



IAC-TH-CP-V1

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

Appeal Number: IA/41860/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 1<sup>st</sup> September 2015**

**Decision & Reasons Promulgated  
On 18<sup>th</sup> September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr T Melvin (Senior Home Office Presenting Officer)

For the Respondent: Mr S Bhanji (Counsel)

**DECISION AND REASONS**

1. The respondent's appeal against decisions to refuse to vary his leave and to remove him from the United Kingdom was allowed by First-tier Tribunal Judge Clemes ("the judge") in a decision promulgated on 13<sup>th</sup> April 2015. In 2012, the respondent applied for leave to remain in the United Kingdom indefinitely. That application was refused on 2<sup>nd</sup> October 2014, when the adverse immigration decisions were made. The Secretary of State, the appellant, found that the requirements of the Immigration Rules ("the rules") were not met.

2. The Secretary of State considered the application for leave in the light of the rules as they were prior to 9<sup>th</sup> July 2012, concluding that paragraph 322(5) applied in his case. As a result, the respondent's application was refused under paragraph 286 of the rules in force prior to July 2012. The application was also considered in the light of the rules as they were after 9<sup>th</sup> July 2012. The respondent could not succeed under the "ten year partner route" as he fell for refusal under section S-LTR.1.6. On 28<sup>th</sup> July 2014, he was convicted of "battery" and a restraining order was made. The Secretary of State concluded that this made it undesirable to allow him to remain in the United Kingdom with his spouse and stepchildren. Consideration was also given to the respondent's private life, the Secretary of State concluding that he could not show that the requirements of paragraph 276ADE(1) of the rules were met, not least because he had not lived continuously in the United Kingdom for at least twenty years and so the requirement of sub-paragraph (iii) was not met. Furthermore, he could not show very significant obstacles to his integration into India, the country of removal, and so the requirement of sub-paragraph (vi) was also not met.
3. The judge heard evidence from the respondent and also from his wife and one of his stepdaughters. Having done so, the judge went on to find that the requirements of the rules were not met, whether the current or an earlier version applied. This was so in the light of the respondent's conviction on 28<sup>th</sup> July 2014. The judge also agreed with the Secretary of State's assessment of the rules in relation to Appendix FM and paragraph 276ADE.
4. The judge then went on to make an Article 8 assessment outside the rules, concluding that the respondent's removal would be a disproportionate response and therefore unlawful. He allowed the appeal "under the Human Rights Act".
5. The Secretary of State applied for permission to appeal, on the basis that as the respondent was unable to meet the requirements of the rules as a result of his conviction, the judge was required to identify clear "exceptional circumstances" for the appeal to be allowed under Article 8. The factors identified in the decision were insufficient, taking into account the extent of the ties the respondent and his wife have to India. Permission to appeal was granted on 16<sup>th</sup> June 2015. In a response under rule 24, the respondent contended that the judge had not erred in law. He and his spouse were well settled in the United Kingdom.
6. Mr Bhanji and Mr Melvin handed up written submissions which were of great assistance.

### **Submissions on Error of Law**

7. Mr Melvin said that the judge, having dismissed the appeal under the rules, went on to apply the "Razgar approach" and allowed the appeal under Article 8. In doing so, he applied a threshold of "reasonableness", in relation to the respondent's removal to India. However, the findings of fact made by the judge were insufficient to show obstacles to family life being continued in India. The Secretary of State's case was that the judge was required to identify "compelling reasons" in the light of SS (Congo) to explain why an assessment outside the rules was required. The findings

of fact appeared to reflect what was required under the rules and the decision appeared to show that substantially the same reasons identified as justifying dismissal under the rules were relied upon in order to allow the appeal under Article 8.

8. In addition, in considering whether the respondent's removal to India would be a lawful step, the judge ought to have taken into account EX.1.(b), the "insurmountable obstacles" test. This was explained in the recent decision of the Court of Appeal in Agyarko [2015] EWCA Civ 440, where this part of the rules was described as imposing a high hurdle and a significantly more demanding test than whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. The judge simply asked the question whether it would be reasonable for the respondent's spouse to accompany him or join him in India. The evidence showed that she has retained substantial ties to India.
9. In addition, the judge's reasoning appeared to rely on speculation, including the prospects of success in the leave application if the respondent had not committed an offence. In fact, the offence was committed while the decision on the application was being reconsidered by the Secretary of State.
10. Finally, the judge failed to take into account at all section 117A to C of the 2002 Act, relevant in the assessment of the "public interest question". The respondent's private life was precarious, in the light of his limited leave in the United Kingdom. The position might be different in relation to family life but the section and the factors identified there were required to be taken into account.
11. Mr Bhanji said that the respondent relied upon the findings of fact made by the judge. Reliance was placed on the evidence of the spouse and the oldest stepdaughter in particular. The findings were summarised at paragraphs 13 and 14 of the decision, with the judge's analysis following thereafter. The Secretary of State disagreed with the outcome but had failed to identify an error of law.
12. Section 117A to C of the 2002 Act did not take matters further in the light of the clear findings of fact. The judge was entitled to take into account delay on the Secretary of State's part, which was a factor in the Article 8 context. The "insurmountable obstacles" test was always hard to meet, as recent case law showed but in this decision, the judge had properly and carefully weighed all the factors. This was so notwithstanding the absence of any express mention of SS (Congo), the "insurmountable obstacles" test or EX.1 of the rules. The judge had taken into account all relevant matters, inherently, in making his findings at paragraphs 13 and 14 of the decision. There were positive findings in the light of the evidence of the witnesses and the judge took into account the ties established in the United Kingdom and those that remained with India.
13. It was clear from the findings that there were "compelling circumstances" even though the judge did not expressly use that phrase. The respondent was an integral part of the family and the breadwinner. The judge was entitled to find family life

even though the stepchildren were adults, because of the strong emotional ties. So far as section 117A to C was concerned, one could argue the degree of precariousness in relation to the respondent's private life.

14. In a brief response, Mr Melvin said that the decision simply did not show that the judge had applied the reasoning in SS (Congo).

### **Findings and Conclusions on Error of Law**

15. At the heart of the Secretary of State's challenge is a contention that the decision is one which contains insufficient reasons to show precisely why the appeal was allowed under Article 8, having been dismissed under the rules. Mr Bhanji's careful response is that the decision contains fully reasoned findings of fact which show compelling circumstances in the respondent's case, the judge being entitled to conclude that the appeal fell to be allowed under Article 8, following an assessment outside the rules.
16. There is no doubt that the decision contains clear findings of fact in the light of the evidence, particularly the evidence given by the respondent's oldest stepdaughter. There is also a clear summary of the Secretary of State's case, as set out in the letter which accompanied the adverse decisions.
17. The difficulty, however, lies in paragraphs 12 to 15 of the decision. These contain the judge's analysis. There are clear findings that the respondent cannot meet the requirements of the rules. Paragraph 13 begins with agreement with the Secretary of State's assessment under Appendix FM of the rules and the judge in the same paragraph makes an adverse finding regarding private life ties. He finds that there are no significant obstacles to the respondent's integration into India. What swiftly follows in paragraph 14 is an Article 8 assessment outside the rules, the judge proceeding to apply Lord Bingham's "five stage test" in Razgar. Notwithstanding a clear finding in paragraph 13 that the judge is "not satisfied that [the respondent] has established such a degree of a private life in the United Kingdom" to enable him to succeed under the rules, paragraph 14 includes the following:

"I can and do conclude that ... refusal of his application and rejection of his appeal would be disproportionate because of the nature and degree of his private life."

Mr Melvin is right to point out that those two conclusions, which do not sit happily together, have been reached without regard to the guidance given recently by the Court of Appeal in SS (Congo).

18. What is required in the light of that case, where a conclusion is reached that a claimant cannot succeed under the rules, is an assessment of whether there are "compelling reasons" or circumstances requiring an assessment outside the rules. Although the judge has referred to the respondent's family and private life in the same paragraph and subsequently, and although he has taken into account the years spent by the respondent in the United Kingdom, his marriage, the period of delay between early 2013 and the date of decision in October 2014, and indeed the

circumstances of the offence committed by the respondent, there is, with respect, no explanation of why those facts amount to “compelling reasons”. As the author of the grounds in support of the application for permission to appeal noted, the evidence showed that both the respondent and his spouse have retained substantial ties to India. The findings of fact do not, with great respect to Mr Bhanji, stand out in themselves as showing why an assessment outside the rules was required or indeed how the judge reached the conclusion that the public interest in the respondent’s removal was outweighed.

19. Furthermore, Mr Melvin is right to draw attention to the absence of any mention of section 117A to C of the 2002 Act. The factors set out there must be taken into account by a Tribunal in deciding the “public interest question” and in weighing the competing interests. Guidance from the Upper Tribunal in Dube [2015] UKUT 00090 and Forman [2015] UKUT 00412 is that a Tribunal need not set out by rote the considerations contained in section 117B but the decision must show that they have been taken into account and given effect. In relation to private life, for example, the weight to be given to ties in this context is reduced where a claimant’s immigration status is precarious. Mr Bhanji is right to say that the degree of precariousness might be a matter of argument in a particular case but the decision in the present appeal does not show that the judge took into account the relevant statutory consideration or what impact it had. In reaching a favourable conclusion in relation to family life, the judge was, again, required to take into account the section and to explain whether particular factors strengthened or weakened the respondent’s case.
20. There is also force in Mr Melvin’s submission that in assessing the proportionality of removal, assuming that reasons were properly identified for making an assessment outside the rules, the judge relied entirely, it appears, on guidance from EB (Kosovo) [2008] UKHL 41, in which a relatively low threshold of reasonableness is identified in relation to an expectation that a spouse will follow a husband or wife to the country of removal. The rules in their current form, for example in EX.1, identify a higher threshold of “insurmountable obstacles”, considered recently by the Court of Appeal in Agyarko but not taken into account by the judge in the present appeal. On the other hand, the Secretary of State made no mention of EX.1 in the letter giving reasons for the adverse decisions and the judge’s attention may not have been drawn to that part of the rules at the hearing.
21. In any event, the absence of reasons showing why the judge moved to make an assessment outside the rules, having found that the requirements of the rules were not met, and the absence of a substantial consideration of the factors set out in section 117A to C of the 2002 Act amount to material errors of law and I set aside the decision of the First-tier Tribunal.
22. In a brief discussion regarding the appropriate venue for the remaking of the decision, the Newport hearing centre was identified as the most suitable, as the respondent’s family live in Southampton. Mr Melvin suggested that the appeal should be remade in the Upper Tribunal, as the evidence had been fully aired. I have considered this suggestion very carefully. I conclude, however, that in the light of

paragraph 7.2 of the Senior President's Practice Statement made in 2012, the appropriate venue is the First-tier Tribunal, where up-to-date evidence may be given.

**NOTICE OF DECISION**

The decision of the First-tier Tribunal, containing material errors of law, is set aside. It will be remade in the First-tier Tribunal at the Newport hearing centre before a judge other than First-tier Tribunal Judge Clemes.

No anonymity direction has been requested or is made.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell