



IAC-AH-KEW-V1

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

Appeal Number: IA/02976/2014

THE IMMIGRATION ACTS

Heard at	Centre	City	Tower,	Decision	&	Reasons
Birmingham				Promulgated		
On 20th October 2015				On 11th April 2016		

Before

DESIGNATED JUDGE OF THE FIRST-TIER TRIBUNAL FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MANISH SEHDEV
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara instructed by S and S Immigration Law

DECISION AND REASONS

1. Manesh Sehdev is a citizen of India who arrived in this country in 2003 aged 16 on a visit visa and who subsequently overstayed. I will refer to him as “the Claimant.” On 29th May 2012 he made representations for the grant of leave to remain under Article 8 ECHR on the basis of his relationship with Shakonthla Kumar, who is a British citizen and has two children who are also British citizens. There appears to have been an initial refusal of his application against which there was an appeal conjoined with an appeal against removal. On 22nd October 2012 that appeal was allowed on the basis that consideration should have been given to Article 8 ECHR and Section 55 of the Borders, Citizenship and Immigration Act 2009. The Claimant’s application was refused again by letter dated 20th December 2013 and a decision made to remove him to India. His appeal against that decision was allowed by First-tier Tribunal Judge J C Boyd, following a hearing at Birmingham on 14th October 2014, in a decision promulgated on 10th December 2014.
2. At the hearing before the First-tier Tribunal both representatives had agreed that as the application had been lodged prior to the amendments to the Immigration Rules which came into force on 9th July 2012 the Rules did not apply and the judge accordingly decided the case without reference to the Immigration Rules. Having heard evidence the judge was satisfied that the Claimant and Ms Kumar were in a relationship and had been living together probably since 2012. He was satisfied that the Claimant had both family and private life in the United Kingdom and having had regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 he went on to allow the appeal under Article 8. I will refer to his decision in more detail below.
3. The Secretary of State applied for permission to appeal. In the grounds it was contended that in the light of **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)** the judge had not identified adequate reasons why the Claimant’s circumstances were so compelling or exceptional that the appeal should have been considered outside the Immigration Rules. It was also said that whilst the judge had found that the Claimant acted as a father figure to his partner’s children and was a stabilising influence he had also found that the children’s best interests would not be adversely affected by his absence. The relationship had been established in the full knowledge of his unlawful status and it would not be unduly harsh to expect him to leave the United Kingdom and apply for leave to enter. It was also said that a finding that he would be financially independent if he remained was speculative. The grounds went on to say that Article 8 had very limited impact for private life cases which did not interfere with a person’s moral and physical integrity. The Claimant had spent the majority of his life in India and there would be no significant obstacles to his reintegration into Indian society. It was submitted that the Tribunal should have found that the decision to remove was proportionate.

4. In granting permission on 27th January 2015 First-tier Tribunal Judge A R Williams firstly stated that he considered that the challenge on the basis of **Gulshan** and **Nagre** was misconceived as the application had been made prior to July 2012. He continued by noting that the judge had found that there was a relationship between the Claimant and his partner's two children and the Claimant was "a stabilising influence for the children." However the judge was not satisfied on the partner's evidence that she would not be able to look after the children on her own. She had her mother living with her and her social worker had made no comment in relation to that element. It was a matter of proportionality. Finally he stated

"I find in this case that it is arguable that adequate reasons have not been given for allowing the appeal (**MK (Duty to Give Reasons) Pakistan [2013] UKUT 00641**). In those circumstances there is an arguable error of law and permission to appeal is granted."

5. At the commencement of the hearing before me Mr Smart sought permission to vary the Secretary of State's Grounds to Appeal. He wished to rely upon the judgment of the Court of Appeal in **Singh v SSHD [2015] EWCA Civ 74**. He said that the hearing before the judge at first instance had taken place on 14th October 2014. The grant of permission to appeal had been made on 27th January 2015 and the judgment in **Singh** had only been handed down on 12th February 2015. It was apparent from the judgment in **Singh** that the new Immigration Rules applied to every case decided after 6th September 2012 and therefore the concession made by the Presenting Officer at the hearing before the First-tier Tribunal had been misconceived as had the consideration by the judge without reference to the Immigration Rules.
6. Mr Bellara objected strongly to a further Ground of Appeal being admitted so late in the day. He said that the judgment in **Singh** had been handed down in February of the current year and there had been ample time for the Secretary to State to make an application in proper form for grounds to be varied but the application had only been made on the day of the hearing before the Upper Tribunal and he had had no prior warning of it. He pointed out that permission to appeal had only been granted in respect of issues under Article 8. He added that even if it had been found that the Claimant could not have succeeded under the Immigration Rules the Tribunal would have had to go on to consider issues under Article 8 bearing in mind the interests of the children as highlighted in **JO and Others (Section 55 Duty) Nigeria [2014] UKUT 00517 (IAC)**. I considered Mr Smart's application but came to the conclusion that it would not be appropriate to grant it. There were strict requirements in the Upper Tribunal Procedure Rules as to time limits for when applications for permission to appeal could be made. The application had not been made until an oral application at the hearing before the Upper Tribunal even though there had been a period of more than six months since the judgment in **Singh** had been handed down. No prior indication of the proposal to rely on **Singh** had been made to Mr Bellara. I also bore in

mind that at the hearing before the First-tier Tribunal the Presenting Officer had expressly conceded that the matter should be considered only under Article 8 ECHR and not under the Immigration Rules and permission to appeal had been granted only in respect of Article 8. In those circumstances I declined to agree to any amendment to the Grounds of Appeal.

7. Mr Smart then addressed me on the substantive appeal. He said he relied upon all the grounds. He said it was clear from the judgment of the Court of Appeal in **SSHD v SS (Congo) [2015] EWCA Civ 387** that for an applicant to succeed beyond the Rules exceptional circumstances had to apply. The grounds related that the judge had found that the applicant was a father figure to his partner's children but he had also said that their best interests would not be affected by his absence and therefore Section 55 of the 2009 Act would not come into play as a result of his removal. It was irrational for the judge to conclude (at paragraph 29 of his decision) that the Claimant's removal would have an effect on the children in the light of the earlier finding. The judge did not explain why he found that Section 117B(6) of the 2002 Act was engaged in the light of his earlier finding. The remainder of the grounds were detailed and he relied upon them.
8. In response Mr Bellara submitted that the judge had set out the whole range of relevant factors. At paragraph 24 of his decision the judge had said that the partner would have been able to look after the children with the help of her mother. He found as genuine the relationship between the Claimant and the children and noted that the partner had a difficult background. At paragraph 30 he found that the return of the Claimant to India would cause unnecessary upset to the family. It was clear from **JO** that the views of the children were required to be taken into account and those views he said were before the judge. He had focussed on the unit of the family as a whole. I questioned whether it could be said that the Claimant had a "genuine and subsisting parental relationship" with the children as referred to at Section 117B(6) of the 2002 Act. Mr Bellara replied that there was no definition of parenthood but the judge had found that the Claimant was a father figure and the social worker's report had been glowing in this respect. He had been a member of the family for a number of years. It appeared that the children referred to him as "Dad."
9. Finally Mr Smart said that the judge had not found specifically that there was a parental relationship between the Claimant and the children. He contended that a parental relationship must involve the claimed male parent being either the actual father of a child or the adoptive father. The judge had not made an express finding in that respect.
10. I reserved my decision having heard those submissions, which I now give. In the light of the concession made by the Presenting Officer at the hearing the judge cannot be criticised for not considering the appeal in the light of the Immigration Rules, even though it is now apparent from **Singh**

that the Rules should be considered first. I noted that at paragraph 24 of his decision the judge stated

“I am not necessarily satisfied that either Ms Kumar or the children would be devastated if the Appellant were to be returned to India to make an application. I am satisfied that this is an overstatement of the situation. I have considered Section 55 of the Borders, Citizenship and Immigration Act. I am not satisfied that the welfare of the children would be adversely affected if the Appellant were to be returned to India to make a fresh application from there. The children have coped very well being looked after by their mother and I do not accept her evidence that she would not be able to look after the children on her own. She has her mother living with her. Her mother is only 61 years of age. I have no evidence before me, apart from Ms Kumar’s own evidence, to say that she is not fit to help her looking after the children. I do not accept that evidence. Indeed the social worker made no comments in relation to that.”

11. In the following paragraph the judge stated that the applicant had a family life with his partner and “is in effect a father to her children.” At paragraph 28 he referred to Section 117B of the 2002 Act which mandated that he was required to take the public interest in maintenance of effective immigration control into account. The judge said he was satisfied that the Claimant could speak English and although not presently financially independent, with appropriate leave he clearly could be. He noted that little weight should be granted to his private life or his relationship with his partner as they had been established whilst he was in this country unlawfully. He continued as follows

“29. The counterbalance to this part of Section 117B is that he has also formed a relationship with Ms Kumar’s two children. A qualifying child is defined in Section 117D as is qualifying partner. This would appear to cover the situation of Ms Kumar and her children. I also have to take into account Section 55 of the Borders, Citizenship and Immigration Act 2009 in relation to the children and the Appellant’s relationship with them and the effect upon them and their welfare were the Appellant to be removed from the United Kingdom. I am satisfied that the Appellant has a good relationship with the children and acts as a father figure to them. Ms Kumar’s previous relationship has broken down in divorce and appeared to be somewhat traumatic. It would appear therefore that the Appellant is a stabilising influence for the children. Accordingly therefore although there is public interest in removing the Appellant this is simply one of the factors that requires to be taken into account in the balancing exercise.

30. In the balancing exercise on the issue of proportionality the situation is that the Appellant, probably under the direction of his father, has been migrated to the United Kingdom. He was left

here at the age of 16. He has now been in the United Kingdom for eleven years. Much of his formative life has been established in the United Kingdom and all of his late teens and his adult life have been in the United Kingdom. He speaks English. He is fully integrated into the United Kingdom, attending sporting functions. He is living with a British citizen and her British citizen children. He has established a relationship with Ms Kumar and her children. On balance I am satisfied that in the particular circumstances of this case it would be disproportionate to remove the Appellant to India, even to the extent of removing in order that he can make a fresh application to come back to the United Kingdom. In the circumstances of his case such a course of action would appear to be pointless and would cause unnecessary upset to the family. I am therefore satisfied that to remove him would be a breach of Article 8 of the ECHR.”

12. What is lacking from that analysis is any reconciliation of what the judge had stated at paragraph 24 to the effect that the welfare of the children would not be adversely affected if the Claimant were to be returned and what he stated at paragraph 29 to the effect that it would. He also failed to set out on what basis he found that the Claimant could qualify as a person having a genuine and subsisting parental relationship under Section 117B(6) of the 2002 Act. He was not a blood parent. He was not an adoptive parent. He had no parental rights or obligations in respect of the children so far as was apparent from the evidence. In the light of these shortcomings I found there was force in the indication in the grant of permission that the judge had not given adequate reasons as illustrated in **MK** for finding that the Claimant’s removal would be disproportionate to the legitimate aim pursued. He thus made a material error of law and I set aside his decision. I had raised with the representatives what should be the position if I found a material error of law and both accepted that the appropriate course would be for the appeal to be remitted to the First-tier Tribunal as fresh findings of fact would have to be made. It would also be the case that at a further hearing the guidance given by **Singh** to the effect that the Immigration Rules should be considered first would have to be followed. Having regard to Upper Tribunal Practice Statement 7.2(b) the appeal is remitted accordingly under Section 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007 to the First-tier Tribunal in accordance with the directions which follow.

No anonymity order was requested and none is made.

Signed

Date 02 November 2015

Deputy Judge French

Directions

(Sections 12(3)(a) and 12(3)(b) of the Tribunals Courts and Enforcement Act 2007).

- (1) The members of the First-tier Tribunal who are to reconsider the case should not include First-tier Tribunal Judges J C Boyd or A R Williams.
- (2) The appeal is to be heard afresh and the issues to be decided will include whether or not the Claimant is entitled to succeed under the Immigration Rules.
- (3) The appropriate hearing centre is Birmingham. No interpreter is required and the time estimate is two hours.
- (4) Each party shall serve upon the other and upon the First-tier Tribunal at least seven days before the hearing any documents, including witness statements, upon which reliance is sought to be placed.

Signed

Date 02 November 2015

Deputy Judge French