Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17859/2016
HU/17863/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 30 October 2018	**On 9 November 2018**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

HARVINDER SINGH (1)
SANDEEP KAUR (2)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Brooks, instructed by Super Immigration Services Ltd
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission, against the decision and reasons statement of FtT Judge Anthony that was issued on 2 October 2017.

2. No anonymity direction was made in the First-tier Tribunal and there is no need to make such an order in the Upper Tribunal.

Error on a point of law

3. The dispute in this appeal centres on whether the assessment of the appellants' private and family life rights protected by article 8 ECHR was adequate. The grounds argue that Judge Anthony failed to consider the guidance given in *UE (Nigeria) & Ors v SSHD* [2010] EWCA Civ 975, [2011] Imm AR 1 in that she made no finding as to value of the appellant's various activities to the community in the United Kingdom even though that is a factor that must be considered when assessing the public interest and finding where a fair balance lies.

4. After I confirmed that Mr M Azmi, who represented the appellants before Judge Anthony, had made submissions on this point (as recorded in the record of proceedings), Ms Aboni conceded that there was legal error in the decision and reasons statement because Judge Anthony made no findings on that issue. Given this concession, there was no need to hear further from Mr Brooks on the error on a point of law issue.

Materiality

5. I asked Mr Brooks why the failure might be material to the outcome, given the comments made by the Court of Appeal in *UE (Nigeria)* at paragraphs 36 and 23.

6. At paragraph 36, Sir David Keene said.

> 36. I would, however, before concluding, emphasise that, while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in *Bakhtaur Singh*. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case and in particular on the extent of the interference with his private and/or family life.

7. At 43, Richards LJ commented:

> 43. As to the other side of the balance, in *MA (Afghanistan)* [2006] EWCA Civ 1440 at paragraph 28 Moses LJ suggested that "It may well be that the benefit of the community of the work performed by the applicant diminishes the weight to be given to the public interest in immigration control." So far as I can recall

> and can discern from the material we have been shown, that judgment was not drawn to the court's attention, and the possibility of contribution to the community being factored into the analysis in that way was not explored or even raised, in *RU (Sri Lanka)* [2008] EWCA Civ 753. Faced with the issue in the present case, however, I would accept that the matters relied on here by way of contribution to the community are indeed capable in principle of affecting the weight to be given to the maintenance of effective immigration control. I agree that that public interest aim can and should be viewed sufficiently widely and flexibly to accommodate such considerations. But they do not have as obvious a bearing as, for example, delay by the Secretary of State in processing a claim or the applicability of a specific immigration policy favouring the applicant, and I doubt if they would in practice carry a lot of weight even on the relatively favourable facts of the present case. But I do agree that they should not be excluded from consideration altogether.

8. I raised the question about materiality of the issue in the appellants' case because of the lack of evidence that the appellants' contribution to the community, particularly that of the first appellant, was in any sense very significant. The evidence before Judge Anthony was limited. The appellant made reference to his community activities in his witness statement, focusing on his charitable and voluntary work since he ceased to act as a minister of religion. That evidence was not developed during the appeal hearing because the appellant was asked no questions about his activities. The appellant relied on a letter from his Gurdwara, which did not specify anything more than the appellant was a key member of the congregation and an experienced minister of religion. The appellant also relied on several character references. They all contain similar information, referring to the appellant's abilities as a minister of religion and his voluntary community work.

9. Mr Brooks admitted the evidence was not particularly clear and asked me to adjourn so more evidence could be obtained. I refused the request because the appellant has been fully aware of the issue, having raised it himself. He was also aware of the directions issued on 24 September 2018, which indicated that if an error of law were found then it was likely the Upper Tribunal would proceed to remake the decision at the same hearing. Although Mr Brooks suggest fairness demanded giving the appellants an opportunity to obtain further evidence, it would be wrong in my opinion to allow the appellants to benefit from their failure to comply with directions.

10. Nevertheless, I decided that I needed to remake the decision because a fresh assessment of proportionality was required.

Remaking the decision

11. There was no need to hear from the appellant. He was not called by Mr Brooks. I assume his evidence remains the same as given previously since he did not provide a further witness statement. There was no indication there were other witnesses. Mr Brooks reminded me that what was required was for me to find a fair balance between the appellants' circumstances and the public interest in refusing them leave to remain.

12. In deciding not to hear from the first appellant, I remind myself that the findings by Judge Anthony are preserved. They are unchallenged by the grounds of appeal. The error of law does not undermine the findings; the legal error is that Judge Anthony failed to include a relevant factor in her balancing exercise. It is her assessment that is challenged.

13. Judge Anthony's key findings are as follows:

    (i) The respondent failed to prove the first appellant had obtain an English language qualification by deception.

    (ii) The appellants are not settled in the UK and do not benefit from the provisions of appendix to the immigration rules.

    (iii) The first appellant did not meet the continuous residence requirements of paragraph 276B of the immigration rules (long residence).

    (iv) There are no very significant obstacles to the appellants' integration in India and they do not benefit from paragraph 276ADE(1)(vi).

    (v) The best interests of the appellants' daughter are that she remains with her parents.

14. Mr Brooks reminded me that the first appellant has been in the UK since October 2005 and that during that time he has been a minister of religion and thereby a constitutive part of the Sikh community in Smethwick. The appellants were financially support by a relative here and were not a burden on state funds. The first appellant speaks English and in integrated into British society. His ability in English is established by his qualifications, which the Home Office has not proven to be false. The appellants have established family life in the UK with their daughter.

15. Ms Aboni argued the public interest required the appellants to leave the UK because they did not meet the requirements of the immigration rules. Their private lives had been established at a time their immigration status was precarious. Their daughter is not a qualifying child. In addition, the evidence fails to show the appellants make a substantive contribution to the community. Since the first appellant's leave was curtailed in 2015, it would appear that his

activities have been no more than voluntary work within the Sikh community.

The appellants' private and family life in the UK

16. I begin by considering the appellants circumstances.

17. The first appellant arrived in the UK on 29 October 2005 as a work permit holder. He was granted various periods of leave as a minister of religion until 22 March 2009. His leave expired on that date because his application made the day before was rejected. The appellant made three further applications for leave to remain as a minister of religion, the last of which was granted on 25 May 2011.

18. Prior to that period of leave to remain expiring (which was on 2 May 2013) the first appellant applied for further leave, which was granted, so that his leave expired on 30 April 2016. The second appellant entered the UK on 13 September 2014, with leave in line with the first appellant.

19. On 23 February 2015, the respondent curtailed that period of leave so that it expired on 30 August 2015. On 28 August 2015, the appellants applied for leave outside the rules and because no decision had been reached by 8 December 2015, the appellants applied to vary their application to one for indefinite leave to remain. That application was refused on 12 July 2016 and it is against that decision the appeals are brought.

20. I remind myself that by operation of s.3C of the immigration Act 1971, the appellants' leave to remain as a minister of religion and as the spouse of a minister of religion are statutorily extended whilst the applications and appeals are pending.

21. I have recorded the appellants' immigration histories because it shows the first appellant has been lawfully resident in the UK between 29 October 2005 and 22 March 2009 and again from 25 May 2011 until today. The second appellant has always had lawful residence in the UK.

22. I mention that the evidence shows the appellants enjoy family life together with their daughter, who was born on 25 July 2015 (as best I can tell from the evidence). Since the first appellant ceased to have permission to work in 2015, the family group have been financial supported by Mr Balbir Singh. I understand from the statement of the first appellant that Mr Balbir Singh is a cousin. Since ceasing to work as a minister of religion, the first appellant spends time as a volunteer in the Sikh community.

23. It is reasonable to infer from their immigration histories and the other evidence that the appellants have established their private lives in the UK during such periods and that a decision to refuse them further

leave will necessitate their departure from the UK with the consequence of interfering with and potentially ending the private lives they have developed here.

24. The interference in family life rights will be much less since the proposal is that the appellants and their daughter would leave the UK together. Any interference would be to where they enjoy family life rather than being interference in the family dynamics. Judge Anthony found, and I have adopted these findings, that the circumstances the appellants would return to in India are not as claimed. She found in paragraph 25 that the appellants would be able to resume their family ties in India and to find work, thus being able to establish private lives there.

Public interest factors

25. I turn to consider the strength of the public interest. I have already indicated that Judge Anthony's findings are preserved including those in paragraphs 24 to 26. She found that the evidence failed to show there are very significant obstacles to the appellants integrating in India. Her reasons for those findings are drawn from the evidence and are sound. Even if Judge Anthony's findings were not preserved, I would draw the same conclusions from the evidence.

26. Because of those findings, I am satisfied the appellants do not satisfy any part of the immigration rules. The appellants do not fall within the provisions of appendix FM because neither of them has settled status in the UK. They do not benefit from paragraphs 276B because of the interruption in the lawful residence of the first appellant. They do not benefit from paragraph 276ADE(1) because they do not meet the age and residence requirements of the earlier provisions and do not meet paragraph 276ADE(1)(vi) because they have not shown there are very significant obstacles to integration in India.

27. Because the public interest requires the maintenance of effective immigration controls (s.117B(1)), the fact the appellants do not meet the requirements of the immigration rules, which express government policy regarding immigration, there is public interest in refusing leave to remain and for expecting the appellants to leave the UK.

28. I consider the extent the appellants have integrated into the society of the UK. They are not able to support themselves because they are not allowed to work. Their ability in English has not been observed but the first appellant has gained a qualification. I bear in mind he has been able to work in the UK previously and he is integrated into the Sikh community in Smethwick. I find the strength of public interest does not increase because of factors relating to the economic wellbeing of the UK because on the evidence provided it is more likely than not that the appellants would be able to support

themselves if they had permission to work. I find the provisions of s.117B(2) and (3) to be neutral factors in assessing the public interest.

29. Nor do I find the public interest is increased because the appellants developed their private life rights in the UK whilst here unlawfully. I have indicated the periods when the first appellant was here without leave to remain. Most of his time has been spent here lawfully, as has all his wife's residence. However, the fact the appellants have had to apply for further leave for a reason not covered by the immigration rules is an indication that their immigration status is precarious (see s.117(5)). This strengthens the public interest in refusing leave and expecting the couple to leave the UK.

30. The appellants' daughter is not a qualifying child and therefore no benefit is derived from s.117B(6).

Other issues – best interests of the appellants' daughter

31. Before I decide where a fair balance lies between the interests of the appellants to remain in the UK and the public interest in refusing further leave and expecting them to go to India, I bear in mind the following two further factors. First, I adopt Judge Anthony's assessment of the best interests of the appellants' daughter, expressed at paragraph 27 of her decision. This has been unchallenged and is obvious. The child is and infant and in the absence of any contrary evidence her best interests are to be with her parents wherever they are. The best interests of the appellants' daughter do not affect my assessment of the public interest in refusing further leave to the appellants even though that will result in the appellants and their daughter leaving the UK.

Other issues – value to the community

32. The second issue, which is the issue that underlies this appeal, is the value of the first appellant's community activities. As I have indicated, the evidence is limited. The comments of Sir David and Richards LJ that I have cited above indicate that for significant weight to be given to such activities, the activities must bring substantial benefit to the community. Lane J, President of the Upper Tribunal, has recently commented on this aspect in *Thakrar (Cart JR, Art 8, Value to Community)* [2018] UKUT 336 and I follow his guidance.

> 106. It is, of course, the case that the balancing exercise to be undertaken in Article 8(2) situations is a wide-ranging one. So much is plain not just from UE but, more particularly, from the House of Lords' opinions in *Razgar v Secretary of State for the Home Department* [2007] UKHL 27 and *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

107. That does not, however, mean there is no difference between, on the one hand, the factors which the respondent may consider in deciding how to exercise discretion under the Immigration Rules or other statements of immigration policy and, on the other hand, the factors to be decided in determining the weight to be given to the public interest in maintaining immigration control. On this issue, I respectfully consider that Richards LJ was right to say what he did in paragraphs 39 and 40 of *UE*.

108. In 1986, the appellate regime was such that an adjudicator, determining a deportation appeal of the kind described in *Bakhtaur Singh*, was required to decide whether the Secretary of State's discretion under the Immigration Rules should be exercised differently. In a real sense, therefore, the adjudicator was an extension of the decision-making process and so had to take his or her own view of matters of immigration policy, albeit giving appropriate weight to the view of the Secretary of State.

109. The present appellate regime is radically different. Appeals no longer lie against decisions taken under the Immigration Rules. Leaving aside revocation of protection status and deprivation of citizenship, immigration appeals now lie only against refusals of protection and human rights claims. First-tier Tribunal judges are no longer empowered by Parliament to decide how a discretionary policy expressed in the Immigration Rules should be exercised in a particular case.

110. Even before the radical changes effected to the appeal regime by the Immigration Act 2014, there had been, over the years, a marked decline in the instances of discretionary decision-making under the Rules. In particular, the adoption of the "points-based" system removed much of the discretion for which the Rules had previously provided.

111. The fact that the respondent has to operate his immigration policy compatibly with Article 8 does not mean that each and every decision he makes, pursuant to the Immigration Rules and his other policies, as to who should and should not be allowed to enter and remain in the United Kingdom, must be based on considerations which are necessarily the same as those relevant to a proportionality balancing exercise under Article 8.

112. Accordingly, the warnings contained in the judgments of Sir David Keene and Richards LJ are important. Before coming to the conclusion that submissions regarding the positive contribution made to the United Kingdom by an individual fall to be taken into account, as diminishing the importance to be given to immigration controls, a judge must not only be satisfied that the

> contribution in question directly relates to those controls. He or she must also be satisfied that the contribution is "very significant". In practice, this is likely to arise only where the matter is one over which there can be no real disagreement.
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> 113. I am not sure that the list of examples given by Lord Bridge in *Bakhtaur Singh* are all of this kind. It must be remembered that those examples were given against the background of the former appellate regime which, as I have said, gave adjudicators a foothold in the policy realm that is not shared by their successors.
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> 114. Without in any way intending to be prescriptive, it is likely that one touchstone for distinguishing between instances that lie, respectively, exclusively in the policy realm and in the area of Article 8, is whether the removal of the person concerned will lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.
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> 115. If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely affected.

33. Thereafter, Lane J comments upon the proper interpretation of *Lama (video recorded evidence – weight – art 8 ECHR)* [2017] UKUT 16. It is authority only for the principle that a person's value to the community is a factor that may legitimately be considered in the balancing exercise.

34. In the case I am deciding, I bear in mind not only the fact that the first appellant's contribution to the community is by means of voluntary work, which itself may be contrary to the restriction on his permission to work in the UK (such restrictions often stating, no work, paid or unpaid), I bear in mind that his voluntary work is not related to being a minister of religion. It does not matter that the appellant was previously a minister of religion. I must bear in mind that the application on 28 August 2015 was for leave outside the rules and not as a minister of religion, and the variation made on 8 December 2015 were for indefinite leave because of long residence and not as a minister of religion.

35. I find, in this case, that the weight to be given to the appellant's activities in the community is at best marginal and does not materially reduce the public interest in refusing leave to remain and expecting the appellants to leave the UK. This is because the evidence fails to demonstrate that the appellants' contribution to the community comes anywhere near the threshold expressed in case law.

Finding a fair balance

36. I turn to my final task, therefore, which is to find a fair balance between the competing positions. In this case, I find the public interest in maintaining effective immigration controls is strong and much stronger than the need to permit the appellants to preserve their private lives in the UK because there is no good reason why the appellants would be unable to re-establish their private lives in India.

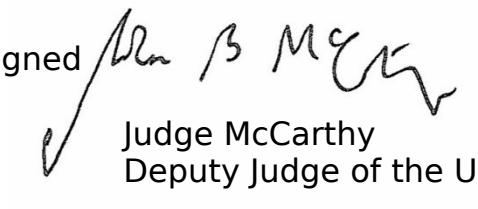
Other grounds – *Nasim and others*

37. There is one final issue on which I must comment. The grounds of appeal suggest Judge Anthony erred by relying on the decision in *Nasim and others (Article 8)* [2014] UKUT 25 because it did not relate to a person such as the appellant. This is to misunderstand the relevance of that case. As I reminded Mr Brooks, the case was reported by the Upper Tribunal to remind all those dealing with article 8 in terms of private life rights that the European Court of Human Rights has often viewed the threshold in terms of whether expelling a person would undermine their moral and physical integrity. That is the conclusion relied upon by Judge Anthony. On the evidence provided, I can find no basis to conclude that the moral and physical integrity of either appellant or their daughter would be undermined by their return to India.

Notice of Decision

The decision of Judge Anthony contains no legal error and is upheld.

No anonymity direction is made.

Signed  Date 31 October 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal