Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34063/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2017	**On 1 August 2017**

Before

Upper Tribunal Judge Southern

Between

NILESHKUMAR BAVABHAI MANGELA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Subbarayan, of Sivaramen, solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Place who, by a determination promulgated on 20 March 2017, dismissed his appeal against refusal to grant him leave to remain on the basis of rights protected by article 8 of the ECHR. The grounds upon which permission to appeal was sought and granted conclude by summarising the challenge pursued as being that the judge made the following errors of law:

a. She failed adequately to have regard to the best interests of the appellant's child;
b. She failed to consider whether the appellant should succeed on the basis that the requirements of para 276ADE of the rules were met on the basis that the son's autism meant there would be very significant obstacles to integration in India;
c. The judge wrongly failed to consider whether the appellant should succeed under para 276A1
d. The assessment of proportionality for the purposes of article 8 ECRH outside the rules was legally flawed

2. In his oral submissions, Mr Subbarayan refined those grounds, placing the emphasis upon the complaint that the judge failed to have adequate regard to what was in the best interest of the appellant's son. In so doing, he advanced arguments straying between his grounds, rather than addressing each in turn, which I took to represent his view that the need to treat the best interests of the appellant's child as a primary consideration was a thread woven through his challenge generally to the decision of the judge. I shall, though, do my best to address each of the issues he has raised.

3. The appellant, who is a citizen of India, arrived in the United Kingdom in May 2006 and was admitted as a student with leave that was progressively extended until 30 August 2012. His wife, also a citizen of India, joined him 3 years later and was granted leave in line as his dependant. It was established in submissions this morning that although the appellant was admitted for the purpose of study, he did not secure any academic qualification because his college closed down. He last attended a college in 2009 and, although the last extension of his leave was for a period between 30 September 2010 and 30 August 2012, I was told that was on the basis that by then his wife had been granted leave to remain as a student and his leave was extended as her dependant.

4. On 23 August 2012, he made an application for leave to remain on the basis of rights protected by article 8 ECHR. That application for leave to remain on the basis of family and private life was refused by a decision dated 30 September 2013 but, for reasons that go unexplained, that decision was said by the appellant not to have been served until about two years later. The appellant lived throughout at [ ] Poppy Field in Kettering but had chosen to give a different address, [ ] Braddon Road in Loughborough, to the respondent, but that does not seem to explain the delay in the appellant receiving the decision. It can be seen that in the respondent's bundle is a copy of a letter from the respondent, dated 30

September 2013, addressed to the appellant at [ ] Braddon Road, enclosing a copy of the refusal. If that was not sent or received, or forwarded to the appellant from his chosen "correspondence address", we do not now know why.

5. At the commencement of the hearing, Mr Melvin raised the issue of whether there was any valid appeal before the First-tier Tribunal, given that, on its face, the appeal was brought significantly out of time and there is no indication that there ever was an application to extend time. However, it can be seen from the notice of appeal submitted by the appellant that he said, at section 2, that the decision of 30 September 2013 had not been "sent" until 28 October 2015 and there has been no challenge to that, so that the appeal was treated as being brought in time. As is recorded at paragraph 3 of the decision of the First-tier Tribunal Judge now under challenge, the judge herself raised this issue but the respondent's representative did not dispute the date of receipt asserted by the appellant. In my judgment, it is now too late to revisit that matter.

6. The respondent refused the application because as the appellant's wife was not an Indian citizen and was not settled or a refugee, he could not meet the requirements of the rules under the partnership route and as the child was also a citizen of India who had not been resident in the United Kingdom for at least 7 years, the appellant could not succeed under the rules on the basis of the parent route. EX1 did not apply because the appellant did not meet the eligibility requirements of the rules. As for private life, the appellant had spent the first 22 years of his life in India and had not lived in the United Kingdom for the 20 years demanded in respect of long residence applications. It was not accepted that he would have lost all ties with his country of nationality. Finally, the respondent could not identify anything disclosed by the application that demanded a grant of leave outside the rules in order to secure an outcome compatible with article 8.

7. As we shall see, the arguments advanced before the First-tier Tribunal in support of the article 8 claim were clearly focussed upon the appellant's son and his special needs as an autistic child. The reason there is no mention of that matter in the refusal letter is, presumably, because the respondent was unaware of the fact that the child was autistic. Although the application form was accompanied by a 6 page long typed letter, this was an issue that was simply not raised. Although that might well be explained by the young age of the child at that time, there is no suggestion that any further submissions were made subsequently while

the appellant awaited a decision on that application, which he did not believe had happened until October 2015.

8. The appeal came before First-tier Tribunal Judge Place on 7 March 2017. She summarised the evidence called before her. The appellant said he had now been living in the United Kingdom for 10 years, and his wife for 7 years. Their son, born on 28 February 2011, was autistic and in need of special schooling and attention. He and his wife received financial support and practical help with care for his son from his wife's 3 sisters, all of whom are settled in the United Kingdom. He was no longer in contact with his parents in India, having married against their will. He has 2 sisters and 1 sister in law living in India. He confirmed that the financial support he received from his sisters-in–law in the United Kingdom would continue should he and his wife and son move to India. The appellant said that his son, now 6 years old, was making some progress in a special school here and that there was not much social care support available in India.

9. The appellant's wife gave oral evidence, saying that her son received excellent care and support in the United Kingdom and that she would find it hard to manage without the practical support provided by her sisters in looking after her son.

10. Two of the appellant's sisters-in-law gave oral evidence. They spoke of having developed a relationship with the appellant's son and said that whilst visits to India would be possible, they could not take place frequently because there was a business to run in the United Kingdom and children who are at school.

11. The findings made by the judge are set out at some length between paragraphs 20-40 of her decision. She began by recording this:

> "Mr Subbarayan (the appellant's legal representative) accepted that the Appellant does not qualify for leave to remain on the basis of the provisions of Appendix FM or paragraph 276ADE of the Immigration Rules and the matter therefore fell to be decided under Article 8."

Remarkably, given the clear and unambiguous terms in which the judge expressed herself, in the grounds upon which the appellant sought and was granted permission to appeal it is contended that no such

concession was made. It is said in the grounds that the only concession that was made was that the appellant could not succeed under EX.1. I do not accept that the grounds accurately represent what was said before the judge. Support for the position as recorded by the judge is found in what has been said by the respondent in the rule 24 response:

> "From the records held by the respondent from the hearing it is submitted that the appellant's representative conceded that the appellant's claim was only submitted under Article 8 outside of the Rules which is reflected in the Judge's consideration of Article 8 outside of the Rules."

The grounds for seeking permission to appeal go on to assert that, contrary to the concession as noted by both the judge and the respondent's representative present at the hearing, the appellant's representative "made submissions on it, i.e. paragraph 276ADE(1)(vi)". But it seems clear from the evidence before me and the submissions advanced, that any such submissions were not advanced to show that the concession just given that the appellant could not succeed under the rules was wrongly made but were made in support of the submission that, given the prominence to be given to the best interests of the appellant's child, a grant of leave outside the rules, was required in order to avoid an impermissible infringement of rights protected by article 8.

12. In any event, this issue is not material, ultimately, to the outcome of this appeal, because, leaving aside the fact that the child had not lived in the United Kingdom for at least seven years and although in the context of the judge's assessment of the article 8 claim informed by what she considered to be in the best interests of the child, at paragraph 36 of her determination the judge delivered an answer to the question posed by para 276ADE(iv), saying:

> "Taking all the evidence into account, I find that it is not unreasonable to expect [the child] to be able to adjust to life in India with his parents."

And it is implicit from the findings made by the judge as a whole that she was bound to have found that the appellant and his wife would not encounter the very significant obstacles to integration on return to India that are demanded by A276ADE(vi).

13. Having explained that the matter in issue between the parties was whether the appellant could succeed on the basis of a proportionality assessment outside the rules, the judge directed herself in terms of the five questions posed by Lord Bingham in *R (Razgar) v SSHD* [2004] UKHL 27 and then addressed those questions in turn, concluding that the first four questions returned a positive answer so that:

"The question for me is therefore proportionality."

14. She began her analysis of the question of proportionality by saying that:

> "I am conscious of the need to take the best interests of the child as a primary consideration in any case…"

and a little later on:

> "The crux of the Appellant's case is that, as his son is autistic, it is in the child's best interests to remain in the UK where there is excellent support for him. It is not disputed that [the child] has a diagnosis of autism…"

Therefore, the complaint in the grounds that the judge failed to consider the welfare and wellbeing of the child is a hopeless one. The judge concluded that the best interests of this child were served by him remaining with both parents. They, of course, had been admitted for the temporary purpose of the appellant's ambition to study and secure further qualifications, an ambition that was not in the event realised, and the position throughout was that they were expected to return to India when the limited purpose for which they had been admitted and then granted further leave had run its course. Mr Subbarayan seeks to argue that the judge fell into error in that she failed to consider the impact upon the child rather than limiting her consideration to the fact that the child would remain with both parents, something, obviously, that would be in his best interests. In his oral submissions, Mr Subbarayan developed that argument, submitting that the section 55 duty extended to safeguarding and promoting the welfare of a child in the United Kingdom. He argued that what was important was the child's environment. Even if it could be demonstrated that there were adequate facilities for autistic children in India, although they were unlikely to be as good as those available here, as the section 55 duty required the respondent to safeguard and promote the welfare of the child, to remove him from the familiar environment in which he is presently receiving excellent care would not be to promote and safeguard his wellbeing. The judge had, after all, herself observed that:

> "It is a matter of general knowledge that autistic children prefer familiarity and routine."

But, by reproducing this observation by the judge out of its context, the grounds misrepresent what the judge is saying. Having said this, the judge continued by saying:

> "This does not amount to it being impossible or unreasonable to expect [the child] to be able to readjust to life in India, particularly since he would be doing so with both his parents. The one doctor

> who states that it is important for [the child] to stay in one place, Dr Paneri, has apparently never met [the child]. There is no direct evidence from any professional who has been involved with [the child] to the effect that it is unreasonable to expect him to be able to adjust to life in India."

15. There were letters in the appellant's bundle from two medical practitioners, Dr Rajiv Barodia and Dr Ravi Paneri. Mr Subbarayan submitted that the judge had fallen into error in failing to give adequate weight to the views they expressed but I am satisfied that complaint is not sustainable. Dr Paneri is a doctor practicing in India. He said that the appellant had sent details of his son's condition by email and considered that the child should remain in the United Kingdom because:

> "In India we do not have even the basic facilities to support such Autistic child in school or medical centre or in big government hospital…"

But that view was impossible to reconcile with evidence put before the judge by the respondent that gave details of significant numbers of specialist facilities for autistic children throughout India, including specialist medical and educational facilities and support organisations established as "Autism Centres". The judge was plainly correct to find that this prevailed over the view of this doctor, unsupported by any evidence.

16. The other letter relied upon, written by Dr Rajiv Barodia, a Locum Consultant Community Paediatrician employed by the Hertfordshire NHS Community NHS Trust, is brief and says simply this:

> "This is to confirm that [the child] was seen earlier by me and was agreed to have a clinical diagnosis of Autism spectrum Disorder with moderate to severe speech and language skills delay.
>
> I understand from [the child's] parents that they are applying for UK citizenship. I am not aware of their immigration status but will like to support their view that [the child] will get better professional support and help in the United Kingdom. A similar service in the native India is hard to find."

Again, that view is impossible to reconcile with the evidence of the existence of support organisations before the judge Nothing is offered to explain how a doctor employed in a Hertfordshire NHS trust is well placed to express a view on the availability of such services in India and it was plainly open to the judge to give no weight to his view, unsupported as it was by any evidence, either of the fact asserted or his expertise to express that view.

17. Earlier in her reasoning the judge had carried out a careful examination of such evidence there was that the parties had chosen to put before her concerning the appellant's son and the care he required,

as well as the arrangements that could be expected to be available in India. At para 24 the judge noted that both parents, unsurprisingly, spoke Gujarati and would have no difficulty in re-establishing themselves in India. She rejected their claim to have no ties or relatives in India. She explained why the asserted falling out with the appellant's parents on account of his marriage was immaterial. She made a clear finding of fact, which was soundly based upon the evidence, that adequate financial support would be available. As to financial support, as the appellant and his wife have not been able to take any form of employment throughout their time in the United Kingdom, it is clear that as the level of financial support provided by relatives was sufficient to provide for them in the United Kingdom, and it has been confirmed that those relatives would continue to provide that financial support, there would plainly be sufficient financial resources available to the appellant and his wife and child in India.

18. Between paragraphs 26 – 33 of her judgment, the judge examined the evidence concerning the arrangements for education and support for this child in the United Kingdom and the educational and support arrangements that would be available for autistic children in India. She explained why she rejected the submission that there is no adequate provision for autistic children in India. She also made a clear and reasoned finding of fact that the child speaks Guajarati as a first language and that there was no evidence to support the submission that he would be disadvantaged in accessing services in India because in the United Kingdom those services are delivered using the English language. Mr Subbarayan submitted that the judge failed properly to engage with a report before her prepared by Northamptonshire Heathcare. But it can be seen that the report records that Gujarati is the language spoken at home, that the child can follow simple instructions in Gujarati without visual clues, although he was not yet, at the date of that report in May 2015, following any verbal commands in English and the parents told the author of this report that the child "understands better in Gujarati". Therefore, the submission advanced that the child would be disadvantaged in that he is used to receiving support serviced delivered in the English language whereas in India he would have to engage with any such services in Gujarati leads nowhere at all.

19. Mr Subbarayan submitted also that the reasoning of the judge is infected by a mistake of fact. At paragraph 26 of her decision, the judge rejected the evidence of the appellant that his son was attending "a special school for autistic children". The appellant's solicitors have now produced an undated letter from the headmaster of the school presently attended by the child. This confirms that the child is being educated in "a class designated ASD-specific" and I accept, although this is not

specifically stated, that the school is one that provides specialist educational support to children such as this one. Although the letter does not confirm his admission date, I accept also that the judge was wrong to reject the appellant's evidence in this regard. But that is not material given the availability of suitable educational and support organisations in India that the judge found to be available.

20. Having reached that conclusion, the judge went on to say that although it was submitted that the provision for autistic children was not as good in India as it was in the United Kingdom it was not for her to resolve that issue because:

> "The caselaw is clear in medical cases that where treatment is available in the country of origin, it is not a breach of a person's rights under Article 8 or Article 3 of the ECHR to return them to their home country."

With respect to the judge, that was to misunderstand the case being advanced. It was not suggested that there would be an impermissible infringement of protected rights on the basis of medical health issues and a disparity in the quality of care available in India as opposed to in the United Kingdom. . The argument, as I understand it to be advanced on behalf of the appellant, is that the best interest of the child were for him to continue to receive the support services he was accustomed to and that should be accepted to outweigh the public interests, as enshrined in primary legislation at s117B(1) of the Nationality, Immigration and Asylum Act 2002, that the maintenance of effective immigration control is in the public interest. But, once again, if that be an error on the part of the judge I do not see that it is a material one. The route to her ultimate conclusion was this. The appellant's child is autistic and requires specialised support which is presently provided in the United Kingdom. His best interests are served by remaining with both parents who are subject to immigration control but have no continuing leave other than as extended by s3C. His first language is Gujrati and he will be able to access continuing specialised support and education in India in a language he understands. It would not be unreasonable to expect the child to move with his parents to India where they will have adequate financial support. The support provided by the appellant's sisters in law does not amount to protected family life and that support is not indispensable. Having found that it was not unreasonable to expect the child to move with his parents to India, the judge had regard to s117B and the fact that the parents' immigration status had been precarious, even if lawful, throughout and so that reduced the weight that could be given to the private life they had established. Therefore, the judge found that the respondent's decision was proportionate and lawful.

21. It is said also that the judge erred in law by failing to have regard to the fact that the appellant had lived lawfully in the United Kingdom for

10 years and so was entitled to leave under 276A1. But, no such application has been made and that was not a question specifically before the judge. If the appellant does make such an application, the respondent will have to consider whether he meet the requirements of 276B(ii). In any event, in carrying out her proportionality assessment, the judge was plainly aware of the length of time the appellant had been in the United Kingdom, the fact that his leave had been extended by section 3C and that there had been a significant but unexplained delay in the appellant becoming aware of the decision to refuse his application.

22. The grounds raise other matters but amount to no more than an expression of disagreement with reasoned findings that were plainly open to the judge. Essentially, this was a fact-based assessment and, having heard oral evidence, the judge was best placed to carry it out. Even if this claim disclosed features that might properly be said to speak compellingly in favour of the appellant, as was observed by Carnwarth LJ (as he then was) in *Mukarkar v SSHD* [2006] EWCA Civ 1045 at paragraph 40 :

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

23. This, of course, is not a case where the judge reached what might be described as an unusually generous view of the facts but the principle is the same one and is equally valid where the challenge is to a conclusion that the appellant no doubt considers to be at the opposite end of the spectrum of judicial assessment. The judge has not left out of account any material consideration and has given legally sufficient reasons for arriving at conclusions that were founded upon evidence (or the absence of it) and which cannot be considered to be unreasonable, irrational or otherwise unlawful.

24. Put another way, the judge has made no material error of law. The appeal to the Upper Tribunal is dismissed and the decision of the judge shall stand.

Summary of decision:

25. First-tier Tribunal Judge Place made no material error of law and her decision to dismiss the appeal shall stand.

26. The appeal to the Upper Tribunal is dismissed

Signed 

Upper Tribunal Judge Southern

Date: 28 July 2017