



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14592/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23 January 2017

Decision & Reasons Promulgated
On 9 May 2017

Before

UPPER TRIBUNAL JUDGE KING TD

Between

IS

(ANONYMITY DIRECTION MADE)

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Hulse of Counsel, instructed by Lords Solicitors LLP
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 1 March 1979.
2. He appealed against a decision made by the respondent on 1 April 2015 refusing his application for leave to remain in the United Kingdom on the basis of family and/or private life.

3. It is his contention that his removal from the United Kingdom would breach his fundamental human rights, particularly as a parent because of his relationship with his daughter HG who resides in the United Kingdom.
4. The appeal came for hearing before First-tier Tribunal Judge Quinn on 19 February 2016. A large volume of documentation was presented and the appellant gave evidence on that occasion. The appeal was allowed.
5. The respondent sought to challenge that appeal particularly on the basis that the Judge, in determining the question of proportionality “mistakenly considered child HG as a qualifying child”. She was not. Clearly in determining the issue of proportionality Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 were important to be taken into consideration. However that consideration had to be on a proper basis. In those circumstances I found there to be a material error of law such as to set aside the decision. My written reasons are annexed hereto.
6. Ms Hulse, who represented the appellant at the hearing before me on 24 October 2016, invited me on that occasion to remake the decision in the light of the documentation already provided. Given that the most central consideration in the case was the best interests of HG, I suggested that it might be prudent to obtain more up-to-date evidence as to her situation and circumstances and that of the appellant. Such additional evidence has been provided in the form of a further supplementary bundle, containing in particular a statement of Susan Pagella in the form of a report on psychological assessment.
7. Thus the appeal came before me for a rehearing. On that occasion I heard some evidence from the appellant but generally the hearing was conducted by way of submissions made by both parties. Ms Hulse understandably placed great weight upon the report of Susan Pagella and invited me to find that, notwithstanding the immigration history of the appellant, the best interests of HG was served by his remaining in the United Kingdom, and that proportionality should be an issue resolved in his favour.
8. The starting point for my consideration perhaps should begin with the decision of 1 April 2015 itself. Such responded to a number of documents identified as having been submitted in March 2015.
9. The adverse immigration history of the appellant was noted. The appellant failed to meet the requirements as set out under the Immigration Rules for family and private life as giving rise to leave to remain. No exceptional or compelling circumstances were found outside of those rules which would render removal disproportionate. The appellant has family in India to whom he could return.
10. There has been no suggestion in this matter on behalf of the appellant that he does meet the Immigration Rules or that he would face significant obstacles to reintegration in India. The focus of the application before the respondent and indeed the focus of the appeal before me is essentially in relation to his daughter HG.

11. The immigration history of the appellant is of some importance in this case, particularly having regard to the operation of Section 117A and 117B. He entered the United Kingdom illegally in or around 2004, thereafter living and working in the United Kingdom clandestinely and certainly without any lawful justification. Indeed he was encountered by the police on 6 April 2008 and was arrested as being an illegal entrant. He was served with IS151A form on the same day notifying him that he was liable to detention and removal. Notwithstanding that notice he failed to leave the United Kingdom but remained.
12. The child HG was born on 22 May 2011 to her mother who is of Lithuanian citizenship. The appellant married on 11 December 2011.
13. On 20 December 2011 he sought an EEA residence card on the basis of that relationship. The application was refused on 19 June 2012. An appeal against that decision was lodged on 2 July 2012. The appeal was dismissed on 30 August 2012. Seemingly the reason for the dismissal was that there was insufficient evidence presented that the sponsor was exercising her treaty rights.
14. On 1 November 2012 the appellant applied once again for an EEA residence card. His application being refused on 8 May 2013.
15. A matter of potential relevance to this matter may be found also in the CAFCASS Report of 3 December 2014, enclosed at pages 236 to 244 of the main bundle. It is to be noted that when the sponsor, Miss LG was interviewed, she would seem to have been doubtful about the marriage because she believed that the appellant's intention had simply been to gain leave to remain in the United Kingdom, she being consistently persuaded by him to get married. It is her account that almost immediately after the marriage abusive behaviour started with the result that in December 2013 their marriage broke up following allegations of domestic violence and of serious sexual crime. After that the parties continue to live apart. There was no access whatsoever to child HG during the period December 2013 to July 2014 but thereafter access was permitted through the Family Courts.
16. On 22 May 2014 the appellant submitted an application to remain on the basis of family and private life, which was refused on 25 July 2014. Thereafter further submissions were made, which resulted in the decision of 1 April 2015.
17. I note the witness statement of the appellant dated 5 February 2016 to be found in the hearing bundle.
18. He communicated via Skype with LG in 2009. She was living in Lithuania at the time. She visited him in September 2009 and stayed with him until February 2010, thereafter they began living together in March 2010 and married on 11 November 2011. LG has also a daughter A by another relationship.

19. Following the refusal of the second application for an EEA residence card made by the appellant, which was refused on 8 May 2013, his wife left the matrimonial home with HG on 24 December 2013. For a few weeks he was allowed to see HG but that ceased on 23 January 2014 because of the opposition by his wife. On 8 January 2014 he was contacted by police in regard to the allegation of sexual assault. That allegation resulted in a court hearing for five days in October 2015, which resulted in a verdict of not guilty for those offences.
20. In the meantime the appellant had sought to prevent the removal of HG from the jurisdiction of an order dated 5 February 2014.
21. Limited contact between the appellant and HG was ordered by the Family Court on 30 June 2014 under a child arrangements order. Limited contact was arranged as from July 2014.
22. There followed the CAFCASS Report dated 8 December 2014 with subsequent child arrangements orders, particularly those of 23 January 2015, 27 March 2015 and 16 November 2015 with a further CAFCASS Report dated 28 January 2016.
23. The appellant has made a statement. He speaks of the pleasure of being with HG and sets out the arrangements that currently exist. He says of LG that she has been difficult and remains difficult in terms of access to HG.
24. It would seem particularly in 2014 that the appellant had limited access to HG seeing her for about one and a half hours at a contact centre. Matters have now progressed to unsupervised contact. Contact is now on alternative weekends with the appellant collecting HG from school on Friday evening and returning her to her mother on Sunday evening. In addition there is granted a week's staying access at Christmas and at Easter and two weeks staying access as arranged during the year particularly during the holidays.
25. In his evidence to me, the appellant indicated that he lives in rented accommodation in a shared house, he having two rooms one of which is designated as HG's room when she comes to stay. The house is also occupied by two other couples. In fact this was the accommodation that he shared with HG and her mother and stepdaughter prior to the separation in 2013 and so it is in effect HG coming home when she stays.
26. The appellant indicates that he has qualifications as a building carpenter and would find work through a number of building companies working some four to five days a week on average. Currently he is unable to work of the restrictions upon doing so. He speaks of the desire to build up his contacts with HG, expressing his fear that if removed to India he would be prevented by LG from seeing or contacting her and indeed she might take her to Lithuania. He has had no contact with LG's daughter A for a considerable time.

27. The departure of the LG in December 2013 resulted in a very large volume of correspondence particularly with the local authorities and with the courts as set out in some detail in the hearing bundle. My attention has not been drawn specifically to any particular item. I have sought to consider those documents which have perhaps the greatest relevance to the issues in this appeal.
28. Perhaps most helpful to the overall situation are the two CAFCASS Reports. The first dated 8 December 2014 has already had some reference made to it.
29. Following the court hearing on 17 September 2014 the appellant had had eleven sessions at the Hope Contact Centre. Contact since then had progressed to an unsupported arrangement held within the community for two hours on a Tuesday. This particular CAFCASS Report was prepared on the directions of the District Judge.
30. The author of the report indicated that it should be read in conjunction with the safeguarding letter filed with the court on 10 June 2014, which recommends that HG should have a positive relationship with both parents to develop her sense of identity and self-confidence.
31. Mrs LG was interviewed on 24 November 2011. The appellant was interviewed on 24 November 2011. On that particular occasion he and HG were observed, various other contacts between the parties were made as highlighted in the report.
32. At the time of the report HG was 3 years old communicating in English to her mother and her father. At that time she was attending nursery and appeared to be settled. She appeared to be a sociable child. At that time her stepsister A was 7 years old. Obvious affection was noted as between HG and her father upon contact. Reference was also made in the report to the social worker's assessment which observed HG to be a "happy child" she has settled well into the nursery. A further report dated 24 June 2014, as mentioned in paragraph 12 of the CAFCASS Report, speaks of HG appearing to be withdrawn and lacking confidence. Mrs LG reported that her daughter was bedwetting. It was noted for the period December 2013 to July 2014 that HG had not spent time with her father and it was considered that her behaviour might have been an indication of missing her father. An alternative explanation had been her witnessing the alleged domestic violence.
33. It was the view of the author of the report that HG and the appellant appeared to be developing a positive relationship.
34. There is also a CAFCASS Report dated 28 January 2016 to be found at pages 321 to 329 of the bundle. This was made in response to the appellant's request for further time with his daughter now aged 4¾. The report was ordered on 16 November 2015. HG was healthy with no special needs. English was her first language. She has not met her paternal family. She has met her maternal family. There was conversation between the author of the report and HG in which she said that she enjoyed school and liked living in her new home and the activities that she undertook. She

indicated that she wished to spend more time with the appellant and enjoyed her time with both parents.

35. It noted that the appellant lived in a three-bedroom, terraced Victorian house and had sole access to two rooms, a living room and an upstairs bedroom. It was approved for HG to stay overnight. The appellant refuted the allegations as to his violence and lifestyle and denied that his motivation for seeing HG was for immigration purposes. It was the view of the author of the report that there was a very real bond which exists between the appellant and HG. Although HG is not aware of the court proceedings she is aware of the hostility between her parents. Reference was made at paragraph 22 of the report that it was not in HG's best interests for decisions about her care to be made by the court. Ms Hulse underlined the fact that it was not the fact of parental separation which was likely to cause harm but the way the parents handled that change, especially having regard to their ability to collaborate, make arrangements and work together towards meeting their children's changing needs. Whilst HG has experienced adverse life effects, such as family separation and parental conflict and frequent changes of address, she has managed to adapt to those variables. Increased contact with the appellant was the outcome of the report. It was as a result of that report that the current arrangements are in place.
36. In citing the CAFCASS Reports it is to be borne in mind that they are reports primarily focused upon the relationship of HG with her father, rather than analysing in any great detail the relationship between HG and her mother and stepsister. It seems clear, however, from the generality of the reports and of the evidence that surrounds them in the bundle, that HG is progressing well at school and is a happy and balanced child. She has coped well with the difficult family situation over the past few years and there is little to indicate that she is suffering from any psychological or real difficulties as a result of the uncertainties that clearly have been manifested over these years. Significantly there is little to indicate that HG faced any significant difficulties or distress during the absence of her father from her life.
37. I turn therefore to the report of Susan Pagella, who had time with the appellant and HG on 16 December 2016. The assessment was of approximately two hours duration (in effect the report confirms that which is set out in the CAFCASS Reports namely that HG enjoys being with her father. She was observed to be playing with her toys expressing her affection for the appellant.
38. The report sets out in some detail the academic research regarding daughters with absent fathers. I find such matters of limited assistance in the practicalities of this case. Clearly the impact upon separation has much to do with context and psychological wellbeing and personality make up as it does with the separation itself. The examples given are somewhat generic. The author of the report seeks to conclude that being deprived of the appellant's love and physical presence could lead to long-term overt or covert psychological damage, possible including childhood depression and absence of self-worth at an internal level. This general comment takes no account, however, as to the relationship between HG and her

mother and her stepsibling and points to no factors specific to HG, which would lead reasonably to that conclusion.

39. Bearing in mind, as I do, the importance that is to be attached to a child being reunited with a parent after a prolonged separation, HG has demonstrated in the past her resilience to that difficult situation. As has been recognised in many judicial decisions, it is almost always in a child's best interest to have the love and affection of both parents if at all possible.
40. The difficulty it seems to me in assessing the best interests of H in this case, is the lack of a balanced assessment as to the chemistry of the family as a whole. The CAFCASS Reports understandably had been focused upon the issue as to how contact with HG can be safely made by the appellant, rather than focusing upon the overall relevance of that arrangement for the future family development and her development. There has been no assessment for example as to the relationship of HG with her mother and with her stepsibling. Given that it is accepted by all parties that the primary parental responsibility for HG will fall upon her mother, little has been canvassed with her mother as to the hopes and plans for the future and indeed where she would fit into such plans. It is not clear whether A, who is the stepdaughter and only a few years older than HG, is living with her mother or has returned to Lithuania. There is no consideration as to whether or not the mother would wish to return to her family in Lithuania. There is at present the prohibitive steps order under Section 8 of the Children Act 1989 issued by the Family Court on 5 February 2014. It is not entirely clear as to whether that remains in force preventing the mother removing HG from the jurisdiction. It may well be that her mother wishes to go back to Lithuania or may wish to remain in the United Kingdom. The difficulty of her position, as was adjudicated upon by the Tribunal in the appeal as to an EEA residence card, was that there was little evidence to satisfy the Tribunal that she was in fact exercising her treaty rights. In those circumstances she has no settled status and it may be argued that her right to remain in the United Kingdom is in any event precarious.
41. One important matter in this case is of course the cultural and personal identity of HG, particularly being a child of a mixed race relationship. It is important for her to have an understanding of the two cultures and to be attuned to the context and affirmed. Clearly identity encompasses far more than the racial ingredients but it is clearly an important consideration to be borne in mind. That having been said HG has been brought up more in the Lithuanian household, having contact with her mother's parents. She has had little contact with the appellant's family if any. Clearly she is a link to that other culture. That being said, such contact could also be made by communications such as Skype, telephone and visits to the appellant and his family arranged outside of the United Kingdom.
42. The appellant expresses the fear that if mother and daughter return to Lithuania he will be permanently deprived of any contact with HG. Such is to ignore the reality that in that country there are no doubt proper Family Court processes, which can be applied to secure contact and communication. Once again the fact that the mother

has not been questioned about her plans for the future has meant little clarification with her as to her willingness to permit contact and cooperation in the future.

43. In seeking to assess the best interests of HG it is undoubtedly clear that in the short-term it is in her best interests to maintain some contact with her father. Whether the arrangements now in place are in her best interests in the long-term is less clear. It may well be that the best interests of HG ultimately is for her to be immersed and secure in one particular culture with her mother's wider family and with her stepsister, finding her identity by that means. As I have indicated, such does not prevent her maintaining some contact with the appellant and hopefully with his wider family in due course.
44. Although the best interests of the child is a primary consideration to determine whether or not removal is justified, it is not a factor which trumps everything else. I bear in mind in that regard **ZH (Tanzania) [2011] UKSC 4**. It was held that the consideration of a child's best interests should take place first and should be given more weight than any other individual concerned. The best interests of the child could not, however, succeed against substantial countervailing grounds which had to be serious to outweigh the best interests of the child.
45. Mr Jarvis submits that the adverse immigration of the history of the appellant provides a substantial countervailing ground. In that connection I have regard to Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. Paragraph 117B(1) makes it clear that maintenance of effective immigration controls is in the public interest. In this case the appellant entered illegally and has remained in the UK despite receiving notification that he should leave. He has faced the refusal of a number of applications which he has made for leave to remain.
46. As is indicated at 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. The nature of the appellant's immigration history, I find, is of particular relevance in this case. It is not simply a question of his overstaying his leave by a short period but by unlawfully entering the United Kingdom on no proper basis. Even having been encountered as an illegal entrant he has failed to leave when requested to do so. In effect he has fundamentally sought because of his own self-interests to override any immigration control.
47. It is said that his inability to speak good English is a matter also to be borne in mind under the provisions of Section 117B. In fairness to the appellant I note he obtained an EMD entry level certificate in ESOL international (entry three) Empress College of London, April 2014.
48. It is the public interest, in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons are not a burden on taxpayers and are better able to integrate into society. There has been a paucity of information as to the appellant's financial stability. At present of course he is not permitted to work

and indeed at no stage in his stay in the United Kingdom as an illegal entrant was there any overt permission to work. It is not clear whether he has ever paid taxes or how regular was the work undertaken in reality. I have noted the comments he has made about his ability to find work. How legitimate that work is it is far from clear, as he would not have been entitled to national insurance or any of the other benefits of being a legal resident. I find that he has always remained unlawfully and I do not find in the circumstances that he has achieved any significant integration into society. He was in a shared accommodation and has always done so. He has given little indication as to his contribution to society.

49. Indeed it may be said that his family relationships were also short lived and precarious. In that connection I bear in mind the comments, as recorded in the CAF/CASS Reports, from LG as to the pressures upon her to marry in order to create an immigration status for the appellant, which in the event did not succeed. The proximity of the marriage to the application to remain is a relevant consideration in that connection.
50. In all the circumstances I have little hesitation in finding that the appellant has from the outset sought to undermine immigration control and to ignore any restriction that was sought to be placed upon him in that connection.
51. In that connection my attention was drawn to the case of **Rhuppiah [2016] EWCA Civ 803** in which Sections 117A to C were considered. The appellant in that case had come to the United Kingdom in 1997, remained unlawfully since 2010. It was recognised by the Tribunal in that matter that the main features of her private life had already been established before then. This is not the case of the appellant before me. He had no status whatsoever before seeking to develop his private life. The court at paragraphs 58 onwards considered the relevance of Section 117B(2) proficiency in English and Section 117B(3) financial independence. Although the lack of fluency in English was regarded as a neutral factor, the lack of financial independence was a factor which counted against the appellant in the Article 8 balancing exercise.
52. The court at paragraph 54 considered Section 117A(2) and Section 117B(5) together as meaning that considerable weight should be given to parliament's statement in Section 117B(5) regarding the approach which should be adopted and the weight given to parliament's statement. In order to identify an exceptional case in which departure from that approach would be justified, compelling reasons would have to be shown. Although it is important that the relationship be re-established with HG, such has been done without any full examination of HG's long term needs and development and the reports have assessed it in narrow focus without consideration of the wider family and cultural context. HG has shown herself to be resilient to change and coped well with her previous separation from her father. There is no reliable evidence placed before me to indicate that any further period of physical separation would result in significant harm to her, particularly when other forms of communication are more likely than not to be available to maintain the relationship. In seeking to balance the competing interests as fairly as I am able, it seems to me

that it is proper to attach little weight to the formation of the appellant's private life and his human rights to see his child, given his fundamental disregard for immigration Regulations and control. I find that is a factor strongly supporting the proportionality of his removal, even when set beside the current best interests of HG that he remain.

Notice of Decision

53. I dismiss the appeal under the Immigration Rules. I dismiss the appeal on human rights grounds and Article 8 of the ECHR.

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. This order is made to protect the interests of HG in particular

Signed



Upper Tribunal Judge King TD

Date 27 February 2017