



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33407/2015

THE IMMIGRATION ACTS

Heard at Glasgow
On 10 August 2018

Decision & Reasons Promulgated
On 03 September 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

[A A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter instructed by Drummond Miller

For the Respondent: Mr A Govan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Farrelly who, for reasons given in his decision dated 29 April 2017 dismissed the appeal against the Secretary of State's decision dated 13 October 2015 rejecting the appellant's human rights claim based on Article 8.
2. The appellant is a citizen of Pakistan where he was born on 28 July 1986 and has been in the United Kingdom since arrival as a student with entry clearance on 31 July 2001. He came to the United Kingdom with his younger brothers, [A] and [R]. Their maternal aunt and her husband notified the Secretary of State on 9 January 2003 of their wish to adopt the three boys. This was initially opposed but following

litigation, adoption was granted on 1 March 2006 by when the appellant and [A] were aged over 18. The Secretary of State in exercise of his discretion granted citizenship to [A] but not the appellant because he had an unspent conviction for assault. The appellant reapplied when his conviction became spent but this was also refused. On 13 October 2015, the Secretary of State refused the appellant leave to remain resulting in this appeal.

3. The appellant has established himself as a property owner and is also a director with his younger brother [R] of a construction company with a turnover of £1,000,000. He continues to live with his brothers and seven children of his adoptive parents.
4. The judge accepted the evidence of the appellant's substantial commercial activity. He noted that the Secretary of State had not pursued enforcement measures allowing the appellant to develop roots in the United Kingdom. In his consideration of the case under paragraph 276ADE(iv), the judge was not satisfied the appellant had no family in Pakistan to whom he could turn and rejected the claim by the appellant of sexual abuse by his father and the consequent family rift. Furthermore, he did not accept the appellant had established he would not be entitled to Pakistani citizenship by virtue of his adoption in the absence of evidence on this point.
5. As to the claim under Article 8 and, applying Part 5A, the judge decided that the appeal did not succeed on private life grounds with reference to ss. 117B(4) and (5). He concluded that the relationships established by the appellant could be considered as part of his family life but having regard to the nature of the relationship, the respondent's decision was not disproportionate and thus dismissed the appeal.
6. Two grounds of challenge are relied on. The first related to the account of sexual abuse and the family rift. It is argued that the judge erred in concluding that there was no evidence in support, whereas such evidence had been given by the appellant and his witness. No finding was made as to the evidence of that witness.
7. The second ground is in respect of the judge's conclusion on the weight to be given to private life. It is argued that with reference to *Rhuppiah v SSHD* [2016] 1 WLR 4203 the "little weight" provision in section 117B can be overridden where there is a sufficiently strong case. A second limb to this ground is that there was a misapplication of the law by the judge on the basis that adult family relationships were "less worthy". The third limb is a misapplication by the judge of the law and a failure to assist whether the delay and dysfunctionality in the appellant's case reduced the weight to be attached to immigration control. Had the Secretary of State not opposed the appellant's adoption he would have automatically become a British citizen as he would have still been a minor.
8. I take each ground in turn. Mr Winter submitted that evidence in support of the claimed abuse had been provided by the appellant and his brother as noted by the judge at [16]. [A]'s short manuscript statement does not refer to the matter but a reading of the decision indicates that this was his oral evidence. The appellant's statement provides more detail as follows:

“The other difficult part is that I have no family ties in Pakistan to return to. During the adoption process, the sexual and physical assault which I suffered at the hands of my biological father came to light. The five social services and the police in the UK have referred the allegation of sexual and physical abuse to the Pakistani police. The local Pakistani police had then arrested and questioned my biological parent about this. This created further problem and rift in the family. Now I am estranged from my biological parent and relatives in Pakistan as a result. I cannot rely on them for any support in Pakistan”.

In Mr Winter’s submission the failure by the judge to reach a finding on this evidence impacted on the judge’s considerations under paragraph 276ADE(vi). By way of response Mr Govan argued the judge’s approach to this issue was correct, and in any event it was not a material matter.

9. Paragraph 18 of the decision indicates the following intervention by the judge:

“I asked Mr Lyndsay QC about what I saw as gaps in the proofs. A substantial part of the claim was based upon estrangement from the appellant’s biological father and his remaining family in Pakistan on the basis of sexual abuse. However, the adoption petition makes no reference to this and refers to a consent agreement from his parents. The adoption certificate made at the Sheriff Court makes no reference. It seems likely that in the course of the adoption process there would be social worker reports and a decision of the court, particularly when faced with allegations of sexual abuse. Mr Lyndsay QC, frankly stated that the reason the respondent opposed the adoption and why proceedings took so long was because they took the view this was an abusive application.”

10. At [36] the judge expressed his findings in the following terms:

“I am not satisfied that the appellant has no family in Pakistan to whom he can turn. His natural parents live there. I have received no evidence to support the claimed sexual abuse and family rift. As stated, this is not in the adoption papers nor are there any social work reports to support the claim. I would accept that the appellant and his brothers had not returned to Pakistan since. However, this can be explained by their wish to advance themselves here and in the earlier years, their lack of immigration status.”

Properly understood the judge was referring to the lack of corroborative material in support of this aspect of the appellant’s claim and in my judgment he was entitled to do so, particularly in the light of the possibility of obtaining confirmation from social services. It is correct the judge did not make a clear finding on the point, but I agree with Mr Govan that this is not material. The context was the consideration of the appellant’s circumstances under the Immigration Rule. Paragraph 276ADE(vi) would avail the appellant were he able to demonstrate that there would be “very significant obstacles” to his integration in Pakistan if required to leave the United Kingdom. The appellant is 32. The judge was entitled to conclude at [38]:

“The appellant spent his formative years in Pakistan. He speaks the language. He obviously has business acumen and is now fluent in English. He has had the benefit of an education here. He is (sic) family here who can support

him and he has assets. Even aside from his biological family I can see no reason why he could not reintegrate.”

Accordingly, I am not persuaded that the decision requires to be set aside in respect of ground 1.

11. Ground 2 has three components. In essence Mr Winter argued that at the conclusion by the judge that the appeal failed “under the private life route” was not legally correct with reference to the decision of the Court of Appeal in *Rhuppiah v SSHD* [2016] 1 WLR 4203, in particular the observations of Sales LJ at [53] as follows:

“... That is to say, for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, i.e. is necessary to give proper effect to Parliament's intention in Part 5A; and a similar interpretation of section 117B(4) is required, for same reasons ...”.

12. In considering Article 8 the judge set out his conclusions at [41] to [46] as follows:

“41. I find that article 8 is engaged in the appellant’s circumstances. I find that he has established a private life within the meaning of article 8 over the time he has been here. I accept the close relationship that exists between his siblings and foster parents and their children. That is covered by the protection afforded by article 8. I see no difficulty in proceedings to the final stage of Razgar, proportionality. It was at this point that the statutory considerations come into play. These are mandatory considerations incorporating the respondent’s policy. (see Dube (ss. 117A-117D) [2015] UKUT 90 (IAC))

42. The decision of the Upper Tribunal in AM (S117B) Malawi [2015] ImmAR 5 points [sic] that these provisions do not confer any immigration status to an individual who did not otherwise qualify. Consequently, a claimant could obtain no positive right to leave to remain whatever the degree of their fluency in English or the strength of their financial resources. The case points out the distinction between time spent whilst here unlawfully from time spent when the person’s immigration status is precarious. The decision also gives guidance on the approach towards section 117B(4) and (5). At paragraph 24 the Upper Tribunal did not require the First-tier Tribunal to adopt subtle gradations of weight during different periods of time.

43. The appellant speaks English and I am satisfied he is fully integrated into life here. I find he is financially independent and has contributed to the economy. The greatest difficulty he faces is in relation to section 117B(4) and (5): namely, that little weight is being given to a private life formed when the person is here either unlawfully or when their immigration status is precarious. The statute [sic] does not say that no weight should be given but the emphasis is upon little weight.

44. I accept that there is a strong bond between the appellant and his siblings and adoptive parents. He has been here 15 years and is integrated and he is economic the active (sic). He has strong ties to this country . However section 117B (4) and (5) requires me to attach little weight to the private life formed. I am significantly influenced by this wording. Applying this, the appeal fails under the private life route.
 45. The final issue arising is whether the appellant has a family life and whether this makes a difference to the application of section 117B. He does not have a qualifying partner or child. I have accepted a close bond exists with his siblings, foster parents, and their children. Section 117B provides that little weight should be given to a relationship formed with the qualifying person when the applicant is here illegally. This means therefore that a relationship formed with the qualifying person when the leave is precarious rather than on lawful [sic] can be given greater weight.
 46. A qualifying relationship is defined. It does not cover the appellant's situation. The statutory provision is silent on other adult relationships. It is my conclusion that this relationship can be considered as part of the appellant's family life. As such, the statutory consideration of little weight being afforded does not apply. Instead, this family life must be evaluated in an unfettered way when carrying out the proportionality assessment. When the nature of the relationship is considered it is not the same as that of a couple forming a separate family unit. In the normal course of events the appellant and his siblings would form their own relationships. They are adults capable of leading independent lives. I this in my conclusion when seen in this context the respondent's decision is not disproportionate."
13. Earlier in his decision the judge set out other factors that were clearly in his mind when carried out his analysis. These are set out in [21] to [34] of the decision and may be summarised as follows:
- (i) the particularity close bond between the appellant and his brothers and the role of his adoptive parents in his life;
 - (ii) his integration into life in the United Kingdom, the history of the adoption proceedings;
 - (iii) the factors surrounding the unsuccessful application by the appellant for discretion to be exercised in respect of his naturalisation application;
 - (iv) the earlier application made in February 2013 for the appellant to remain on Article 8 grounds;
 - (v) the evidence of substantial commercial activity and tax paid; and
 - (vi) the respondent not having pursued enforcement measures and objections at an early stage which allowed the appellant to develop roots.
14. I agree with Mr Govan that the decision contains a careful analysis of all relevant material and the challenge does not identify or assert that anything was left out in connection with the Article 8 exercise. Mr Winter candidly acknowledged that since his majority, the appellant has developed his private life aware of the precariousness

of his immigration status. Although the judge did not specifically ask himself whether the private life had “a special and compelling character”, a reading of the decision as a whole, reveals that he gave appropriate weight to all the factors relied on and reached a conclusion lawfully open to him on that material. Mr Winter clarified that the challenge was not a rationality one. I accept that another judge might have come to a different conclusion however the matter of the weight is essentially for the judge having directed himself correctly.

15. The second limb to this ground relates to the treatment of the family relationships by the judge in [46]. Here too I am not persuaded that the judge carried out an erroneous analysis. He had proper regard to the adult relationships between the appellant and his brothers and was entitled to observe that that relationship was not the same as that of a couple forming a separate family unit. There was no evidence before him of a dependency between the brothers beyond normal and emotional ties which could have led to a different conclusion in the proportionality analysis.
16. Finally, the point is argued that if the respondent had not opposed the appellant’s adoption, he would have automatically become a British citizen as he would have still been a minor. It is contended that this resulted in a reduction of the public interest. The judge considered this aspect at [28]:

“The appellant and his brother then asked the respondent to exercise discretion on the matter. This was done in the case of his brother. However, in February 2010 the respondent advised the appellant that because of his conviction for assault he would not benefit from favourable exercise of discretion. I was advised the appellant received a fine of £150. He said the assault occurred as a reaction to racist taunts and disruption in the shop where he worked. The consequences of the conviction were particularly severe for the appellant in this regard. It seems likely that but for the conviction the discretion may well have been exercised in his favour as it was for his brother. There are no other distinguishing features.”

17. As I was reminded by Mr Govan, the appellant did not succeed in obtaining naturalisation on reaching majority because of a criminal conviction. Mr Winter confirmed there was no judicial review to the Secretary of State’s decision in this regard and he candidly accepted the fact of the appellant’s conviction. In my judgment the judge gave due weight to this aspect and did not fall into error.
18. By way of conclusion I am not persuaded that the grounds of challenge establish that the judge erred in law and therefore dismiss this appeal.

UTJ Dawson

Upper Tribunal Judge Dawson

20 August 2018