



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/15389/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 15th October 2018**

**Decision & Reasons Promulgated
On 18th October 2018**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

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

Respondent

Representation:

For the Appellant: Mr T Melvin (Senior Home Office Presenting Officer)
For the Respondent: Miss P Yong (instructed by Majestic Solicitors)

DECISION AND REASONS

This is an appeal to the Upper Tribunal by the Secretary of State, with permission, in relation to a judgment of the First-tier Tribunal, Judge Phull, promulgated on 9th July 2018 in which she allowed the appeal on the basis of Article 8 of the ECHR.

For the purposes of this judgment I shall continue to refer to the Secretary of State as the Respondent and Mr Singh as the Appellant.

The factual background of this case is that the Appellant is an Indian national born on 13 October 1981. He entered the UK as a visitor in 2004 and when his visit visa expired on 5 August 2004 he remained in the UK as an over stayer.

His partner is also an Indian national who is in the UK as a Tier 4 student. She entered the United Kingdom on 2 June 2009.

The couple entered into a religious marriage and started to live together on 11 February 2013. A daughter was born to them on 9 December 2013. His partner gave birth to their second child two weeks ago. His partner's leave expires on 12 August 2019.

The Appellant and his partner say that she studies and also works part-time whilst the Appellant looks after their daughter. It is anticipated that he will look after both children in due course while she continues with her studies and works.

Additionally, the Appellant has a brother in the British Army who provides additional financial support to the family.

It was accepted before the First-tier Tribunal that the Appellant could not meet the requirements of the Immigration Rules, either appendix FM as a partner or parent or paragraph 276 ADE with regard to private life.

The Judge then went on to consider Article 8 of the ECHR. The Judge found that Article 8 was engaged given that the Appellant had a partner and child with another child on the way. She concluded, correctly, that the issue was proportionality.

The Judge correctly identified that the child was not a qualifying child because she is neither a British citizen nor has she lived in the UK for more than seven years. At paragraph 23 of the Decision and Reasons the Judge found on balance that J (the child) cannot be left alone in the UK with her mother because she is a minor and dependent on both parents for a stable home life. The Judge also found that it was not reasonable for J to leave the UK and accompany the Appellant as that would deprive her of the right to enjoy her family life with her mother who is studying in the UK. The Judge then considered section 117B and noted that this Appellant speaks English, which is a neutral point and that he was not entirely self-sufficient which was an adverse point. However, the Judge went on to find that the child should not be held to blame for her father overstaying his visa and went on to find at paragraph 25 that, having carefully weighed up the facts of the case, she found there was very little evidence of a pressing social need to remove the Appellant. She said his partner has limited leave and she inferred, because she was shown no evidence to the contrary, that J also had leave in line with her mother. Her mother relied on the Appellant to look after J so that she could study and work. She found it would not be in the child's best interest to be separated from either parent and as she is only four years old she requires day-to-day care in contact with both parents and it would not be reasonable for the child to leave the UK.

She found the Appellant's removal would have an adverse impact on his family life with his partner because his partner would be unable to pursue her studies if the Appellant had to leave because she would single-handedly have to look after J and the new baby rather than focusing on her studies. She found that the suggestion of making alternative childcare arrangements was a narrow

view because such an arrangement would still deprive the child of family life with her father. His removal would put enormous pressure on his partner to find additional funds for childminder/nursery fees and the result may be her falling foul of the terms of her student visa. On that basis the Judge allowed the appeal.

I find that the Judge materially erred in law in her consideration of this appeal. She makes no reference to section 117B (4) which states that little weight should be given to a private life or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully. This Appellant has been unlawfully in the United Kingdom for 14 years. She also makes no reference to the provisions of section 117B(5) which states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

Paragraph 117B(6) can have no application because the child is not a qualifying child.

In fact, I am informed that the child J to has not been granted leave in line with her mother. However, that has no bearing on my consideration and would appear to be no more than oversight by the Secretary of State.

The Judge also failed to take into consideration the guidance of MA (Pakistan) [2016] EWCA Civ 705 which states that when considering the reasonableness of removing a child there has to be a balancing exercise taking into account all matters, including the conduct of the parents while at the same time recognising that a child cannot be punished for the poor behaviour of its parents.

In human rights appeal a Judge has to consider human rights through the lens of the Immigration Rules. Appendix FM to the Immigration Rules contains the rules which the Secretary of State considers to be compliant with Article 8, a person's right to private and family life. We have been told time and again by the higher courts that appropriate weight has to be given to the views of the Secretary of State and the interests of immigration control. So much is now enshrined in statute in the terms of section 117A, B and C of the Immigration and Asylum Act 2002. Section 117 B(1) makes clear that the maintenance of effective immigration controls is in the public interest. This is a reminder that if a person cannot meet the requirements of the Immigration Rules it will only be rare cases where an Appellant can succeed under Article 8 when he cannot succeed under the Rules.

It is also now well-established case law that where children are involved the best interests of children are to be taken as a primary consideration. However, they are a primary consideration, not the paramount consideration and their best interests can be outweighed by other matters.

The Judge in this case appears to have taken into consideration matters which would have applied had section 117B(6) have applied, namely whether it is reasonable for the child to leave the UK and failed to carry out a balancing exercise placing appropriate weight to the public interest in the maintenance of

immigration control. She has failed to identify what factors in this case take it out of the ordinary.

For all of the above reasons I find the First-tier Tribunal's Decision and Reasons fatally flawed and I set it aside.

There being no change to the factual scenario, save for the fact that the second child has now been born, I went on to hear submissions prior to re-deciding the appeal.

Miss Yong argued that the child, now aged four and at nursery, it would be against her best interests for the Appellant to be removed. Her best interests required her to be cared for by both her parents. The Appellant's support is necessary for his partner to continue with her studies and part-time work and his removal would be disproportionate.

I note firstly that considerable weight needs to be attached to the public interest in the maintenance of immigration control and in that regard the fact that the Appellant cannot meet the Immigration Rules is a weighty matter.

I have no hesitation in finding the best interests of the children are to remain with living with both parents. However, I also note that one child is aged only four and the other an infant. The centre of their lives remains the family unit. I also note that both children are Indian nationals and in the same way as a British child is entitled to be brought up in the country of its nationality and culture, so must be the case with an Indian child.

Both parents speak Punjabi and the children will therefore grow up speaking that language, it being the first language of their parents. Even if they do not, English is widely used in India, including in education.

Even if it was in the children's best interest to live with both of their parents in the UK, I find that those best interests in this case give way to the public interest in immigration control for the following reasons.

The Appellant's presence in the UK has not just been precarious but unlawful for 14 years, with flagrant disregard to UK immigration laws. He has done absolutely nothing to seek to regularise his stay until the application which gave rise to the extant appeal (6 February 2017).

The Appellant and his partner entered into a relationship in 2013 in the full knowledge that he had no right to be in the UK and that her leave was temporary in nature. They could have had no expectation when they entered into that relationship that they would be entitled to continue it within the UK unless they could meet the Immigration Rules.

Whilst the Appellant can speak English, that is a neutral point. With regard to the requirements of section 117B(3) the Appellant is not financially independent. His wife is a student and whilst I was told that she works on a part-time basis, currently she is on maternity leave and thus not working. I was given no satisfactory answer as to how the family maintains itself. The Appellant's brother in the Army, I was told, provides some financial support.

However, self-sufficiency means precisely that, not reliance upon a third person. So much was established by Rhuppiah [2016] EWCA Civ 803.

Section 117B(4) confirms little weight should be given to any private life the Appellant has accumulated as he has been in the UK unlawfully. Neither his partner nor his children are qualifying persons.

To suggest that the Appellant's presence in the UK is necessary in order for his partner to continue with her studies is not an attractive argument. Notwithstanding the fact that she came to the UK to study she has nevertheless entered into a relationship and indeed a religious marriage with the Appellant and they have gone on to have two children together. This has of necessity impacted on her studies and will continue to do so for some time to come. Her priority would not appear to be her studies, rather her family life. I do not criticise her for that but it ill behoves them to then argue the strength of her need to continue her studies.

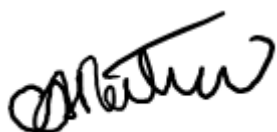
Given that both the Appellant and his partner are Indian nationals, one with no right to be in the UK and one with temporary leave; that the children are Indian nationals; that they both have family members in India; that the Appellant's partner is highly educated and the Appellant has previously worked in India, there will be no hardship or obstacles to family life continuing in India. If the partner chooses not to accompany the Appellant to India then that is her choice. If and when he can meet the requirements of the Immigration Rules he will be free to seek entry to the UK. Alternatively, the family can enjoy family life in India.

There is nothing unusual, exceptional or compelling about this case to justify allowing it on Article 8 grounds when the Appellant does not meet the requirements of the Immigration Rules.

Notice of Decision

The appeal by the Secretary of State to the Upper Tribunal is allowed in that the Decision and Reasons of the first-tier Tribunal is set aside and in re-deciding the appeal it is dismissed.

No anonymity direction was requested and therefore none is made.



Signed

Date 15th October 2018

Upper Tribunal Judge Martin