IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12058/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 April and 30 June 2015	**On 9 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GS (INDIA)
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:
For the Appellant: Mr N Bramble, Specialist Appeals Team
For the Respondent/Claimant: Mr V Makol, Legal Representative, Maalik & Co, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing on Article 8 grounds the claimant's appeal against the decision by the Secretary of State to refuse him leave to enter the United Kingdom, and to cancel his leave to enter as a Tier 4 General Student Migrant. Although the First-tier Tribunal did not make an anonymity direction, the best interests of minor children affected by the refusal of leave to enter have since assumed more importance and so

it is appropriate to accord them, and hence the claimant, anonymity for these proceedings in the Upper Tribunal.

2. The claimant, who is a national of India, was granted leave to enter as a student in July 2009 and leave to remain as a student on 9 August 2012 in order to follow an extended Diploma in Business and Administrative Management at the Citizen 2000 Education Institute. His leave to remain in this capacity ran until 30 August 2014.

3. On 27 January 2014 he flew back to India, and on 8 March 2014 he flew out of India. On his arrival at Heathrow Airport on 9 March 2014, he was interviewed. He said he was studying at the Citizen 2000 Education Institute, and had commenced his studies in April 2012. Home Office checks with the institute established that they had withdrawn their sponsorship on the basis that the claimant had not attended any lesson and had failed to repay the required course fee for the course which was due to commence on 9 August 2012. They also established that the institute's licence had been revoked since 6 February 2014.

4. The claimant was issued with a notice of refusal of leave to enter on 10 March 2014 on the ground that the Immigration Officer was satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining leave, or there had been such a change of circumstances in his case since the leave had been granted that it should be cancelled.

5. The claimant initially appealed solely on the ground that he was a bona fide student, who had been in regular attendance at his college. The college was made aware of his sudden departure from the UK in January 2014 due to his sister's death in India.

The Hearing before, and the Decision of, the First-tier Tribunal

6. The claimant's appeal came before Judge Wyman sitting in the First-tier Tribunal at Hatton Cross on 23 September 2014, and (following an adjournment) at Richmond Magistrates Court on 19 November 2014. By the time that the appeal came before her, the claimant had raised an additional ground of appeal, which was that he should be granted limited leave to remain in the United Kingdom as the partner of a British national.

7. At the initial hearing on 23 September 2014, Mr Makol on behalf of the claimant acknowledged that he could not meet the maintenance requirements set out in Appendix FM. He was married to a British national who had four children from her previous marriage. She was a widow, and the children were aged from 5 to 13. The claimant's wife was not working as she was caring for the children.

8. At the resumed hearing on 19 November 2014, the judge received oral evidence from the claimant and his wife, Ms K. He gave his evidence through a Punjabi interpreter, and she gave her evidence in English. The claimant said he had met Ms K at the gurdwara (temple) in November 2013. He had been attending this gurdwara regularly since first coming to the United Kingdom in 2009. Ms K's uncle was President of the gurdwara. Initially, he spoke to her parents, but he also spoke to Ms

K herself at the temple. They had got engaged at the end of November 2014. However due to his sister's death, he then had to leave the country as an emergency. The wedding had to be postponed until after his return from India, and until after his release from detention. He was released on bail on 14 April 2014. They had a religious wedding at the temple on 25 May 2014, and they had a civil wedding on 11 July 2014. He now lived with her wife and her four children at an address in Kestrel Court, Hounslow.

9. He communicated with his wife in Punjabi. She was originally from Afghanistan. His parents had not come to the wedding. But his wife's parents had travelled to India to meet his parents before the wedding. His wife had not been able to accompany her parents on this trip, as she had to stay to look after the children.

10. In her evidence, Ms K confirmed that she had met the claimant at the gurdwara in November 2013, and had become engaged to him in December 2013. It was an arranged marriage. Her family had decided that she should remarry as she was still young. Her first husband had died over two years ago. She had never worked in the UK. Her first husband had been disabled and suffered from epilepsy. She stayed at home to look after both the children and him. She confirmed that she knew that the claimant only had a temporary visa as a student.

11. In her subsequent decision, Judge Wyman set out her findings at paragraph [59] onwards. She concluded at paragraph [75] that the Secretary of State was correct to cancel the claimant's continuing leave and to refuse him leave to enter the United Kingdom as a student. While he may have been a genuine student previously, the claimant clearly had not been a genuine student since September 2013.

12. At paragraph [78], she formally dismissed the claimant's application for leave to remain as a partner under the Rules, as neither the claimant nor his wife met the relevant income threshold of £18,600 per annum.

13. She went on to address an Article 8 claim outside the Rules. At paragraph [107] she said she did not think it would be reasonable for the sponsor to leave her home and move to India to be with her husband. At paragraph [113] she reached the following conclusion:

> "Taking all the evidence into consideration, given that I have found that it is a genuine and subsisting marriage, it would be a disproportionate interference with the sponsor's right to respect for her private and family life if the [claimant] is not granted leave to remain in the United Kingdom."

The Application for Permission to Appeal

14. The Secretary of State applied for permission to appeal, advancing four grounds. Ground 1 was the judge had failed to resolve a material conflict as to the claimant's credibility. It was incumbent on the judge to consider his credibility in the light of his previous attempt to gain entry by deception.

15. Ground 2 was the judge had failed to resolve material conflict arising, inter alia, from the inconsistencies which she noted between the oral evidence of the claimant and the sponsor. She noted that the discrepancies included whether or not the sponsor was given an engagement ring, the month of the engagement, whether they talked together on the first introduction and the colour of the front door. These inconsistencies were significant. The claimant and the sponsor gave different answers to questions they reasonably would have been expected to have known the answers to. Non-genuine couples will often be able to give substantially consistent and rehearsed evidence. The judge had failed to explain how these discrepancies were to be explained, other than by dishonesty. Moreover, the inconsistency in the oral evidence should have been considered in the light of the claimant's previous attempt to gain entry by deception; the marriage taking place within three months of the claimant's refusal at port; and the apparent paucity of documentary evidence to establish co-habitation.

16. Ground 3 was the judge had failed to apply the Immigration Rules correctly. In particular, the judge had not considered EX.1 in Appendix FM. The judge had erred by failing to engage with the considerations of EX.1A(ii), EX.1B and EX.2.

17. Ground 4 was that the judge had failed properly to apply primary legislation. While she had given some consideration to the provisions of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014, no attempt had been made to apply the key consideration of financial independence to the facts. The judge's broader consideration of Section 117B was also incomplete or inadequately reasoned.

The Grant of Permission to Appeal

18. On 30 January 2015 Judge Hollingworth granted permission to appeal on all grounds raised.

The Error of Law Hearing

19. At the hearing before me to determine an error of law, Mr Makol mounted a robust defence of the judge's decision. He relied in part for this purpose on a Rule 24 response that he had sent to the Upper Tribunal on 16 April 2015. He drew my attention to the fact that in the case of **Dube [2015] UKUT 90 (IAC)** it was held that Sections 117A-117D did not represent any kind of radical departure from or override of previous case law on Article 8, so far as the need for a structured approach was concerned. Sections 117A-117D were essentially a further elaboration of **Razgar**'s question 5, which was essentially about proportionality and justifiability.

20. The judge may not have considered financial independence properly, but she had looked at every factor which needed to be considered for question 5 of the **Razgar** test to be answered. It could not be right that the lack of financial independence could override the many other factors which she had listed in paragraphs [86] to [114] of her decision. These included the fact there were four British children involved, and that the claimant was never an overstayer.

21. Having received extensive submissions from both parties, I ruled in favour of the Secretary of State. I gave my reasons for so finding in short form, and my extended reasons are set out below.

22. There was then further discussion on the issue of the forum and scope of the re-making of the decision. It was agreed that there would be a resumed hearing before me in the Upper Tribunal to re-make the decision under Article 8 with a time estimate of two hours. Mr Makol indicated he wished to adduce further evidence to support the disputed claim that the marriage between the claimant and the sponsor was genuine and subsisting, and on the question of insurmountable obstacles to the sponsor relocating with the children to India; and/or on the topic of whether such relocation would be unreasonable and unjustifiably harsh. As neither party was contending that the judge's findings of fact on, or pertaining to, any of these questions should be preserved, I gave permission to the claimant for new evidence on these topics to be adduced, provided that such new evidence was contained in a paginated and indexed bundle to be served on the Upper Tribunal and the Specialist Appeals Team not less than seven days before the resumed hearing.

Reasons for Finding an Error of Law

23. In his detailed skeleton argument before the First-tier Tribunal, Mr Makol submitted that the claimant fulfilled the exemption criteria contained in EX.1. Judge Wyman wholly failed to address this question in her decision.

24. She rightly dealt with one potential avenue under Appendix FM by which the claimant could qualify for leave to remain as the partner of a person present and settled here, namely where the financial requirements are met. But she did not address the alternative route by which the claimant could obtain leave to remain as the partner of a person present and settled here, which is the route contained in EX.1(b). This is where the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

25. EX.2 provides that for the purposes of paragraph EX.1(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

26. As a result of not addressing EX.1, the judge's freewheeling proportionality assessment outside the Rules was fatally flawed. For establishing that there were not insurmountable obstacles to family life between the claimant and Ms Kaur continuing in India was, and is, an essential pre-cursor to an informed and balanced proportionality assessment outside the Rules.

27. Although the claimant does not have to establish insurmountable obstacles to succeed in an Article 8 claim outside the Rules, the question of whether it is

reasonable to expect the sponsor to relocate to India is to a significant degree influenced by the outcome of an assessment under EX.1(b).

28. The judge's proportionality assessment was also flawed in other respects. Firstly, the judge appears to have given no weight at all to the fact that the parties had allegedly become engaged at the time when it was known that the claimant only had limited leave to remain as a student, and they had proceeded to get married in the full knowledge that the claimant had been refused leave to enter, and was facing removal. Secondly, the judge wrongly characterised the claimant as having a good previous immigration history "save for the fact that I have found that he has not been a genuine student for the academic year commencing September 2013." The judge's reason for holding that he had a good previous immigration history is that he had never previously overstayed his leave: see paragraphs [89] and [112]. But the judge thereby overlooked the fact that the claimant's immigration offending was just as bad as that of an overstayer, and arguably worse, in that he had remained in the United Kingdom when he knew that he was not a genuine student; and so the Rule under which he had sought and obtained leave to remain no longer applied to him.

29. Moreover, it followed from the judge's finding that he had not been a genuine student since the academic year commencing September 2013 that he had dishonestly sought to re-enter the United Kingdom in March 2014 under the guise of being a genuine student.

30. The judge had the benefit of receiving oral evidence from the claimant and the sponsor at a lengthy hearing on 19 November 2014, and the judge was not bound to conclude that the claimant's dishonesty with regard to his activities as a student was fatal to the proposition that his marriage to Ms K was genuine and subsisting. But the judge failed to give adequate reasons for finding that the marriage was genuine and subsisting, as opposed to the marriage being entered into with the predominant purpose of enabling him to remain in the UK, in the light of (a) the claimant's adverse immigration history, (b) the judge's implicit finding of dishonesty, (c) the inconsistencies in the oral evidence noted by the judge, and (d) the timing of the marriage.

31. For the above reasons, the decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds is vitiated by a material error of law, such that the decision should be set aside in its entirety and re-made.

Directions for the Resumed Hearing

32. My directions for the resumed hearing included a direction that the findings of fact made by the judge at paragraphs [59] to [77] would be preserved. I further directed:

> "None of the findings of fact made in the context of the Article 8 claim will be formally preserved, although many of them will be uncontroversial, such as the ages of the children and various aspects of Ms K's background history. The judge did not make a finding about the status of the claimant's relationship with Ms Kaur's children, and so this remains an unresolved question."

The Resumed Hearing

33. The claimant's solicitors filed a considerable volume of additional documentary evidence for the purposes of the resumed hearing. The evidence included the following email from the Sikh Academy attended by Ms K's eldest daughter. In an email dated 4 June 2015 the child protection officer said to Ms K:

> "[A] has seen me regarding information needed which she wished to present to court regarding issue about her step-dad's residency in the UK. She wants me to say his positive influence in her life has resulted in her stopping her counselling as this was no longer needed. I understand you have also requested to speak with her counsellor regarding this. I have chatted to her counsellor and she said she cannot respond to this.
>
> Also from the school point of view we also cannot make similar comments.
>
> What we can say is the same as what I sent you in November, that is:
>
> "Dear Mrs K
>
> This is to confirm A is a student in year 9 at [named school] and she had counselling at school from March 2014 until September 2014." "

34. I received oral evidence from the claimant, his wife and his step-daughter A. The claimant gave his evidence through a Punjabi interpreter whom he clearly understood. He adopted as his evidence-in-chief a supplementary witness statement which he signed in my presence. There was nothing fake about their marriage. They provided many letters of support from family and friends acknowledging that they were in a genuine marriage. He would also like to state that their extended family in the United Kingdom had offered him prospective jobs if he was granted a visa. He had accepted K's children as his own as she had come to learn that she was widowed. He had formed a close bond with her four children. K was now six months' pregnant with his child, and she could not travel abroad. K she was not working, she had four children and now was pregnant. She obtained some public funds, for which she was entitled to for her family. She also obtained financial help from her family, which was vast, and they helped out as often as they could. This meant that he was not relying on public funds.

35. He would not be happy to have his child born in India due to the lack of medical training there. He also did not have faith in the treatment his wife would receive. He believed it would be unfair for him to have to return to India to apply to re-join his wife, and also she could not possibly meet the financial requirements, as she did not earn the monies the Home Office needed.

36. In cross-examination, he was asked to explain what had taken place at the engagement in November 2013. He said his wife's uncle had arranged for them to meet at the gurdwara, and they had a chat. He asked whether there was an engagement ceremony. He said they had to keep it quiet because her husband had died recently (in 2012) and she had four children. For cultural reasons, they could not announce the engagement publicly. They did not have a celebration within the family as they did not want the news to leak out to the community. He saw his

future wife at the temple every Sunday before going to India for his sister's funeral (she died on 15 January 2014) and they also chatted on the telephone every night. He was asked whether there was anybody outside the family who could confirm the engagement. He answered he did not know. There might have been onlookers.

37. The claimant confirmed that his wife's parents to India had flown out to meet his parents in April 2014, after he had been arrested and refused leave to enter. It was put to him that the marriage in May 2014 was one of convenience. The claimant responded that his wife had tried to get bail for him after he was arrested. She was not able to get bail because she was not working. But her uncle was able to stand surety for him.

38. He was asked when he had first met his wife's children. He said he saw them in the temple, but he met them for the first time after they were married. He had however talked to them on the telephone before marriage. He agreed that he had been only part of their lives since May 2014, which was just over a year. He was asked why the family could not move to India. He said they were safe here and they were British born. India was not safe for girls. Also his wife was seven months' pregnant, and she was due to give birth in September. So she could not travel. Every day there was news of rape in India on the BBC. He was asked whether he explained his immigration status to his future wife. He said he had told his wife everything very clearly. His wife could bring him back from India. If he had not been refused leave to enter, he would have tried his best to extend his visa. But if not, he would have gone back to seek entry clearance.

39. In re-examination, he was asked to expand on the father daughter relationship she said he enjoyed with A and her younger sister. The appellant described what they had done on Father's Day. The whole family had gone to a vegetarian Asian restaurant by the name of Chini Chor.

40. Ms K adopted as her evidence-in-chief a witness statement she had signed in my presence. She did not work when her first husband was alive, as he suffered from epilepsy. She said she still could not work. But because of the claimant's presence, she had recently started a course.

41. In answer to supplementary questions from Mr Makol, she confirmed that they had got engaged in November 2013. There was no celebration as she was a widow, and her family did not want to spread it out too much. She was asked when her husband had first met the children. She said it was before the engagement, when they were talking. The girls met him regularly in November. The girls and boys met him regularly, and they were a part of it. The girls were happy with him. Since the marriage, it was a big change especially with the elder one, A. She was getting depression. But she was so happy after the marriage. The child protection officer called her after the marriage to say that A was so happy and she did not need to continue with her counselling. A did not like to stay away from home now. She used to stay away.

42. In cross-examination, she said her family had attended a ceremony to mark the engagement at the gurdwara. The ceremony was called ardass and it was conducted by a resident granithi. She could not say why a statement from the granithi had not been obtained.

43. She was now doing a level 1 beauty course. She was not educated enough at present to do any kind of job. She was willing to go on to do a level 2 beauty course, and to use this qualification to get a job in a salon as a receptionist.

44. She went on to give a detailed account of what the family had done together on Father's Day, including attending the Chini Chor Restaurant in Hounslow.

45. A was the final witness, and she adopted as her evidence-in-chief her witness statement signed by her on 21 November 2014. In this statement, she said she was 14 years old. After her father passed away on 31 March 2012, she had been taking counselling sessions at a school. This was because she was very depressed and her life was miserable. Also she was never happy. But after her mum got married to G, her life had changed. She had got the fatherly love she had missed in past two years. G, whom she called dad, had always been there for her, and always made her happy. He had never let her down. For this reason she was happier in life, and her grades were getting better in school. As she was more happy and cheerful because of dad, she had stopped her counselling sessions and did not go any more as there was no need. G was the most understanding and amazing father a little girl could have. He had made her and her family happier than ever, and she was happy that her mum had married him. He always made her brothers and sister cheerful, and he also never let them be sad. She really hoped he was allowed to stay with her mum and us as a family in the United Kingdom.

46. In answer to supplementary questions from Mr Makol, she said that before she had counselling, she was aggressive and had anger management problems. There was no improvement after her counselling. It was her step-father who made her better. That was why she had stopped her counselling sessions. There was no point in sending him back to India, it would ruin everyone's life. She had not been to India since she was aged 2. There was no cross-examination.

47. Also present at court were a number of supporting witnesses whom Mr Makol did not call to give oral evidence, but who had provided signed statements or letters of support. Of the family members who attended, Mrs B's letter at page 58 of the supplementary bundle is reasonably representative. She is the mother of Ms K. She confirmed that her daughter and G had got married on 25 May 2014 according to their religion, and their civil marriage was on 11 July 2014. Ever since they had been living together. She and her husband had gone to India to visit the parents of G to arrange the marriage. Since her second marriage, her daughter had started to be happy in life again and also her children seemed to be more joyful.

Discussion and Findings on Remaking

48. The first question which I have to decide is whether the marriage between the claimant and Ms K is genuine and subsisting, and whether the parties to the marriage genuinely intend to live together permanently as husband and wife. On the debit side, one of the key discrepancies which emerged at the hearing in the First-tier Tribunal resurfaced. Before the First-tier Tribunal, Ms K said that they got engaged in December 2013, whereas the claimant said that they had been engaged in November 2013. Although both of them adhered to a November 2013 date in their evidence before me, the thrust of the claimant's evidence was that there was no ceremony to mark the engagement, whereas Ms K said that there was, and gave a detailed description of what the ceremony consisted of and who had presided at it. Another discrepancy emerged for the first time. This was over the contact which the claimant had with Ms K's children before their marriage. K's evidence was that her children met the claimant at the gurdwara before their engagement, and gave their seal of approval to the proposed engagement. But the claimant said he had not met the children at all until after they got married, and he had merely seen them at the gurdwara, but not spoken to them at the gurdwara – albeit that he had spoken to them on the telephone during the week.

49. I note that family members such as the claimant's mother-in-law do not in terms confirm that the couple became formally engaged in November 2013 or indeed at any point prior to the claimant going back to India in the middle of January for his sister's funeral. It is also significant that the parents of Ms K did not go out to India until April 2014 to arrange the marriage. I question whether there could have been a formal engagement between the couple *before* the marriage had been arranged to the satisfaction of not only Ms K's family, but also the claimant's family.

50. So I am not persuaded on the balance of probabilities that there was a formal engagement before the claimant left for India, and for that reason the claimant rightly did not claim that he had a fiancée in the UK when he was interviewed on his return.

51. However Ms K's involvement in an unsuccessful attempt to secure the claimant's release on bail is consistent with her family having raised the possibility of marriage before the claimant's departure, and I consider that in all probability there were mixed motives for the marriage between the couple taking place when it did. Both families recognised that the claimant needed to get married urgently in order to facilitate him being able to remain in the UK. At the same time it was not a sham marriage. The most powerful testament to the marital relationship being a genuine and subsisting one is the fact that Ms K is now carrying a child fathered by the claimant. In addition, they gave a credible and consistent account of their recent family life. Accordingly, the eligibility requirement that was put in issue by Mr Bramble is shown to be met.

52. As the claimant cannot qualify for limited leave to remain as a partner of a British national by meeting the financial requirements, he has to show that there are insurmountable obstacles to family life with his partner being carried on in India. Mr

Bramble questioned whether the claimant could take advantage of the exemption criteria in EX.1 on the ground that he did not meet one of the suitability requirements. But an overstayer is not precluded from taking advantage of EX.1 on suitability grounds and, from an immigration perspective, the claimant's conduct is not as bad as that of an overstayer. In the light of the First-tier Tribunal Judge's preserved findings of fact, the claimant's student leave was liable to curtailment from the autumn of 2013 as he had stopped studying. But it was not actually curtailed until he was refused leave to enter, and his extant leave was then converted into Section 3C leave consequential upon him being permitted to pursue an in-country appeal against a decision to refuse him leave to enter. Accordingly, the claimant can avail himself of the exemption criteria contained in EX.1.

53. However, I find that the claimant has not discharged the burden of proving that he could bring himself within EX.1(b). He and his wife entered into marriage in the full knowledge of the claimant's precarious immigration status, and so both of them took the risk that they might not be allowed to carry on married life in the United Kingdom as opposed to in the claimant's country of return, India. Ms K and the claimant were brought together by their shared adherence to the Sikh faith, and their common cultural and social bonds as Sikhs. The claimant's family in India live in a state adjacent to Punjab province, and thus not far from the Golden Temple of Amritsar to which Ms K made a religious pilgrimage with her elder daughter some ten to twelve years ago. Ms K lived in a Sikh community in Afghanistan until 1998, and re-settling in India with the claimant and his family would involve a perpetuation of the familiar rather than having to adjust to a different set of cultural, religious or social values. No objective evidence has been brought forward to sustain the proposition that there is a real risk *per se* in India for young women being subjected to sexual abuse, and in any event there is no reason to suppose that the claimant and his family would not ensure that the claimant's step-daughters were kept free from harm. The fact that Ms K has become naturalised as a British citizen does not give her the right to insist that she carries on family life in the UK, rather than in India, simply because of her British national status and the British national status of her children. Absent compassionate circumstances, the requirements of the Rules have to be met, and the evidence falls very far short of establishing that there are insurmountable obstacles to family life between the claimant and Ms K being carried on in India.

54. But as Mr Bramble acknowledged, there is another potential route by which the claimant can qualify for limited leave to remain. This is under EX.1(a) which corresponds to Section 117B(6) of the 2002 Act as amended by the Immigration Act 2014. Although the claimant is not a biological father, he can still be treated as a parent by virtue of being a step-father.

55. A useful summary of the learning on the best interests of children in the context of immigration is to be found the determination of **Azimi–Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:

> "30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom,

irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

(i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

(ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

(iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

(iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.

(v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases."

56. The following observations of the Court of Appeal in **JW (China) v Secretary of State for the Home Department [2013] EWCA Civ 1526** are also pertinent:

> "22. In my view the correct approach is very well summarised in the Upper Tribunal decision of **MK (Best interests of child) [2011] UKUT 00475 (IAC)**, where this was said at paragraphs 23 and 24 of the determination:
>
> > "…If, for example, all the factors weighing in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parents remaining in the UK, that is very likely to mean that very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parents own claim that they want to remain) point overwhelmingly to the child's interest being best served by him returning with his parents to his country of origin ... then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn the decision appealed against was and is proportionate." "

57. It is a matter of concern that there is no independent evidence from the schools attended by the children of the paternal role that the claimant is said to have played in the children's lives since the summer of 2014. Of even greater concern is the content of the email from the child protection officer at the Sikh Academy attended

by A. Her rights as a child include waiving her right to confidentiality in the exchanges which she has had with the counsellor at school. It is reasonable to question why neither the counsellor nor the child protection officer are prepared to go on record as affirming the positive role that A says the claimant has played in her life since his marriage to her mother. Had it not been for A's oral evidence, I would have been inclined to interpret the email from the child protection officer as a coded message that things were not as they seemed, and that in truth neither A nor the school regarded the claimant as having assumed a paternal role in A's life; and that the reason for A stopping counselling had nothing to do with her step-father's positive influence.

58. In view of when the counselling began and when it ended, I remain sceptical (in the absence of independent confirmation) that the reason why the counselling came to an end in September 2014 was because, as her mother put it, A was so happy with the marriage. If that were true, the counselling should have started and stopped much sooner.

59. But in the assessment of a child's best interests, a vital component is listening to the child herself. I found her evidence persuasive. I do not consider that her evidence was rehearsed, or that she was feigning her devotion to the claimant, or her feelings about the essential role as a father figure which he now played in her life and the life of her younger siblings. Accordingly, I find that the claimant has discharged the burden of proving that he has a genuine and subsisting parental relationship with a qualifying child. Although I did not hear from any of the younger children, I am prepared to accept that he also has a genuine and subsisting parental relationship with them as well. I focus on the eldest child, A, as she has the strongest private life claim, by virtue of her age, and hence her length of residence in the UK. Although from a family life perspective, her best interests lie in her remaining with the family unit wherever it happens to be, from a private life perspective, her best interests clearly lie in her continuing her secondary education in the UK, and continuing to enjoy until the age of her majority all the benefits and advantages which flow from her British national status. Although the hardship to her consequential upon the relocation of the family to India will to some extent be tempered by the considerations to which I referred in my discussion of insurmountable obstacles, I consider this has only a marginal impact on where her case lies on the spectrum identified in **JW (China)**.

60. Turning to the wider proportionality assessment, there are undoubtedly factors which militate in favour of the claimant's removal. Immigration control is a desirable end in itself, and it is not in the public interest for migrants to be seen as successfully circumventing the Rules. If the claimant was applying for entry clearance from India, he would not be able to rely on EX.1, and he would only be able to obtain entry clearance as and when his wife earned an annual income of at least £18,600 per annum. The claimant is clearly not fluent in English, as he gave his evidence through a Punjabi interpreter. He is also not financially independent. On the other hand, his presence in the family unit should assist in the family coming off benefits. Firstly, there is no reason to suppose that the claimant cannot undertake

gainful employment, once he is allowed to do so, and secondly, by sharing in childcare responsibilities, he can make it easier for his wife to take up gainful employment. If the claimant was a significant immigration offender, the scales might be tipped in favour of enforcement of immigration controls. But, for the reasons given earlier, I find that the claimant is not disqualified from taking the benefit of EX.1(a) on the ground that he does not meet one of the suitability requirements. So, having considered all the relevant factors, I find that the claimant succeeds in his appeal under EX.1(a) and under Section 117B(6). I find it would not be reasonable for child A to leave the United Kingdom.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is allowed under Appendix FM of the Rules.

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.

Signed Date

Deputy Upper Tribunal Judge Monson