



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000641

First-tier Tribunal No: HU/54882/2023
LH/06597/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between
HEMALKUMAR KANJI BARIYA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. J. Collins, Counsel instructed by G. Singh Solicitors

For the Respondent: Mrs. R. Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 3 September 2024

DECISION AND REASONS

1. In a decision dated 16 June 2024, I set aside the decision of the First-tier Tribunal to be remade.

The hearing

2. No new evidence had been submitted for the appeal which proceeded by way of submissions only. The appellant and his partner attended the hearing. The submissions were translated for them by the interpreter, Mr. N. Vyas, who confirmed before proceeding that they fully understood each other. The language used was Gujarati. I reserved my decision.
3. I have taken into account the documents in the bundle provided for this hearing (135 pages), the appellant's skeleton argument, and the respondent's review.

4. As set out in my error of law decision, the appeal is on Article 8 grounds outside the immigration rules. The findings in relation to Article 8 under the immigration rules were preserved. The burden of proof lies on the appellant to show that the decision is a breach of his right, and/or those of his partner and children, to a family life under Article 8. It was confirmed by Mr. Collins that no appeal was being brought on private life grounds.
5. The appellant's partner is now pregnant. However, it was accepted by Mr. Collins, that this would be a new matter, and the appeal was not argued with reference to the unborn child.

Decision and reasons

6. In her review the respondent did not accept that the appellant had a genuine and subsisting relationship with his partner and, consequent to this, she did not accept that he had a genuine and subsisting parental relationship with her children. It was accepted by Judge Howard that the relationship between the appellant and his partner was genuine and subsisting [41]. He accepted that the appellant lived together with his partner and her children [53]. While there is no direct finding of the existence of family life between the appellant and his two stepdaughters in his decision, and while he refers only to the private life that he has established with them [76], it was not asserted by Mrs. Arif that the appellant did not have a family life with his partner and stepdaughters. Given the finding that they were living together as a family unit, and taking into account the evidence before me, I find that the appellant has a family life with his partner and stepdaughters sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life.
7. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
8. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. There is a strong public interest in refusing leave to remain to those who do not meet the requirements of the immigration rules.
9. The appellant had an interpreter at the hearing to translate the submissions and I have no evidence of his English language skills, although it is submitted in the skeleton that he can speak some English (section 117B(2)). It is submitted in the skeleton that he is financially independent, but no details are given, and I have no evidence of his financial independence. In her statement the appellant's partner states that she supports the family with her salary, but I find that this salary is insufficient to meet the financial requirements for entry clearance as a partner under the immigration rules. This is not taking into account the effect of her pregnancy on her earnings (section 117B(3)). In relation to sections 117B(4)

and 117B(5), the appellant came to the United Kingdom with a visit visa in February 2022 and I accept that the relationship with his partner began when he had limited leave and no expectation that he would be allowed to remain. I find that he overstayed his visa, but only by a period of about six weeks before making this application for leave to remain.

10. In relation to section 117B(6), the appellant's stepdaughters are not "qualifying children". They are not British citizens and have been in the United Kingdom for less than seven years. I accept that they have pre-settled status, and are entitled to remain in the United Kingdom, but this does not make them "qualifying children".
11. It is submitted that the appellant has a genuine and subsisting parental relationship with his stepdaughters. As set out above, there is no specific finding to this effect in the decision of Judge Howard. Mrs. Arif made no submissions either way. I have considered the evidence before me. I have found that there is family life between the appellant, his partner and her children. I find that the appellant lives in a family unit with his partner and stepdaughters and has been since early 2022, a period of over two years. The appellant's evidence is that his stepdaughters consider him as a father figure (page 24). His partner's evidence is that she was abandoned by the father of her daughters and that he was "always absent and never showed any interest in their welfare or happiness" (page 31). The appellant is listed as the partner of his stepdaughters' mother by their schools (pages 43 and 44). I find on the balance of probabilities that the appellant plays a parental role in the lives of his stepdaughters.
12. In her review, the respondent considered that there was "no evidence of any insurmountable obstacles to family life taking place in India or Portugal". At the hearing Mrs. Arif submitted that the appellants' stepdaughters could remain in the United Kingdom with their mother while the appellant went to India. It would be in their best interests to remain in the United Kingdom and there was no evidence of any detriment to them if the appellant returned to India. Communication could be maintained using modern methods. She did not submit that the appellant's stepdaughters could return to India in order to continue family life there.
13. I have considered the best interests of the appellant's stepdaughters. Their best interests must be a primary concern in accordance with the case of ZH (Tanzania) [2011] UKSC 4. I find that they have been in the United Kingdom since 2019, a period of five years. I find that they are nationals of India with pre-settled status under the EUSS. I find that Janvi is 14 years old and Ishika is nine years old. I find that they are both in education in the United Kingdom. Given Janvi's age, she will have started her preparation for GCSEs. I have no evidence that they have any medical or developmental issues. I find that they have no contact with their biological father.
14. As was acknowledged by Mrs. Arif, I find that it would be in the best interests of the appellant's stepdaughters to remain in the United Kingdom. I find that they are settled in the United Kingdom and that it would not be in their best interests to uproot them from their education and social networks. Especially in the case of Janvi, they will have started to develop their own independent lives outside of the family unit. They have experienced upheaval moving to the United Kingdom, and further from their father leaving them. I find that further upheaval is not in their best interests.

15. I find that it would be in the best interests of the appellant's stepdaughters for the appellant to remain living with them in the United Kingdom. I reject Mrs. Arif's submission that there would be no detriment to them if the appellant returned to India. I find that they have been living as family unit for two and a half years. I accept the evidence that, as their mother is the only adult entitled to work, that it is she who provides financial support while the appellant cares for them at home. I find that it would not be in their best interests to lose this care from the appellant.
16. While the best interests of the appellant's stepdaughters are a primary concern, they are not the only concern, and must be balanced against the public interests in the maintenance of effective immigration control. However, I find that the effect of this decision would be that the appellant would return to India with no expectation of being able to return. It is accepted by both parties that the appellant would not be able to meet the requirements of the immigration rules for entry clearance as the spouse of his partner, as he would not meet the financial requirements. I find that the family life which the appellant currently enjoys with his stepdaughters could not continue using "modern methods of communication". They are no replacement for the physical presence of the appellant in Janvi and Ishika's lives.
17. Given that it was not suggested by Mrs. Arif on behalf of the respondent that Janvi and Ishika return to India in order to continue family life, I find that the effect of this decision is that family life between them and the appellant will come to an end. I find that this is not in their best interests, and that it is not proportionate in all the circumstances to deprive two young girls of a father figure for the second time in their lives, girls who are entitled to remain here and whose lives are well settled here. I find that, in all the circumstances, the best interests of Janvi and Ishika outweigh the weight to be given to the public interest in maintaining effective immigration control.
18. Taking this account, I find that the appellant has shown on the balance of probabilities that the decision is a breach of his right, and those of his partner and stepdaughters, to a family life under Article 8 ECHR.

Notice of Decision

19. The appeal is allowed on human rights grounds, Article 8 family life.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
20 September 2024