the vulnerability of the first appellant compelling and found there were insurmountable obstacles preventing family life continuing between the first appellant and her family outside the United Kingdom. He found that the respondent's decision is not proportionate particularly bearing in mind the status of the first appellant's husband in the United Kingdom and that the appellants should be allowed to remain in the United Kingdom with first appellant's husband and family.

### **The hearing**

11. I heard submissions from both parties in respect of whether there is a material error of law in the decision. Ms Fujiwala in respect of the respondent stated that the appellants case is not balanced against the public interest. She also submitted that the respondent's submissions were not considered by the Judge. She said that there was no assessment of the public interest as set out in paragraph 117B. It states that little weight should be given to private life when the applicants immigration status is precarious. She invited me to remit the appeal to the First-tier Tribunal for the public interest to be considered.
12. Mr Nazim on behalf of the appellants noted that the Judge had considered the public interest at paragraph 7 of the decision. He noted that there has been no challenge to the First-tier Tribunal's findings especially in respect of the credibility of the appellant and her husband's evidence. He said that the Judge gave good reasons for why the first appellant cannot return because her parents have both died. The first appellant would therefore return as a single woman. He argued that the substance of paragraph 117 has been considered. The Judge considered EX1 and said that there are

insurmountable obstacles to the appellant returning to India. The child is now an adult although he was a minor at the date of application.

### **Findings as to whether there is a material error of law**

13. The respondent's quarrel with the decision is that the judge did not take into account the public interest in the required balancing the proportionality exercise when allowing the appellant's appeal under Article 8 of the European Convention on Human Rights. The respondent argues that the Judge found that the appellants do not satisfy the immigration rules for leave to remain and therefore should have found there were no exceptional circumstances to allow the appellant's appeal pursuant to Article 8 if the public interest had been properly considered.
14. The Judge stated that the first appellant's husband was granted indefinite leave to remain in the United Kingdom while the appellants applications for further leave to remain were pending. The Judge found that in the circumstances, it would be unduly harsh for the first appellant's husband to relocate to India because he has been in this country for nearly 20 years, is a priest and had broken ties with India.
15. The Judge was therefore right to assume that the appellant would be returning to India as a single woman with her child. The Judge was heavily influenced by the fact that the first appellant's husband has no intention of returning to India even if his wife and her child must return. The Judge found that the first appellant was vulnerable and would be discriminated against as a divorced woman from her first husband and would have no family home to return to and will become destitute. The Judge found that a woman returning alone to the north of India can suffer from gender-based violence. He also found that the appellant was vulnerable.
16. The Judges statutory duty was to have regard to sections 117A and 117B in the evaluation of the appellants appeals. However, the Judge's duty is for a structured approach and to ask the five questions set out in Razgar [2004] UKHL 27 which is about proportionality and justifiability. The Judge gave cogent reasons for the decision.
17. It is not true to say that the Judge did not consider paragraph 117A and 117B. At paragraph 7 of the decision it is specifically stated that the provisions of section 117A and 117B of the Immigration Act 2004 "have been given consideration". The Judge states in the decision that the maintenance of effective immigration control is in the public interest. The Judge then goes on to say that the appellant has been in a genuine and subsisting relationship with her husband since 2011 which, whilst precarious does not mean that no weight should be attached to it. Additionally, he added that the first appellant would not be a financial burden on the economy as she will continue to be

assisted by both her spouse and her brother, as she has been throughout the time she has lived in the United Kingdom.

18. The Judge cannot be criticised for taking a gender sensitive approach to the appeal and to effectively find that the first appellant would be deprived of her family life with her husband not only in this country but also in India. He considered the first appellant's circumstances from her perspective as a vulnerable woman returning to India with her child without support.
19. The evidence was that the appellant's husband has lived in this country some 20 years and while the appellants application was pending for leave to remain, the respondent granted the first appellant's husband indefinite leave to remain on the bases of his long residence and his work as a priest. Therefore, the respondent granted the first appellant's husband leave to remain when he knew that his wife and child had applications pending for indefinite leave to remain. The respondent was aware that his decision would not only interfere with the first appellant's family life with her husband but that it would come to an abrupt end.
20. Although I accept that the Judge did not set out the requirements of section 117A and 117B in the findings of fact section of the decision, it is obvious that the Judge considered the appellant's rights balanced against the respondent's interest in a fair immigration control policy as set out in paragraph 7 of the decision.
21. Even if there is an error of law in not setting out the respondent's interest in the findings of fact section of the decision, I find that it is not material as the Judge set out in the decision that he must consider the public interest. Even if there was a material error of law, I remake the decision.
22. It must have been obvious to the respondent that having granted the first appellant's husband indefinite leave to remain while the appellants applications were pending, would inevitably lead to the breakup of this family unit. It should then not be open to the respondent to say that the first appellant's husband can return to India with his wife and child, if he wishes. It would have been open to the respondent not to grant the first appellant's husband leave to remain and require the entire family to relocate to India thus preserving the continuity of family life.
23. The respondent by granting one member of this family unit indefinite leave to remain imposes upon the respondent a positive duty to preserve his family life with his wife and child. There is no dispute that the first appellant and her husband are in the subsisting relationship and have been living as a family unit in this country. The respondent's decision therefore imposes a positive obligation on the United Kingdom to permit the appellants to continue to reside in this country with the first appellant's husband given that he granted the first appellant's husband leave to remain.

24. The settled jurisprudence of the European Court of Human Rights is that it is likely to be only in exceptional cases that Article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the United Kingdom at the time when his or her immigration status is precarious. Exceptional circumstances are required to grant the appellant leave to remain under Article 8 when the applicants cannot meet the requirements of the immigration rules. The respondent's policy states that exceptional does not mean unusual or unique. It states at paragraph 3. 2. 7d of the instructions that "exceptional means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate and added that this is likely to be the case only very rarely." This is one such case.
25. I find that the appellant's case is strong and compelling as the respondent's decision would result in unjustifiably harsh consequences for the first appellant and would not be proportionate due to the respondent's actions in granting her husband leave to remain. The appellant's son was under the age of 18 at the date of decision and therefore his appeal rests all falls with that of the first appellant. I find that in this appeal the strength of the public policy is outweighed by the strength of the appellants Article 8 claims.
26. It follows therefore that the respondent's decision is not proportionate to the respondent's legitimate interest in immigration control as set out in paragraph 117A and 117B.
27. Considering all the evidence in this appeal, I remake the decision allowing the appellants appeals. That finalises this appeal.

## **DECISION**

The Secretary of State's appeal is dismissed.

I remake the decision and allow both appellants appeals.

Signed by

Ms S Chana  
A Deputy Judge of the Upper Tribunal

The 9<sup>th</sup> day of September 2018