



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

Appeal Number: HU/02101/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 3 July 2019**

**Decision & Reasons Promulgated
On 23 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**L S
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O’Ceallaigh, counsel
For the Respondent: Ms Jones Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant is a citizen of India born on 19 February 1983. He appealed against the decision of the respondent on 21 January 2019 to refuse his human rights claim. His appeal came before Judge of the First-tier Tribunal L Murray (“the FTTJ”) who, in a decision promulgated on 16 April 2019, dismissed his appeal.
- 2.** Permission to appeal was granted by Designated Judge Shaerf in the following terms:
“... The grounds state the Judge erred in not treating the interests of the Appellant’s two minor cousins as a primary consideration: their father had died in 2016 and the Appellant is the central male figure in their lives and that the Judge

did not address the Appellant's case that he should be granted a further short period of leave to regularise his status consequent on the disruption to his life in education resulting from the allegations of fraud which the Judge had dismissed.

The Judge's assessment of the interests of the Appellant's minor cousins at paragraph 39 of her decision did not reflect that the only brother of their mother had died in February 2019, reinforcing the claimed role of the appellant who lives with them in their lives. The Judge found at paragraph 39 of her decision that there was no family life. The threshold to establish family life is not high. The issue which the Judge had to consider was whether the decision under appeal interfered with that family life and, if so, whether the interference was sufficiently grave to engage the State's obligations under Article 8 of the European Convention and then whether that interference would be disproportionate to any of the legitimate public objectives identified by Article 8(2). It is arguable that in an otherwise carefully constructed decision the Judge erred in her treatment of the Article 8 claim."

3. Hence the matter came before me. At the outset of the hearing I indicated to the parties that I had read the FTTJ's record of proceedings which referred to Mr O'Ceallaigh having made oral submissions to the FTTJ to the effect that the appellant's role within the family engaged Article 8. He had also referred to various factors which rendered the appellant's circumstances unusual and exceptional. He had made reference in those submissions to the two children having lost their father and uncle, the latter earlier this year, and the appellant's own role within the family as a result: it was described as a "close family dynamic". I indicated that my preliminary view was that the FTTJ's finding at [39] that "it has not been argued that the ties he has amount to family life for the purposes of Article 8 ..." was an error of law being a failure to take into account or perhaps to misinterpret the oral submissions made for the respondent.
4. Ms Jones, for the respondent, noted the FTTJ's reference at [15] to the submissions for the appellant as regards the nature of the appellant's role within the family and the existence of the two children. She noted there had been no specific reference in the appellant's skeleton argument to the existence of family life, merely to claimed exceptional factors. She noted a 350 page bundle had been produced and yet this did not include reference to the dynamics of the family, an expert report, a social services report or anything from the school as regards the appellant's relationship with the children. However, she accepted that, if the record of proceedings referred to oral submissions for the appellant with reference to his claimed family life, there would be an error of law.
5. The appellant's skeleton argument in the FTT refers at [40] to the requirement of the FTT to consider the Article 8 rights of everyone affected when deciding whether or not a decision is proportionate (**Beoku Betts v SSHD [2008] UKHL 39**). The submissions in the skeleton, as regards the Article 8 claim, were extremely limited. There was no specific reference to the existence of family life. However, these submissions were supplemented by the oral submissions for the appellant. The record of proceedings makes it clear that it was claimed the appellant's circumstances were exceptional and highly unusual "due to the role played within the family. He has lived with the family for 13 years and there are two children who have lost father and uncle in a short time and he played a role with school work and looking after them – close family dynamic." While there is no specific reference in the record of proceedings as to whether the appeal was pursued on the basis Article 8 was engaged on grounds of family life, it was undoubtedly the fact that, given the appellant's claimed role within the family, his removal could impact on the well-being of the children who had lost their father and uncle.

Thus the best interests of these children should have been addressed by the FTTJ in her decision, pursuant to s55 of the British Citizenship and Immigration Act 2009.

6. I indicated to the parties' representatives that, in the light of the FTTJ's record of the oral submissions for the appellant, I would find there was an error of law in her decision in that she had failed to identify and take into account the best interests of the children in her decision. Furthermore, those interests had not been factored into the proportionality assessment pursuant to Article 8: the FTTJ stated "It has not been argued that the ties he has amount to family life for the purposes of Article 8 and the evidence before me does not show this". This is not an accurate reflection of the oral submissions for the appellant which specifically referred to the close family dynamic which included the appellant's role in the context of two children who had lost both their father and, earlier this year, their uncle. The FTTJ had failed to have regard to that role and the children's best interests in concluding there was insufficient evidence to demonstrate that Article 8 was engaged in respect of family life.
7. In **Azimi-Moayed & Ors (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** the Tribunal held that duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so. In **NN (South Africa) & Anor v Secretary of State for the Home Department [2013] EWCA Civ 653** it was said that whether or not "family life" is established, it is a question of fact in each case whether it is appropriate to focus on family life rather than "private life" but in practice the factors to be examined in order to assess the proportionality of the removal are the same regardless of whether family or private life is engaged. The FTTJ's analysis was therefore flawed.
8. I indicated to the representatives that I would find the FTTJ had made an error of law in failing to identify the best interests of the two children and to make them a primary consideration in the assessment of proportionality. I invited them to make submissions on the materiality of that error of law.
9. Ms Jones submitted there was a paucity of evidence before the FTTJ as regards the children and the appellant's relationship with them; she noted the appellant's 350 page bundle which contained little of relevance, on her submission. She drew my attention to paragraphs 35, 39 and 41 of the FTTJ's decision. She identified references to the children's best interests at paragraph 38.
10. Mr O'Ceallaigh submitted there was no analysis of the children's best interests; he agreed that there had been no mention of these specifically in his skeleton argument before the FTTJ but he observed there had been extensive oral evidence, as noted in the record of proceedings, on the issue. He submitted the FTTJ had failed to take into account the exceptionality of the appellant's circumstances: he had lived in the same household for 13 years; the children had suffered bereavement. The appellant's role in their life was exceptional. This could have made a difference to the outcome. Furthermore, the appellant had become an overstayer as a result of a series of bad luck. He submitted the interests of the children should have been considered in the context of the accusation made against the appellant: his life had been on hold for three years; he should have been granted a short period of leave to regulate his status; even 60 days would have been sufficient to enable him to rectify his student status; there were no difficulties with finances. This should have gone into the mix.

Discussion

11. I do not accept Ms Jones' submission that the FTTJ referred to the best interests of the children and their impact in the decision-making process. The focus of the FTTJ's decision was on the appellant's private life, the FTTJ having apparently decided that the appellant did not pursue a family life and that there was insufficient evidence to demonstrate the existence of one [39]. My attention was drawn to [38] in which the FTTJ made reference to **Kaur (children's best interests/public interest interface) [2017] UKUT 14 (IAC)** but this reference is in the context of the "little weight provisions in Part 5A of the 2002 Act [which] do not entail an absolute, rigid measurement or concept..." The reference to this authority was not in the context of identifying or taking into account the best interests of the children. It is clear from the previous sentence in [38] that the FTTJ's focus was the appellant's private life.
12. The findings at [39] simply do not go far enough. The mother of the two children, whose deceased husband was the appellant's cousin, says in her statement

"He is the only member of my family my children have in the United Kingdom (after their grandparents, as their dad is no longer alive. ... He has always played the role of a brother in my life and plays an active role as an uncle to my children. After my husband passed away in 2016, [the appellant] has played in [sic] important role in my children's lives as their only male figure in the family. [The appellant] not only helps me with caring for my mother-in-law and father-in-law, but also helps me with children; such as with homework as he is extremely skilled in Maths and Art. He helps out significantly with household chores as well as with my children and he is one of the only person I would trust around my young children (as they are ten and twelve). ... My children and I have lot of respect for [the appellant], as he is the only member of family we now have after the death of my husband. ... [The appellant] not only has helped out significantly during the time that my husband died, but recently (16/02/2019) my only brother also passed away, and [the appellant] has also been a significant help during this very difficult time, and he is a great asset to our family. ... My children and I would all be devastated if [the appellant] was to return to India, as we have built a great relationship with him."
13. The FTTJ does not criticise the evidence of this witness. It is not rejected by the FTTJ. Indeed it is implicit from paragraph 38 that the FTTJ accepts it: she refers to "the Appellant [having] a good relationship with his cousin's family, their children and his aunt and uncle with whom he lives." The FTTJ goes on to state she "accept[s] that life cannot have been easy for the family when the Appellant's cousin died young in 2016 and that he helps with the children aged 10 and 12. [She] further accept[ed] that they would find it difficult if he returned to India." This is not the evidence of the children's mother which is that they would be "devastated" if he were to return to India. There is a significant difference between devastation and difficulty, particularly for two young children in such circumstances. At paragraph 41 the FTTJ states "Within the spectrum of 'little' weight I give some weight to his private life given the relationships with family". She concluded that his private life "does not have a special and compelling character".
14. As was said by Keene LJ in **IA (Somalia) v SSHD [2007] EWCA Civ 323**:

"... in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error ... [A]n

error of law is material if the Adjudicator might have come to a different conclusion ... "

15. I accept that, had the FTTJ identified and taken into account, as a primary consideration in the proportionality assessment, the best interests of the children, as she was required to do pursuant to s55, she might have reached a different conclusion. Her findings outside the Immigration Rules, pursuant to the Article 8, cannot stand as a result of the material error of law in failing to identify and take into account the best interests of these children.
16. It was submitted by the parties that, in the event of my finding a material error of law, I should remake the decision. I agree and re-assess the proportionality of the interference with the appellant's and the children's protected rights as against the public interest.
17. In accordance with the guidance in **Kaur**, cited above, I identify the best interests of these two children at the outset and in isolation.
18. These two children lost their father in 2016. While it is not suggested in the evidence that the appellant has a genuine parental relationship with these children, he has a role in their care. The evidence of the children's mother makes it clear that he is involved in their upbringing in that he cares for them, he is trusted by her to look after them and he supervises them with their homework and other activities. He is the children's "only male figure in the family" according to the children's mother. This is a close family dynamic in which the appellant has a closer relationship with the children than would have been the case if their father had been alive. I adopt the evidence of their mother and find that they would be devastated if the appellant were to return to India. These children have lost their father; they have also lost an uncle who died earlier this year and the appellant would be the third close male relative to leave the household were he to be removed to India. His removal must be seen in that context. It is in the best interests of these children to continue to live within the current household with the appellant living in the household and continuing to support the children emotionally and practically following the deaths of their father and their maternal uncle.
19. I have regard to the submissions of Ms Jones that there is no expert or other independent evidence as to the impact of the appellant's removal on these children. However, it is axiomatic that young bereaved children, such as these, have suffered and are suffering as a result of those bereavements. It is not fanciful that the appellant in such circumstances has stepped, in a practical and emotional sense, if not a parental sense, into the shoes of the children's deceased father. Irrespective of the specific biological nature of his relationship with each individual child, it is clear that his departure from the family home where he has lived for the last thirteen years, and before the children were born, would cause these children significant upset and detriment. They would, in the words of their mother, be devastated by his departure; they have known him all their lives and come to rely upon him emotionally and practically since their father's demise.
20. It is not in dispute that Article 8 is engaged insofar as the appellant's private life is concerned. The proposition that the impugned decisions of the Secretary of State interfere with, substantially so, the private lives of the appellant and the children of the family, to whom he is close, is incontestable. It is not in dispute that there are not very significant obstacles to his integration into India on return (paragraph 276ADE(1)(vi)). The issue is whether the appellant's circumstances are such that the degree of interference with his protected right is such as to outweigh the public interest in the maintenance of effective immigration controls (s117B(1) of the 2002 Act).

- 21.** The threshold for the engagement of Article 8 is a low one: **AG (Eritrea) v SSHD [2007] EWCA Civ 801**. Given the appellant's circumstances, the deaths of the children's father in 2016 and their uncle in 2019, and the children's and their mother's reliance on the appellant for practical and emotional support, I find that Article 8 is engaged in this case not only on the grounds of his private life but also on grounds of the appellant's and the children's and their mother's family lives.
- 22.** The appellant's relationship with the children was formed at a time when he had lawful status here: he entered the UK in June 2006 with leave to enter as a student and that was extended to 31 January 2010. At that time the children's father was still alive but the appellant was living in the family household and would have had a close relationship with the children nonetheless, at least sufficient to engage Article 8 on private life grounds, from their birth. They are now aged 10 and 12. That relationship has strengthened since the death of the children's father in 2016 such that it now amounts to family life.
- 23.** The appellant's immigration history is relevant to the assessment of the public interest. On 11 January 2010 the appellant applied for further leave to remain as a Tier 4 general student. That application was refused on 2 February 2010. The application was refused because a page was missing from the application form. Despite the respondent's policy the appellant was not given the chance to remedy it.
- 24.** On 10 February 2010, within 28 days of his previous refusal, the Appellant applied for further leave to remain as a Tier 4 general student. That application was refused on 12 March 2010 because his application now included a bank statement which was out of date. There is no suggestion in the evidence that the respondent notified the appellant of this discrepancy notwithstanding it must have been clear to the respondent that it was merely an error.
- 25.** On 31 March 2010 the appellant sought reconsideration but there was no response until 9 March 2011. Following pre-action correspondence the appellant was given a right of appeal but it proceeded on the papers and the appellant's previous representatives failed to inform the tribunal that the appellant had the correct funds for the relevant period and failed to include his bank statement. The appellant's appeal rights were exhausted on 14 November 2012. On 12 December 2012 the appellant applied for further leave to remain as a Tier 4 general student. He sat a test of English for International Communication ("TOEIC") at Premier Language Training Centre. This was refused with no right of appeal. The appellant made human rights representations in June 2014; this was refused and certified in November 2016. On 18 October 2017 the appellant made a human rights application on the basis of his family life with his partner and his private life. It is that application which was refused and led to the appeal to the FTTJ. The respondent concluded inter alia that the appellant had cheated in the TOEIC test and that he had not paid litigation costs awarded to the Home Office; he did not therefore meet the suitability criteria. He also concluded the appellant did not meet the relationship requirements of the Rules because he and his partner were not married and did not cohabit. The respondent concluded the appellant did not meet the exemption criteria in the Rules (section EX.1) and that there were not very significant obstacles to his integration on return (paragraph 276ADE(1)(vi)). He also concluded there were no exceptional circumstances (paragraph GEN.3.2 of Appendix FM) in that it would not result in unjustifiably harsh consequences for the appellant, a relevant child or another family member. It was noted that the appellant had remained in the UK in breach of Immigration laws for a period in excess of 7 years.
- 26.** I turn to the issue of proportionality. It is submitted for the appellant that the failure of his applications for leave to remain as a student, and on appeal, were through no fault of his own,

rather those of his representatives at the time. This is relevant to the extent that he did not flagrantly abuse the Immigration Rules. It is also highly relevant that he did not, as the FTTJ found, cheat in the TOEIC test. It is nonetheless a fact that he did not demonstrate at the material times, that he met the criteria in the Immigration Rules for the grant of leave to remain as a student or indeed on the basis of his private or family life at the time.

- 27.** The appellant speaks English. He is not financially dependent on the state (**Rhuppiah [2018] UKSC 58**). There are sufficient funds within the family unit for him to return to his studies and thereafter he could work. He would not be a burden on the state from a financial perspective. He has integrated into British society.
- 28.** Pursuant to section 117B(5) “little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious”. That is the case for the appellant between June 2006 and January 2010. The children were born in this period and his relationship with them was formed at that time. The appellant does not have a parental relationship with the two children, albeit they are emotionally and practically dependent on him to some extent. That dependence was established in 2016 with the death of their father. The appellant was in the UK unlawfully at the time.
- 29.** Pursuant to s117B(4) “little weight should be given to a private life established by a person at a time when the person is in the UK unlawfully”. That is the case for the appellant from 31 January 2010.
- 30.** In **Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC)** it was held that the Parliamentary intention underlying Part 5A of the 2002 Act is to give proper effect to Article 8. That was a case involving a father who had primary care for the children of the family. In that case the family were supported by public funds. The headnote to that authority is helpful:
 - “(I) Where the case of a foreign national who is not an offender does not satisfy the requirements of the Article 8 ECHR regime of the Immigration Rules, the test to be applied is that of compelling circumstances.
 - (II) The Parliamentary intention underlying Part 5A of NIAA 2002 is to give proper effect to Article 8 ECHR. Thus a private life developed or established during periods of unlawful or precarious residence might conceivably qualify to be accorded more than little weight and s 117B (4) and (5) are to be construed and applied accordingly.
 - (III) Mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of "very significant hurdles" in paragraph 276 ADE of the Immigration Rules.”
- 31.** At [45] the Upper Tribunal said this, with **Kaur** in mind, on the issue of “little weight” pursuant to s117B:
 - “**Kaur** reasons that this produces the result that in some cases a private life developed during a period of unlawful or precarious leave in the United Kingdom may qualify for virtually no weight, whereas in others the quantity of weight to be attributed may verge on the notionally moderate where the assessment is that the particular case, with its individual traits and circumstances, belongs to the upper end of the "little weight" spectrum.
- 32.** At [47] the Upper Tribunal give this guidance:

“...these Appellants must demonstrate a compelling (not very compelling) case in order to displace the public interests inclining towards their removal from the United Kingdom. In formulating this principle, we do not overlook the question of whether the adverb "very" in truth adds anything to the adjective "compelling", given that the latter partakes of an absolute flavour. It seems to us that the judicially formulated test of "very compelling circumstances" has been driven by the aim of placing emphasis on the especially elevated threshold which must be overcome by foreign national offenders, particularly those convicted of the more serious crimes, who seek to displace the potent public interests favouring their deportation. In contrast, immigrants such as these Appellants confront a less daunting threshold.”

33. To use the format in **Treebowhan**, I give effect to section 117B of the 2002 Act in the following way:

- (a) The starting point is that the maintenance of effective immigration controls is in the public interest.
- (b) There is no dispute about the English language ability of the appellant.
- (c) The appellant is financially independent and capable of working in the UK. He is not financially dependent on the state and is unlikely to become so.
- (d) The appellant is integrated into British society.
- (e) Given the nature of his status in the United Kingdom throughout his stay, the family and private life which he has established and developed qualifies for the attribution of little weight only. That said the case has been made that his family and private life is of a special and compelling character encompassing as it does the close family dynamic resulting from the death of the children’s father in 2016 and, more recently, their uncle and the appellant’s role in their day to day lives, providing them with emotional and practical support. The children’s protected rights are engaged by the appellant’s removal because they would lose that support (**Beoku-Betts v SSHD [2008] UKHL 39**). These are compelling circumstances.

34. The best interests of the two children are served by their remaining within the stable family unit with the appellant continuing to provide support. The appellant’s removal would sever that day-to-day supportive relationship and the family dynamic which is important to the children’s emotional stability, well-being and welfare. These are a primary consideration albeit not the only consideration.

35. This is an unusual set of circumstances: the appellant has a role within the family unit, not as a parent but as a male figure providing close support to two dependent (albeit not currently financially) children in compelling circumstances where their father (and latterly their uncle) have died, leaving them in the sole care of their mother, a widow. Mr O’Ceallaigh was frank in submitting that he had not appreciated the nature of the family dynamic until meeting the appellant and his family on the morning of the hearing in the FTT. This explains the paucity of the documentary evidence before the FTTJ but that paucity was addressed in oral evidence and there is sufficient such evidence to demonstrate the positive impact of the appellant’s presence in the family home, providing as it does a stable home environment for the two bereaved children. It is perhaps to the credit of the appellant and his family that they did not overplay this aspect in their evidence.

36. I balance the salient features of the appellant's case with the public interest, as identified above, and conclude that the public interest is just outweighed by the degree of interference with the appellant's and, more particularly, the children's protected Article 8 rights to a family and private life notwithstanding the appellant's poor immigration history. I am satisfied that the appellant's case just overcomes the threshold necessary to amount to a disproportionate interference with the protected rights of the two children who have suffered the loss of their father in 2016 and an uncle earlier this year. To them, at their young ages, the removal of the appellant would amount to yet another bereavement. These are compelling circumstances: such an upheaval in their lives so soon after the deaths of two close relatives would undoubtedly cause further suffering.

37. This appeal therefore succeeds.

Decision

38. The making of the decision of the First-tier Tribunal involved material errors on points of law. The FTTJ's decision outside the Immigration Rules, pursuant to the Article 8 jurisdiction, is set aside. I remake the decision and allow the appeal on Article 8 grounds.

39. Given my references to the children and their personal circumstances, the appellant is entitled to anonymity in these proceedings.

A M Black

Deputy Upper Tribunal Judge

Dated: 17 July 2019

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

A M Black

Deputy Upper Tribunal Judge

Dated: 17 July 2019