



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

Appeal Number: HU/08206/2019 (P)

**THE IMMIGRATION ACTS**

**Decision under Rule 34 without a  
hearing  
23<sup>rd</sup> June 2020**

**Decision & Reasons Promulgated**

**On 8<sup>th</sup> July 2020**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**RAJNISH [S]**

Appellant before the First-Tier Tribunal, respondent before the UT

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent before the First-tier Tribunal, appellant before the UT

**DETERMINATION AND REASONS (P)**

1. FtT Judge Phull dismissed Mr [S]'s appeal "under the Immigration Rules" (sic) and allowed the appeal "on Article 8 - Human Rights grounds" for reasons set out in a decision promulgated on 30<sup>th</sup> October 2019. Permission to appeal was granted by Designated FtT judge Woodcraft to the SSHD to appeal the decision, on 28<sup>th</sup> January 2020. Directions for the further conduct of the appeal were sent on 30<sup>th</sup> April 2020 and, in the circumstances surrounding COVID 19, provision was made for the question of whether there was an error of law and if so whether the decision of the FtT Judge should be set aside to be determined on the papers.

2. Mr [S], through his legal representatives, stated that he did not wish to make any further submissions save that they relied upon previous grounds submitted (email dated 5<sup>th</sup> May 2020). The SSHD filed a skeleton argument dated 1<sup>st</sup> April 2020. Neither Mr [S] nor his legal representatives has responded to that skeleton. Neither party sought an oral hearing to determine whether there was an error of law by the FtT Judge such that the decision should be set aside to be remade.
3. I have taken the reference to “grounds” by Mr [S]’s legal representatives to mean the grounds of appeal to the FtT and the skeleton argument relied upon before the FtT; there are no other grounds of which I am aware.
4. I am satisfied that the submissions made on behalf of the appellant and the respondent together with the papers before me<sup>1</sup> are sufficient to enable me to be able to take a decision on whether there is an error of law in the decision of the FtT and if so whether the decision should be set aside, on the papers and without hearing oral submissions.
5. Mr [S] is an Indian national subject to a deportation order imposed as a result of him receiving a sentence of 12 months in 2009. His wife is a British Citizen of Pakistani descent. Their relationship was embarked upon when he was unlawfully in the UK. They have a daughter who is a British Citizen who has been with foster carers/in care for the past 10 years. Mr [S] sees his daughter for unsupervised contact four times a year. The wife has mild learning difficulties and Asperger’s Syndrome according to a psychiatric report prepared in 2012.
6. The FtT judge found Mr [S] enjoys a genuine and subsisting relationship with his daughter and is a committed parent “because the social work contact schedule from early 2015 confirmed he has maintained contact with his daughter without fail” [50]. The judge accepted his evidence that his daughter is always happy to see him, that his imprisonment had an adverse effect on her, that his contact with her after his release from prison was reduced from every day. The judge found that “if he were deported this would have a further adverse impact on her, one he cannot alleviate from India. It is not in dispute that if the appellant is deported, his daughter will remain in care, because I accept as a matter of fact that his daughter was taken into care because his wife was unable to look after her alone” [50].
7. The judge further found that removal of Mr [S] would have the effect that his daughter would grow up in care without her parents

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<sup>1</sup> (a) the SSHD’s bundle; (b) the bundle filed on behalf of Mr Sharma received by the Tribunal on 10<sup>th</sup> July 2019 and skeleton argument dated 30<sup>th</sup> September 2019; (c) the decision of FtT Judge Phull promulgated on 30<sup>th</sup> October 2019; (d) The application for permission to appeal and the grant of permission to appeal dated 28<sup>th</sup> January 2020.

([51]) and that her contact with her father would “be limited to telephone calls, email and, possibly, very occasional visits to India, if she is allowed to by the Family courts/social services ([51]).

8. The judge goes on to find:

“52. I have no doubt that the effects of deportation on the child would be considerable. The question is whether it would be “unduly harsh” on the child. This will obviously depend upon the weight to be given to the respondent’s lawful aim, which in turn amounts to whether those harsh effects are ‘due’ on the basis of the offending. I have found on the basis of the evidence before me the appellant poses a low risk of reoffending and whilst I consider his offending to be serious it is non violent offending.

53. I find that the appellant cannot exercise a right to a family life because he cannot take his daughter to India. She is under the care of social services and the council is allowing him to have unsupervised contact with his daughter. I accept his evidence that if his deportation order is revoked he would apply to have his daughter return to him and his wife.... I find that the appellant has established that the effect of his deportation on his British child would be unduly harsh.”

9. In so far as Mr [S]’s wife is concerned, the judge found that she could not manage alone ([55]), that she could not look after their daughter alone and that is why she was taken in to care when he was in prison; that she would find it very difficult to manage her life without her husband and there is no-one who could provide her with care she requires if her husband is deported ([58]).

Grounds seeking permission to appeal.

10. The SSHD submits that although the judge refers to the severing of the relationship between the child and her father he does not give reasons for this, that the ability to provide economically for the child and wife which would cease on deportation does not amount to undue hardship and that there has been no consideration of the child’s best interest if he did apply to have the child returned to him.

11. In so far as the wife is concerned the SSHD submits that the high threshold of very compelling circumstances has not been made out. And that no consideration has been given to the size of India on deciding she could not go to India with him. Nor does the judge take into account that the wife would be able to maintain contact with the child and in any event appears to have managed to travel to Pakistan by herself in any event.

Decision

12. The FtT decision is most unsatisfactory. Although the judge has set out the relevant legislative framework, he has failed to properly apply this. The issue of whether it is unduly harsh is not dependant on

the nature of the criminality. It either is or is not unduly harsh. The judge seems to think that the test relies upon an interference with a right to family life rather than a right to respect for family life. The judge mistakes parental responsibility for a genuine and subsisting parental relationship. There is no indication what contact his wife has with the child. There is no indication why, given he has not been in prison since at least 2010, no application was made for him and his wife to have the child returned to live with them - at that time she would only have been away from them for a few months. There was no explanation why what he claimed was daily contact was reduced to once every three months. As it was at the date of the hearing she had gone into care aged about 4 and by the time of the hearing was aged 15. The finding by the judge that unsupervised contact amounted to a genuine and subsisting parental relationship is unreasoned. Even if it was such a relationship, there is no assessment of the best interest of the child, the effect on the child of contact being maintained through letters, visits etc as oppose to what he wanted. The judge has simply not identified with any reasons why it would be unduly harsh upon her for her father to be deported.

13. In so far as the wife is concerned, there is even less reasoning. The judge has failed to acknowledge the age of the medical reports relied upon, failed to identify the role played by the wife in the child's life, failed to refer to evidence of difficulties the wife would have in India other than that her family were unhappy with the relationship, failed to provide any reasons why she could travel to Pakistan without assistance but cannot remain in the UK without such assistance as would be provided by social services, failed to provide details of what he did for her which she was unable to do and why.
14. Overall the FtT decision, although long, fails to reach either reasoned or actual findings on the fundamental issues to be determined in an appeal of this nature.
15. The appeal in the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside for legal error. The appeal against the decision giving rise to the appeal in the First-tier Tribunal is allowed with no findings preserved.
16. In this case, there have been no findings on relevant matters as required. Oral evidence will be required, and full findings of fact will have to be made. In accordance with the practice direction, it is appropriate in this case for the appeal to be remitted to the First-tier Tribunal to be heard afresh.

#### Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remit the appeal to the First-tier Tribunal to be heard afresh, no findings preserved.

Not before FtT Judge Phull.

Jane Coker  
Upper Tribunal Judge Coker  
23<sup>rd</sup> June 2020