



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

Appeal Number: IA/48728/2014

THE IMMIGRATION ACTS

**Heard at Field House
On the 27th November 2017**

**Decision & Reasons Promulgated
On the 29th November 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**SUKWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Pennington-Benton of Counsel

For the Respondent: Mr Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of India, with permission, appeals against the decision of the First-tier Tribunal (Judge Green) who, in a determination promulgated on the 30th March 2016 dismissed his appeal against the decision of the respondent to refuse his claim on human rights grounds (Article 8). The First-tier Tribunal did not make anonymity direction and no grounds been submitted on behalf of the appellant such a direction is necessary.

2. The Appellant's immigration history is set out within the determination at paragraph 1-2 of the FTT determination and in the decision letter issued by the Secretary of State of the 17th November. It can be summarised briefly as follows.
3. The appellant was issued with a six-month visit visa valid from the 21st March 2003 until 21st of September 2003. He entered the United Kingdom in April of that year and in September 2003 applied for further leave to remain. The application was refused in November 2003 and it is recorded that the appellant did not appeal that decision. On 6 July 2007 the appellant's children, S and J, entered the United Kingdom on student visas valid from 2007 until 2009. In October 2009 the appellant's children applied for Tier 4 student visas but they were rejected having been made on the wrong form. Further applications were rejected because mandatory sections of the form had not been completed.
4. On 18 January 2011 the appellant was encountered working illegally. An application for leave to remain was made outside of the rules on the 31st January 2011 which was rejected with no right of appeal. A reconsideration request was made which also was rejected. He appealed that decision in 2011 and the Tribunal dismissed his appeal (see decision of Judge Whiting referred to in the FTT decision at paragraph 15). He became appeal rights exhausted on 2 November 2011. A further human rights application was made refused in 2012 and following further representations a decision was made on the human rights claim in a decision of the respondent of 17 November 2014. That decision is summarised in the decision of the First-tier Tribunal at paragraph 2.
5. The appeal came before the First- Tier Tribunal at a hearing on the 18th March 2016. In a determination promulgated on the 30th March 2016 he dismissed the Appellant's appeal on human rights grounds.
6. The Appellant sought permission to appeal that decision and permission was initially refused by the First-tier Tribunal but a Judge of the Upper Tribunal granted permission on the 12th September 2016. In consequence of the grant of permission, the Upper Tribunal sent out further directions on 30 January 2017 in which the Secretary of State was ordered to file and serve a statement reporting on the progress of the consideration of an application made by J and the approach to be taken to the immigration status of her and other members of the family.
7. The appeal was therefore listed before the Upper Tribunal. There was a level of agreement between the advocates as to whether the judge had made an error on a point of law in reaching his decision. Mr Clarke on behalf of the respondent accepted that the judge had made a material error of law in that the judge had failed to consider the circumstances of the family members together and that the judge had, in essence, misapplied the decision of PD and others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). He submitted that the findings of fact made in relation to J were relevant to any consideration of the

circumstances of the appellant. He accepted that the judge had not expressly considered section 117B(6) although the determination at paragraph 14 (ii) did reflect such a submission having been made. J, by reason of her length of residence was a qualifying child and it was not in dispute that the appellant had a genuine and subsisting parental relationship with her and the issue was reasonableness of return. In respect of the judge's findings at paragraph 17 and 18, he accepted that those paragraphs did indicate a best interest assessment and assessment of reasonableness (paragraph 17) and a consideration of the other public interest considerations under section 117B (paragraph 180).

8. Mr Pennington-Benton made the following submissions. He also referred the Tribunal to paragraphs 17 and 18 in which the judge set out his findings of fact which were relevant to the circumstances of the family. He submitted that a significant finding of the judge was that J was dependent upon the appellant, her father. The findings of fact made in relation to J did not demonstrate that the established dependence upon her father would end on her 18th birthday. In the light of the findings of fact made whereby the judge found that J was a minor and had lived in the United Kingdom since 2007 for a period of nine years and that this was a "significant period of time the development of a child identity" and in the light that her connections of United Kingdom was stronger than those in India, that his conclusion that her removal was a disproportionate interference of the private life under either paragraph 276 ADE (1) (vi) or outside of the immigration rules and therefore would have allowed her appeal was a relevant consideration in the appellant's appeal.
9. Thus he argued the judge should have allowed the appeal and it would have been up to the Secretary of State to determine a suitable period of leave for the appellant. Therefore as the judge found it was disproportionate to remove J there had been no basis for disallowing the appeal of the appellant (upon whom she was dependent. Furthermore he submitted that if the appellant's appeal was dismissed then J would have to leave the UK (see paragraph 18). However it was not explained how a breach of J's Article 8 rights were displaced by the respondent's agreement not to remove her of the appellant until the summer. The judge having found that J met the requirements of Article 8 should have granted the appellant leave because in not doing so would have resulted in the breakup of the family unit and the inevitable removal of J. He accepted in his submissions that the appellant would not have succeeded in his own right but that was not the issue given the presence of J. Similarly he accepted that the circumstances of his adult son who was living independently were not sufficient support for the appellant's claim. However it was the presence of J and the findings of fact made in relation to her that were relevant to the appellant's appeal. Thus he submitted the judge's disposal of the case was incorrect and that the judge should have allowed the appeal and the Secretary of State would then have considered what period of leave was appropriate for the appellant. He confirmed that since the decision J had been granted a period of leave.

10. After having had the opportunity to hear and consider the oral submissions of the parties I informed them that I had reached the conclusion that I was satisfied that there was an error of law that was material and that I would allow the appeal. The reasons for doing so are set out below.

Discussion:

11. Appendix FM, "Family Members", begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under Article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in Article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her Article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations "where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on Article 8 grounds".
12. In his analysis the judge made reference to the earlier decision of the Tribunal made in 2011 whereby the appellants claim was refused. At that stage the appellant's minor children were dependents upon his claim. The judge at paragraph 15 considered that the findings of fact made in respect of the appellant were still relevant. In respect of S, he was now an adult and a married man and was living independently. However in respect of J, the findings of fact were five years old which judge found was a "considerable period of time in J's life and I do not think that I can simply adopt those findings as they apply to her in 2011." The judge went on to state that it was "appropriate and necessary" to make separate findings of fact in relation to J. There appears to have been some argument as to the correct approach to take when considering Article 8 and the decision of PD (as cited). The judge recorded at paragraph 16 that there was no appeal before the Tribunal in respect of either S or J and that in those circumstances neither were appellants in the case. In respect of J, however, the judge having heard her own oral evidence, considered that it was right to make findings of fact as they apply to her. However whilst it was correct that there was no separate appeal before the Tribunal that was made by J (or even S) that did not preclude the FTT from considering the family circumstances as a whole and in particular, the circumstances of the appellant in the light of those of J.
13. J had given evidence on her own behalf which the judge recorded at paragraph 9. In addition there was a "significant" bundle of evidence including letters written by J's friends at school ([10 - 14] of the bundle) and evidence of her scholastic achievements.

14. The judge concluded at paragraph 17 that removal of J (had she been an appellant) was a disproportionate interference of her private life under Article 8, either under paragraph 276 ADE or outside of the Immigration Rules. The reasons given can be summarised as follows; J's length of residence in the United Kingdom since the age of 9 years which the judge found to be a "significant period of time the development of a child's identity", she had done well at school and the judge was impressed by her motivation to continue with her education and her achievements. By reason of the length of residence she had developed a private life beyond her own family and the Asian community and that as she had grown older (and on account of the length of residence in the United Kingdom) her connections with United Kingdom had grown stronger and her connections with India had grown weaker. The judge took into account that she had some cultural connection with India having lived there for the first nine years of her life but that was counterbalanced by the fact that she had not been back to India in the preceding nine years. The judge also took into account that she had a familial tie there through her mother with whom she spoke periodically but overall reached the conclusion that her connection with United Kingdom was far stronger than that with India.
15. At paragraph 18 the judge made reference to the public interest considerations in respect of the appellant noting his significant period of residence but that had accrued either unlawfully or when his status was precarious and as such little weight would be given to that. He spoke English was not financially independent. However the judge found that whilst J was not an appellant she was "dependent" upon her father and that the logical inference was if his appeal was dismissed it meant that she must return to India. The judge went on to refer to an undertaking given by the respondent not to remove the appellant or J before she had completed her A-levels. At paragraph 19 the judge concluded by stating that in view of the findings of fact in relation to J that the course of action should be for her to appeal the removal directions or make a separate application. There did not seem to be any consideration of how J's circumstances affected those of the appellant in the light of the findings of fact made.
16. In this case, it was not said that the appellant could meet the requirements under the Rules under Appendix FM or Paragraph 276ADE but it was accepted by the parties that the issue related to an assessment outside of the Rules. There did not seem to be any issue as to whether the first four limbs of the Razgar test were satisfied thus the issue related to that of proportionality. This required a fair balance to be struck between the public interest and the rights and interests of the Appellant and others protected by Article 8 (1) (see Razgar at [20]) which includes the Appellant and his children (see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43]).
17. When assessing the proportionality of the removal decision the judge was obliged to consider the best interest of the child, J, who would be affected by the decision. There is no specific reference made by the judge when

considering the circumstances of J as to the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). However as Mr Clarke submitted paragraph 17 was essentially an assessment of J's best interests and the issue of reasonableness of return.

18. There was no dispute on the evidence before the judge that the Appellant had a genuine and subsisting parental relationship with J.
19. In the assessment under Article 8, the best interests of the child must be a primary consideration. That meant that they must be considered first. They could, of course, be outweighed by the cumulative effect of other considerations. In carrying out the balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (section 117A). Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
20. S117B Article 8: public interest considerations applicable in all cases:
 - (1) The maintenance of effective immigration controls is in the public interest.
 - (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (4) Little weight should be given to—
 - (a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(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.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

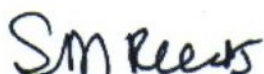
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

21. When looking at the determination, it had been submitted on behalf of the appellant that he had a genuine and subsisting parental relationship with a qualifying child (see paragraph 14(ii) recording the submissions of the appellant's Counsel). J was such a "qualifying child" on account of her residence in the United Kingdom of over 7 years having arrived in the UK in June 2007.
22. S117B(6) provides that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where, (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.
23. However despite the strong findings of fact made in relation to J, her best interests and the conclusion reached that she would have satisfied the Rules under Paragraph 276ADE (1)(vi) and in the alternative, that her removal was disproportionate (see paragraph 17) the judge failed to consider those overarching findings when considering the circumstances of the appellant and the effect of this upon his removal. In particular whilst the judge appeared to apply the public interest considerations under Section 117 at paragraph 18 of the decision, the judge failed to consider S117B (6) on the basis that the appellant had a genuine and subsisting relationship with his daughter, who was a qualifying child based on her length of residence and that in the light of the findings of fact that it would not be reasonable for her to leave the United Kingdom. I accept the submission made by Mr Pennington-Benton and in the written grounds that this was due to misreading of the decision of PD (as cited) and how the family circumstances should be taken into account.
24. MA (Pakistan) concludes that the reasonableness test in this context is wide ranging, effectively bringing back into play all potentially relevant public interest considerations, including the matters identified in section 117B. Accordingly, when considering the reasonableness of a child leaving the UK, a relevant factor is that the appellant had remained for a significant period of time either unlawfully or when his status was

precarious and this strengthens the public interest in his removal along with the matters set out in paragraph 18 of the decision.

25. However, taking the circumstances as a whole, as I have set out above, I am satisfied that the judge's findings properly construed were that it was not reasonable for J, a qualifying child to leave the United Kingdom. Her length of residence was for a substantial period of 9 years from the age of 9. The judge, in accordance with the case law of Azimi-Moayed concluded that this was a significant period of time and she had developed a private life beyond that of her family. Her previous connections with India had grown weaker and the judge concluded that her connection with the UK was stronger than her connection with India (see paragraph 17). Indeed since the decision of the judge, the respondent has issued J with a period of leave to remain in the United Kingdom. The judge did consider the public interest considerations at paragraph 18 as it is expressed in the S117 considerations but did not include a consideration of section 117B(6) on the mistaken basis that as J was not an appellant, it was not a relevant consideration when considering the appellant's appeal. In the light of the findings of fact made and in particular that J was dependent upon him (see paragraph 18) had the judge properly directed himself to Section 117B(6) I find that the judge would have reached the conclusion on the evidence that was before him that the Appellant's removal was disproportionate having regard to all of those circumstances.
26. Consequently I am satisfied that in the light of the factual findings made and when set against the correct legal framework that the submissions of Mr Pennington-Benton are correct and that the judge should have allowed the appellant's appeal. I accept his submission that in the light of those strong findings relating to the circumstances of J when put in the context of S117B(6) even taking into account his poor immigration history, the level of dependence between the parties was such to justify the the conclusion that public interest did not require his removal. As Mr Pennington - Benton submitted the respondent would then consider the appropriate length of any grant of leave.
27. Consequently the appeal is allowed; the decision of the FTT is set aside and remade; the appeal is allowed.



Signed
Upper Tribunal Judge Reeds

Date: 27/11/2017