**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA114252015

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18 May 2017** | **On 21 June 2017** |

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**MISS ARATHI SOMARAJAN**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Winter, instructed by R H & Co Solicitors
For the Respondent: Mr M Matthews, Senior Presenting Officer

**DECISION AND REASONS**

1. This appeal comes before me pursuant to an interlocutor dated 16 December 2016 by the Court of Session in respect of a joint minute of the parties' process in the following relevant terms:

*"WINTER for the appellant and SMITH FOR THE Secretary of State for the Home Department concur in stating to the court that the parties are agreed that the Upper Tribunal erred in law in:*

*Finding that the First Tier Tribunal's finding on the following matter was properly reasoned:*

*(a) The First Tier Tribunal's finding in fact at paragraph 54 of its decision dated 15th July 2015 that it was likely the appellant will not remain staying with her parents and sister for much longer: There was no basis in fact on the evidence before the Tribunal for this finding.*

*The Secretary of State therefore hereby withdraws her Answers to the Grounds of Appeal and consent to the granting of the appeal. The parties therefore crave the Court:*

*(i) to allow the appeal and to set aside the decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 11th February 2016; and*

*(ii) to remit the references to the Upper Tribunal (Immigration and Asylum Chamber), differently constituted, for consideration anew of all grounds originally before the Upper Tribunal (immigration and Asylum Chamber) and which grounds are not limited to the ground identified in (a) above."*

## Introduction

2. Mr Winter explained at the outset that it had been agreed between the parties in the Court of Session that the First-tier Tribunal had erred in law. Such agreement does not however appear in the minute and he and Mr Mathews accepted that it was therefore necessary for me to first decide whether the First-tier Tribunal erred in law in its decision dated 13 July 2015 based on the grounds of the renewed application to the Upper Tribunal which led to the grant of permission by UTJ Plimmer dated 30 November 2015. I am grateful to the parties for their extensive submissions including the written submissions by Mr Matthews which he relied in addition to argument *de bene esse* in respect of a proposed amended ground by Mr Winter based on the procedural fairness of the First-tier Tribunal Judge having considered material that had not been provided by the parties.

3. I reserved my decision on error of law and sought counsels' views on any remaking that might ensue. Mr Winter was content to rely on his oral argument before me in respect of the error of law challenge as to any such remaking. Likewise, Mr Matthews was content to rely on his written submissions supplemented at the hearing and had no questions for the witnesses. This was understandable as there was no evidence of any material change to the evidence given by the appellant and her witnesses before the First-tier Tribunal two years ago save for a procedural updating. The appellant however now seeks to rely on an expert report by Olivia Holden as well as the 2015 country report on India by UK Border Agency. Mr Matthews wished the chance to make written submissions on this

material and a short timescale was set for this exercise giving Mr Winter the chance for responding. Mr Winter however took this as an opportunity to add to his submissions on error of law in addition. The opportunity to the make further submissions was confined to the country evidence based on a speculative finding of error of law. It was not intended to be an opportunity to expand on matters discussed at length at the hearing let alone one to resurrect an abandoned ground challenging rationality on which there has not been full argument. I have therefore disregarded the additional submissions and make my decision on error of law based on what was argued at the hearing.

**Background to the case**

4. The appeal is against a decision by First-tier Tribunal Murray who, for reasons given in her determination dated 13 July 2015, dismissed the appellant's appeal on Article 8 grounds and under the Immigration Rules against the respondent's decision dated 5 March 2015 refusing to vary leave to remain and to remove the appellant who is a national of India. She was born in Libya on 9 January 1989 but has retained the Indian nationality of her parents who left India 30 years ago. In 2007 the appellant's mother came to the United Kingdom from Libya with a work permit; her husband and the appellant's younger sister accompanied her as dependants. The appellant was granted leave at the same time to enter as a student and pursued courses of studies leading to the award of a BSc Honours in July 2013 and an MA in 3D Designs for Virtual Environments in July 2015. She was granted successive periods of leave as a student with the most recent expiring on 19 January 2015. On 12 January 2015, the appellant applied on form FLR(FP) for further leave to remain indicating that the basis was Private Life on the UK (10-year route) and Family Life. The refusal of that application is the subject of this appeal.

5. In refusing the application, the respondent explained that she had considered the appellant's circumstances under paragraph 276ADE (in respect of her private life) and considered exceptional circumstances. This included consideration of mental health issues that the appellant was suffering from. The view was taken that it was open to the appellant to return to India or Libya and to pursue her studies or employment there or otherwise make an application for entry clearance under points-based system to continue a presence in the United Kingdom.

6. The appellant gave evidence before First-tier Tribunal Judge Murray who heard also from the appellant's parents and her sister. The conclusions that she reached can be summarised as follows:

   (a) The appellant has family and cultural ties to India and it was considered that she could integrate and establish a private life there. The appellant spoke Hindi and English. She has been to India on holiday where she had family members and where had stayed on her own with her aunt.

(b) It is not the case that in Indian culture, no single woman live on their own. The judge noted the amendment to the evidence by the appellant's father who initially statement was in terms that in Indian culture no single woman lives on her own. It appears at the hearing he explained that no single women in his family were living alone. With the appellant having spent short periods of time in India, she must have "a good idea of what life there is about".

(c) The appellant's health issues were not sufficient for an Article 8 claim on health grounds in the light of available healthcare (in India).

(d) It was clear that the appellant and her family members are close. She was however 26 years old and although single, it was "likely that she will not remain staying with her parents and sister for much longer". The evidence that the family would be split if the appellant could not remain in the United Kingdom was "unrealistic". There relatives that the appellant could stay with. The judge also relied on a COI report being in the public domain, which indicated that single Indian women lived in major cities.

(e) The appellant has always been legally in the United Kingdom and that she is close to her family members but "there is nothing unusual in this case".

(f) The appellant had confirmed that she was aware that one of the terms of her student visa was that she had to return to India at the end of her studies and she was aware of this. There was no legitimate expectation on her part or her family members that she would be able to stay.

(g) Although the appellant's family members have ILR, this did not mean that they have to stay here. If the appellant is returned to India, her mother and sister could go there or her sister could remain behind as a student in the UK. With her father working abroad for most of the time, it would not be unreasonable that the family could have its base in India instead of the United Kingdom.

(h) The appellant speaks English to a high standard as do her family members. She has integrated well into the society in the United Kingdom and has never claimed benefits and relies on her parents for her funds. Her immigration status is precarious with reference to s.117B(5) and has always been so with no automatic right to remain here. There were no exceptional circumstances or compassionate or compelling factors and accordingly, little weight was given as to the appellant's private life.

(i) It was clear that the appellant has family life in the United Kingdom but she has been an adult for eight years. Her financial dependency on her parents could continue if she goes to India. The appellant's emotional dependency on her parents (and they on her) and the wish

that the family remain together was "totally unrealistic". The appellant has studied and has qualifications and it is "now time for her to start a life outwith the family unit". This would not be "unreasonable".

(j) "When public interest is taken into account [sic] and when proportionality is assessed, public interest must succeed over the appellant's Article 8 rights and her parents' and sister's Article 8 rights".

(k) One of the factors in the proportionality exercise must be that the appellant cannot meet the terms of the Rules. "Even taking her health issues into account and her relationship with her family the weight must fall in favour of public interest as opposed to the appellant's and her family's human rights".

**Did the First-tier Tribunal err in Law?**

7. Mr Winter confirmed that it was accepted the appellant could not meet the requirements of paragraph 276ADE(vi) on the basis that she was unable to demonstrate very significant obstacles to her integration into India where she would have to go to if required to leave the United Kingdom. Mr Winter however emphasised that reliance was also placed on the unchallenged finding by the judge of the appellant's family life. As a preliminary matter, I sought clarification from the parties at to the circumstances that led to the family's departure from Libya in 2007 when the appellant came to the United Kingdom with her parents and younger sister. There was no evidence before the judge that this was compelled by the current unsettled situation there. There was therefore no requirement for the judge to focus on the practical and financial realities that were relevant in *Rai v ECO (New Delhi)* [2007] EWCA Civ 320.

8. I now turn to the specific grounds of challenge. Ground 1 is in terms that approach by the Tribunal that the family could relocate with the appellant to India was not the correct approach and was legally flawed. Had the correct approach been taken, there were no sufficiently weighty factors justifying separation where the appellant has always lived with her family taking account of her lawful stay in the United Kingdom, never having lived in India, her emotional and financial dependence on her family, her competence in English, not being a burden on the tax payer and having a limited number of relatives in India where she would have language difficulties. This is coupled with her health issues and the fact that her parents own a house and have a mortgage. The Immigration Rules are "not a legitimate aim in their own right". The Tribunal had erred in finding that the weight must fall in favour of the public interest and had the Tribunal approached the case in the correct manner it would have not reached these findings. The Tribunal had reached an irrational decision as on no view could have been said that there was any public interest in removing the appellant from the United Kingdom when all the factors were properly considered and assessed.

9. This ground is somewhat discursive and although a rationality challenge is raised, Mr Winter confirmed at the hearing that he no longer relied on this part of the ground on although he argued that the challenge was more than a disagreement. *Mirza v SSHD* [2015] CSIH 28 is among the authorities relied on.

10. Mr Matthews' arguments are set out in a detailed skeleton that he adopted. He submits that the scope of *Mirza* has been subsequently significantly narrowed and is confined to its facts having regard to *Butt*, *re: judicial reviews* [2015] CSIH 72 and more importantly to *Khan v SSHD* [2016] CSIH 13 and *Lardjani v SSHD* [2016] the latter being decisions of the Lord President of the Court of Session. He further argues that *Mirza's* utility has perhaps been even further eroded following the decision of the Supreme Court in *Agyarko v SSHD* [2017] UKSC 11.

11. The starting point for any article 8 consideration is the Rules which is how the judge began her analysis. With Mr Winter having accepted that there were no insurmountable obstacles to the appellant living in India, there was no error by the judge reaching such a conclusion herself on the evidence. Indeed, ground 1 does not seek to assert otherwise. The appellant's representatives have accepted that she is unable to meet the requirements of the Rules in respect of her private and family life. As I have observed above, paragraph 276ADE sets out the Secretary of State's policy in relation to private life. Appendix FM includes provisions in relation to adult dependent relatives which are confined to circumstances where there are serious disabilities or illness of which the appellant is fortunately free. The next matter to be addressed is whether the judge correctly directed herself as to the approach she was required to take under article 8 since, absent the rationality challenge, ground 1 can only succeed if it can be shown that the judge took an unlawful approach or failed to take all the relevant factors into account. There is no suggestion that the judge failed in respect of the latter but instead, the challenge is to the way in which the she undertook the balancing exercise. The judge saw her task as finding whether there were exceptional circumstances (see [52]) and concluded that there was "nothing unusual" (see [55]). In [59] she concluded that "in this case there are no exceptional circumstances or compassionate or compelling factors".

12. The Supreme Court in *Agyarko* was concerned with applications made by foreign nationals residing unlawfully in the UK for leave to remain here as the partners of British Citizens with whom they former relationships during the period of unlawful residence. The appellant before me is in a different category. She had an existing family relationship before she arrived in the UK and it has been accepted that family has continued into her adulthood with lawful leave during which she pursued her tertiary studies dependent on her father for financial support. The nature of the family life was therefore not one that engaged consideration of insurmountable obstacles under FM Section EX, which is concerned in part with partner based family life.

13. Nevertheless, the Supreme Court considered aspects of article 8 that are relevant to this appeal. At [39], Lord Reed posited a number of issues for consideration including the role that precariousness plays in article 8 and how it should be interpreted. In paragraph [50] he concluded with the observation that "…"precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK is unlawful or precarious affects the weight to be attached to it in the balancing exercise." Lord Reed also observed in his concluding remarks on precariousness at [53] "One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK and in which a less stringent approach might therefore be appropriate. Here again, the distinguishing feature in the appeal before me is that the family life existed at the time of entry and continued during a period of lawful residence that however did not have the promise of settled status. It cannot be said that the judge was not alive the fact of the appellant's lawful leave and the history of the family since their departure from Libya. There was no evidence that the appellant was under any misapprehension about the uncertainty of her immigration status.

14. The task before the judge was to strike a fair balance between the competing public and private and family life interests in play and to apply a proportionality test in doing so. The judge made an observation over the absence of anything "unusual" in part of her analysis but she was otherwise was correct to consider whether there were compassionate or compelling factors. Having regard to the overall reasoning in the decision and the analysis undertaken which included all relevant factors, my conclusion is that the reference to "unusual" is not fatal to the lawfulness of the proportionality exercise. I am satisfied that the judge departed from the correct legal test or that she was imposing a test of exceptionality.

15. By the time the case came before the First-tier Tribunal the appellant's parents and sister had achieved indefinite leave to remain. Her father had worked in Libya in 2010, in 2011 in Algeria, and returned to Libya in 2014. He is now working in Iran. There was no evidence before the judge that the appellant had embarked on a further course of studies when she applied for the extension of leave to remain before expiry of her leave on 15 January 2015. Mr Matthews accepted that by August 2017, in the light of the s 3C of the Immigration Act 1971, appellant may succeed on an application for permanent residence simply by effluxion of time. This would be of possible relevance in any remaking of the decision in the light of the observations by Sales LJ in *Rhuppiah v SSHD* [2016] EWCA Civ 803 at [44]:

> "… There is a very wide range of cases in which some form of leave to remain short of ILR may have been granted, and the word "precarious" seems to me to convey a more valid concept, the opposite of the idea that a person could be regarded as a settled migrant for Article 8 purposes, which is to be applied having regard to the overall circumstances in which an

> immigrant finds himself in the host country. Some immigrants with leave to remain falling short of ILR could be regarded as being very settled indeed and as having an immigration status which is not properly to be described as "precarious". The Article 8 context could be taken to support this interpretation. However, it is not necessary to decide in this case whether the Secretary of State is correct in her submission or not, since whichever view is correct the appellant clearly loses on this point."

16. I am however concerned at this stage whether the FtT erred in law in 2015. At the time of the judge decided the case, the appellant was some way short of being within reach of an application for settlement and no prospect of that arising in the absence of any evidence of further studies being contemplated.

17. The judge was unarguably entitled to look at the likely future for the appellant (see [54]), to consider what she might encounter in India ([54) and to consider the possibility of the family unit relocating in the context of the appellant's father working outside the UK. These are all factors that are relevant to the assessment of whether there were unjustifiably harsh consequences. The judge was correct to consider the reasonableness of the impact of leaving her family in the UK and living in India. The judge was also correct in her analysis under the provisions of Part 5A of the 2002 Act.

18. It is understandable why Mr Winter felt unable to pursue the irrationality challenge in ground 1 which asserted that on no view was there any public interest in removal of the appellant. This was plainly not correct. Taking an overall view of the judge's consideration of the various factors in play, I am not persuaded that having regard to the remaining basis of challenge in ground 1, there was any material error in the judge's approach. The judge was required to weigh the factors relied on by the appellant in order to remain in the UK against the competing public interest. She gave adequate reasons why that interest prevailed and left nothing out of her consideration.

19. Ground 2 brings a challenge on the basis that the judge reached findings which were unsupported by the evidence with reference to the conclusion expressed at [54]:

> "… It is clear that the appellant and her family members are close. The appellant is however 26 years old. Although she is single just now it is likely that she will not remain staying with her parents and sister for much longer."

20. The joint minute acknowledges that the judge's conclusion in [54] was not properly reasoned. Mr Matthews' response to this ground in his skeleton argument accepts that the FtT went too far but nevertheless he relies on observations by Elias LJ in *AP (India) v SSHD* [2015] EWCA Civ 89 at [26]:

> "… The Tribunal must have regard to all relevant circumstances when considering the issue of proportionality, and in my view that includes in an appropriate case having regard to likely future events. That is not taking into consideration later events but assessing matters in the round at the

point when the decision is made. Moreover, in my view the Tribunal must in an appropriate case be entitled to make common sense inferences about what is likely to happen in the future based on the facts as they were before the Entry Clearance Officer. It does not necessarily require specific evidence on the point."

21. The evidence of the appellant's plans are set out in her statement which sets out in positive terms her business activities with a worldwide customer base. The medical evidence indicates that the appellant had attended her doctor on 28 January 2014 with symptoms of depressed mood secondary stress. She attended "Doing Well" by Depression Service on a number of occasions in 2014 and 2015. Scores provided indicated that she had a significant anxiety disorder with depressive illness but she had improved with cognitive behavioural therapy and was discharged in February 2015. The appellant was free from any mental illness at the time the appeal was heard and there was no indication that it had an adverse impact on her post-graduate course which she had completed in May 2015 or her future business plans.

22. The judge has also heard evidence from the appellant's father that it was likely that he would be arranging a marriage for her although it was up to her to decide when that would happen (see [5]).

23. It seems to me that although the judge erred in failing to give reasons, the available evidence shows that such a prediction was the only common sense inference from what was known. There was no evidence that the family life between the appellant and her family was of such intensity that there would be no question of her ultimately pursuing an independent life which was in reasonable prospect.

24. *AP (India)* in part was concerned with the correct approach to adult males remaining in a family home and bringing their spouse to join them and their parents so that family life may indeed remain close for a lengthy period of time. The error by the court below was because it undermined the analysis of the strength of family life and the full impact which separation would have on each member of the family. There was no such evidence before the First-tier Tribunal in the instant case that any prospective marriage would result in the appellant remaining in the family household thereafter. Accordingly, I do not consider the acknowledged error material which required the decision to be set aside.

25. Ground 3 is a challenge to reference by the judge to the background evidence as support for her conclusion that there were single Indian women living in major cities in India. She indicated that she had referred to a COI report which was in the public domain. The challenge essentially is that the judge had failed to exercise anxious scrutiny in looking at that material. I asked the parties whether it was permissible for the judge to examine evidence that had not been provided by the parties. After giving the matter some thought, Mr Winter sought to amend the grounds on the basis that there had been procedural unfairness in this course being

adopted. Such an amendment was strongly opposed by Mr Matthews in the context of the history of this appeal when there had been plenty of opportunity for amendment to the grounds. Although my initial inclination was to encourage exploration of this limb, on reflection, I find merit in Mr Matthews' argument and I do not grant permission.

26. There remains a challenge to the adequacy of the judge's assessment of that Country of Origin information, being the 2012 UKBA report. It is correct that having embarked on this course the judge was required to consider that evidence with care particularly as she had not had submissions on the document from the parties. Mr Matthews' response was that on close analysis of the passages referred to in the grounds it was somewhat doubtful that the absence of reference to the paragraphs raised in the grounds could have made a material difference. Specifically, he submits that [24.03] of the COI report identifies that the greatest inequalities are felt by women belonging to weaker sections of Indian society who remain poor and socially excluded. He contrasts the position of the appellant who comes from a well-educated family and is highly educated herself. As to [24.06] which the grounds rely on the support for the proposition that women's marginalisation within the Indian economy has increased, Mr Matthews observes that that passage does not comment on the prospects of a woman educated to post-graduate level who comes from an apparently well-off family and who will continue to be financially supported by them. [24.07] of the COI report refers to sexual harassment of women in the work place including physical and verbal abuse from male supervisors. Mr Matthews makes the valid submission that the fact of sexual harassment at work could not undermine the judge's conclusion that single women do live on their own in India.

27. I am not persuaded that the judge was incorrect to observe that women live on their own and that the appellant has relatives whom she could stay with.

28. As to Ground 4, Mr Winter accepted in the course of his submissions that this ground which argues a failure to give adequate reasons or a failure to take account of all relevant factors, a failure to assess all relevant factors in reaching an irrational finding does not raise anything that was not addressed in ground 1. Reference is made to the First-tier Tribunal's observation that the appellant had studied, had a qualification and that it was time for her to start a life outside the family unit. A judge is required to assess the evidence rather than impose her own view but when this observation is considered in the context of the whole of [60], it appears that the judge was assessing the reliability of the evidence of the future dependence the family members had on one another. It was legitimately open to the judge to question that evidence and whilst the language she chose was unfortunate, I am not persuaded that she fell into material error. The issue at stake in the appeal was whether there were compelling circumstances which outweighed the public interest in the appellant's removal from the United Kingdom following completion of her studies. The appellant had relied on the strength of the family unit and also the

difficulties she anticipated she would have if living in India. In both respects the judge took all relevant factors into account and came to a conclusion rationally open to her on the evidence.

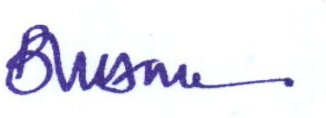
29. Ground 5, challenges the decision of the First-tier Tribunal in two respects. The first was its direction at [52] to see if there were exceptional circumstances in the case. The second, in [25] is the observation by the judge that there was nothing unusual in the case. I have dealt with the latter above. As to the former, Mr Winter readily conceded that in the light of the decision by the Supreme Court in *Agyarko*, such a challenge was not open to him. He was right to do so. As observed by Lord Reed at [56]:

> "The European Court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in *MF (Nigeria) v SSHD* [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said, at para 42:
>
> > "In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal."
>
> Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as Lord Dyson MR made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. "

For the reasons I have already given, when reading the determination of the First-tier Tribunal as a whole, I do not consider the finding that there was nothing "unusual" in the case is fatal.

30. By way of conclusion I am not persuaded that the judge fell into material error in her reasons for dismissing the appeal. The appeal before me is dismissed.

Signed Date 16 June 2017



Upper Tribunal Judge Dawson