



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

Appeal Number: IA/11425/2015

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 9 February 2016**

**Decision and Reasons  
Promulgated  
On 17 February 2016**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**AARATHI SOMARAJAN**

Appellant

**and**

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

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by RH & Co, Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The respondent refused the appellant's application for leave to remain in the UK for reasons explained in her decision dated 9 March 2015. Designated Judge Murray dismissed the appellant's appeal to the First-tier Tribunal by decision promulgated on 15 July 2015.
2. The appeal to the Upper Tribunal is on the following grounds:-
  - 1 The appellant is an Indian national. She was born on 9<sup>th</sup> January 1989. She first entered the UK on 19<sup>th</sup> August 2007 on a student

visa. Her mother was already in the UK on a work permit. Her sister and father arrived in the UK in January 2008 as dependants of the appellant's mother. The appellant's mother, father and sister were all granted indefinite leave to remain in 2012. Her parents own their own house which has a mortgage. They are working. The appellant has always lived with her family (apart from very short periods apart when she had to return to India to apply for a visa). Her stay in the UK has always been lawful. She has never lived in India (for any substantial period of time) as her father worked in Libya (her parents had not lived in India for 30 years). The appellant maintained she would suffer from language difficulties were she to return to live in India. She has a very limited number of relatives living in India. She maintained she was emotionally and financially dependant on her parents. She relied on Paragraph 276ADE and also relied on her case being granted outside the Immigration Rules in relation to Article 8, ECHR. The FTT refused the appellant's appeal.

**Ground 1 - error of law in approach taken to assessing proportionality**

- 2 The FTT accept that the appellant has family life in the UK at paragraph 60. However, the FTT erred in law at paragraph 57 by failing to assess proportionality from the starting point of separation of the family, having regard to the fact that the appellant's parents and sister have indefinite leave to remain and are entitled to remain in the UK, and whether there were sufficiently weighty factors justifying such separation between the appellant and her family (see *Mirza v Secretary of State for the Home Department [2015] CSIH 28*). The FTT has adopted the approach that the family relocate with the appellant to India. This is not the correct approach and as such the decision of the FTT is legally flawed to a material extent.
- 3 Had the FTT taken the correct legal approach, it had not identified any sufficiently weighty factors to justify separation. There are no sufficiently weighty factors justifying such separation where the appellant has always lived with her family, her stay in the UK has always been lawful, she has never lived in India, she is emotionally and financially dependent on her family, she speaks English, she is not a burden on the tax payer, she has a limited number of relatives in India, she would have language difficulties, her health issues, her parents own their house and have a mortgage, and in any event it is not reasonable for family life to be conducted by way of the occasional visit, Skype or email (see *Mansoor v Secretary of State for the Home Department [2011] EWHC 832 (Admin)* (at paragraph 16 per Justice Blake).
- 4 The FTT has erred in law at paragraph 62 by failing to recognise that the terms of the Immigration Rules are not a legitimate aim in their own right. A judgement needs to be made as to how significant the aim, and how far the removal of the particular claimant in the circumstances of her case is necessary to promote that aim (see *Mansoor, supra* at paragraph 35). On the facts in this appeal (see previous paragraph), it cannot be said that the removal of the appellant is necessary to promote that aim. The FTT has thus erred in law at paragraph 61 when finding that the

public interest must succeed over the appellant's Article 8, ECHR rights. The FTT erred in law at paragraph 62 in finding that the weight must fall in favour of the public interest in removing the appellant. Had the FTT approached the case in the correct manner it would not have reached these findings. The FTT reached an irrational decision as on no view can it be said that there is any public interest in removing the appellant from the UK when all relevant factors are properly considered and assessed.

**Ground 2 - arriving at findings which are unsupported by the evidence**

- 5 The FTT erred in law at paragraph 54 when finding that it is likely that she will not remain staying with her parents and sister for much longer. There was insufficient or no evidence to support that finding and when the appellant has lived with her family all her life. There was no evidence that she would not remain with her parents.

**Ground 3 - failing to exercise anxious scrutiny in relation to the country information**

- 6 Further the FTT has erred in law at paragraph 54 when referring to the Country of Origin Information report (COI report). The FTT has referred to single women living in major cities in India. However the FTT has erred in law by failing to exercise anxious scrutiny in relation to the COI report. In particular the COI report states there is gender inequality (paragraph 24.03 of the COI report), women's marginalisation within the Indian economy has increased (paragraph 24.06 of the COI report), women suffer from a general inadequacy in health care provision, physical vulnerabilities that are gender specific and biases in access to health care (paragraph 24.06 of the COI report), there is a prevalence of gender based violence such as sexual assault (see paragraph 24.07 of the COI report), sexual harassment of women in the workplace including physical and verbal abuse from male supervisors (see paragraph 24.15 of the COI report) and there was high level of crime against women (see paragraphs 24.30 and 24.37 of the COI report). The FTT has either not taken account of those paragraphs of the COI and/or has failed to assess those paragraphs when assessing whether it is proportionate to remove the appellant. The FTT has thus erred in law by failing to exercise anxious scrutiny.

**Ground 4 - failure to give adequate reasons and/or failing to take account of all relevant factors and/or failing to assess all relevant factors and/or reaching irrational findings**

- 7 In particular, the FTT finds that it is totally unrealistic for the family to remain together, that it is now time for the appellant to start a life outside the family unit and that this would not be unreasonable. Those findings do not address the relevant legal question of proportionality and whether having regard to all relevant circumstances it can be said to be proportionate to separate the family. The FTT does not explain why it is totally unrealistic for the family to remain together and in particular in light of *AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89* (paragraphs [45]-[47] per McCombe LJ). The FTT considers that the appellant has studied and has

qualifications and on that basis it is time for her to start a life outside the family unit. The FTT does not assess all the other factors outlined in paragraph 3 of this application together with the paragraphs referred to in relation to the COI report. Although the judge has referred to the fact that the appellant has been lawfully in the UK (see paragraph 55), the ability of the appellant to speak English (see paragraph 58), and the fact that she is not a burden on the taxpayer (see paragraph 59, although this paragraph focuses on the appellant's private life), it is unclear how these have been assessed when the FTT assesses the appellant's family life at paragraph 60 and whether the decision is proportionate. If it is said that the FTT has assessed all relevant factors when assessing the appellant's family life, the decision of the FTT is irrational as on the facts of the appeal it reached a decision which no other reasonable tribunal would have reached.

**Ground 5 - error of law in looking for "exceptional circumstances"**

8 Further and in any event the FTT erred in law at paragraph 52 by looking for exceptional circumstances and erred in law at paragraph 55 in finding that there is nothing unusual in this case. The correct test is proportionality (see *Mirza, supra* quoting from Lord Reed's judgement in the UK Supreme Court in *Bank Mellat v HM Treasury* [2014] 2 AC 700).

3. There is also a "ground 6" headed "error of law in FTT refusing permission to appeal", which disputes the reasoning of the First Tier Tribunal's refusal of permission. That is not apt to be framed or considered as a ground of appeal. Permission now having been granted, the question is simply whether the grounds disclose any legal error such as to require the decision of the First Tier Tribunal to be set aside.

**Submissions for Appellant**

4. The grounds all went to show that the Tribunal erred on the basis of family life, outwith the terms of the Immigration Rules. At paragraph 60 the Judge accepted that family life existed in the UK. Ground 1 disclosed an error of not taking the separation of the family members as the starting point. The case was analogous to *Mirza*. The other family members could not be expected to leave the UK.
5. By way of background, the appellant's father now works mainly in Iran but he returns regularly to spend time with his family. The appellant's mother continues to work in the UK. In India, the appellant has two grandmothers, both elderly, one aunt, and a cousin. There were no weighty factors and indeed no public interest at all in removal of the appellant.
6. The Judge made an irrational finding that the appellant was likely to leave the family home. All the evidence was that they would stay together, at least until the appellant marries, and nothing was presently contemplated in that respect. There was nothing to show that she was about to embark on an independent life. Reference was made to *AP (India)* [2015] WL 537878, EWCA Civ 89, at paragraph 45:-

“... adult children ... who are young students, from most backgrounds, usually continue to form an important part of the family in which they have grown up. They attend their courses and gravitate to their homes during the holidays, and upon graduation, while ... they seek to “make their own way” in the world. Such a child is very much part of the ongoing family unit and until a child does fly the nest his or her belonging to the family is as strong as ever. The proportionality of interference with the family rights of the various family members should receive, I think, careful consideration in individual cases where this type of issue arises.”

7. Lord Justice McCombe continued at paragraph 47:-

“It seems to me that while three members of the family passed through the gate (by means other than a success based upon historic injustice) this nuclear family as a whole, including the student son, wanted to settle in the UK. Three of them were held entitled to do so. Not surprisingly, the son continued his studies for the time being in India, but he alone was ultimately refused entry. The idea that this family’s family life (as it existed before) should be maintained by telephone, other forms of communication and occasional visits, as the FTT considered possible ... is to my mind wholly unrealistic.”
8. It was accepted that the present appellant has no legitimate expectation to a grant of leave on the same basis as obtained by the other family members. Nevertheless, the proportionality assessment was bound to come down in her favour.

### **Submissions for Respondent**

9. In a Rule 24 response dated 31 December 2015 the respondent says that the Judge directed herself appropriately and made sound findings in relation to Article 8, based on the evidence and the case law, and that the grounds are only disagreement and argument.
10. Mrs O’Brien pointed out that the appellant came to the UK as an adult and as a student, and has never been here in the capacity of a family member. She was not on a route which led to settlement and had no status which linked her to the rest of the family. *Mirza* had to be read along with other and subsequent authority, and in light of the significant distinction between UK citizens and non-nationals. All the family members in this case are citizens of India, and only of India. It is realistic to consider that they have the option of locating there if they prefer. They may prefer to remain in the UK and have leave to do so, but they do not have the rights of citizens.
11. The Judge was criticised for not tackling the case on the basis that the family would be separated, but she plainly did resolve it on the assumption of separation. If her decision was based only on the alternative that they might all leave the UK to remain together, there would have been nothing else to say. The determination was not to be read as saying simply that they all ought to leave.
12. Although the Judge said at paragraph 60 that the appellant had family life in the UK, that was in a passage using ordinary language rather than a finding of family life for Article 8 purposes going beyond normal emotional

links. In the same paragraph and elsewhere the Judge declined to find such links. It was scarcely surprising to find that a well educated adult in her mid 20's was likely to start life outwith the bounds of the family unit. The appellant had lived independently as a student in the past, and came here independently in that capacity. The Judge's use of the phrase "totally unrealistic" was meant as a rejection of the argument that for her to leave the family unit would amount to a devastating schism. It should be read as a finding that the evidence from the appellant and her relatives on this point was highly exaggerated.

13. The appellant said that there could be only one rational outcome to this case, but that was far from the case. The Judge balanced all relevant factors and was entitled to come down on the side that she did. There was nothing legally wrong with describing the situation as disclosing nothing unusual. That was simple and correct language. The Immigration Rules were designed so as in general not to give adult relatives the right to chose to reside together in the UK simply because some of them were entitled to reside there. Such rights arose only in strictly defined circumstances, e.g. advanced age and extraordinary dependency.
14. The use of the phrase "exceptional circumstances" at paragraph 52 appeared to reflect the submission made to the Judge.
15. The grounds did not disclose irrationality and amounted only to a classic example of disagreement with a proportionality assessment properly reached on the facts.

### **Response for appellant.**

16. No matter what the submission had been to the Judge, it was an error for her to approach the assessment in terms either of what was "usual" or "exceptional". The only question was proportionality. The outcome was simply irrational, there being so many factors in favour of the appellant that there could properly only be an outcome in her favour. There should have been no finding that she was likely to start life on her own, because there was no evidence to that effect, only to the contrary. She remained integral in her family. It should be borne in mind that there are cultural factors bearing on this family and also a changed social and economic climate generally for young adults, who increasingly tend to remain for longer periods in their family of birth.

### **Discussion and conclusions.**

17. There did not have to be explicit evidence from anyone that the appellant was about to start out on her own in order for a judge to conclude that she was capable of doing so, and likely to do so. The witnesses had a common interest in asserting the opposite, but from the surrounding evidence the inference could sensibly be drawn. No-one would be much surprised, for example, by the appellant taking up an attractive job offer in another town or even country.
18. There is always a public interest in maintaining the Immigration Rules. The House of Lords said so in *Huang* [2011] UKHL 11 at paragraph 16,

referring to “the general administrative desirability of applying known rules”. This is reflected in section 117B(1) of the 2002 Act: “The maintenance of effective immigration controls is in the public interest”. The Judge did not fall into an error of finding that the public interest must always prevail. She gave the Rules no more and no less than their proper place.

19. There was no direct reference for the appellant to *Mirza*. I do not think it is authority for the proposition that persons with indefinite leave to remain in the UK may never reasonably be expected to leave. In any event, the Presenting Officer was correct to point out that separation of the family is precisely the assumption on which the substance of the decision is based.
20. The high points of the argument for the appellant are, I think, to be found in the comparison with *AP* and in the criticism of the phrase “totally unrealistic”.
21. *AP* is not an authority that all young adults, capable of leading an independent life, who prefer to remain within the bosom of their family have a right to do so protected by Article 8 of the ECHR until such time as they choose, overriding the requirements of the Immigration Rules. The argument for the appellant, aiming at the high target of irrationality, amounted or came very close to such a proposition. Each case turns ultimately on its own facts and circumstances.
22. I find it not entirely clear at first sight of the sentence what the term “totally unrealistic” is intended to convey. However, put in context of the rest of paragraph 60 and the rest of the decision I accept the submission of the Presenting Officer. The underlying meaning is that the appellant and her relatives were significantly overplaying their ongoing emotional interdependence and the extent of the wrench if the appellant were to embark upon a more independent life. That is a sensible judgment of the evidence.
23. Proportionality assessments should not be displaced by searching for words such as “unusual” or “exceptional” and giving their use a legal analysis taking them beyond ordinary language. Such terms are used in both ordinary and technical senses in varying contexts throughout the case law.
24. *Macdonald’s Immigration Law and Practice* 9<sup>th</sup>. ed., vol. 1, paragraph 7.96 refers to the body of law on the precise scope of Article 8 as “characterised, unhelpfully in our view, by a proliferation of phrases which all simultaneously attempt to define thresholds and legal tests for the application of Article 8”. This case did not turn on any nicety of legal formulation, or on whether a particular word or phrase is used at any point in the determination in an ordinary or in a specialised sense.
25. I do not agree with the submission that the case had only one conceivable answer, and that it was irrational to find in favour of the respondent. The facts were such that an assessment had to be made. In

doing so, the Judge did not stray into any error of legal approach. She did not fail to give adequate reasons or to take account of all relevant factors on each side. The grounds are, in the end, only a disagreement with the final proportionality assessment which the judge reached on a clear appreciation of the facts.

26. The determination shall stand.
27. No anonymity order has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

Upper Tribunal Judge Macleman

11 February 2016