Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: IA/34870/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 February 2018	**On 26 February 2018**

Before

Upper Tribunal Judge Kekić

Between

Jaspal Singh Sandhu
(anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Ms C Charlton of Bhogal Partners
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

Determination and Reasons

Details of appellant and basis of claim

1. On 8 December 2017 this Tribunal found an error of law in the determination of First-tier Tribunal M A Khan who, on 3 July 2017, dismissed the appeal of this appellant, a national of India born on 5 December 1977, on human rights grounds and under the Immigration Rules.

2. The judge was found to have erred due to his failure to make findings on whether the appellant's presence in the UK was conducive to the public good on account of a previous conviction for battery for which he received a community order sentence, his failure to consider material matters regarding relocation to India (specifically the family circumstances of the sponsor) and the lack of any meaningful assessment of article 8 including the absence of any finding on whether there was family life between the sponsor and the appellant. Accordingly, his determination was set aside in as much as it related to the article 8 claim. A full summary of the submissions made by the parties and my reasons for finding errors of law are set out in my determination of 8 December 2017.

Appeal hearing

3. It was agreed by the parties that the appeal should proceed on article 8 grounds only, it having been accepted by Counsel in the grounds for permission that the judge's finding that the appellant did not meet the definition of a partner for the purposes of the Immigration Rules was sustainable. I therefore proceeded on that basis.

4. Brief oral evidence was called. The appellant gave his evidence in Punjabi through an interpreter. He adopted the contents of his witness statement prepared last year and confirmed there had been no changes. He stated that he had his mother and two married sisters in India. He had a son from his previous marriage who was now in the UK, having arrived 4 weeks ago. A residence permit for his son was seen. He confirmed that his son lived with him and the sponsor at 21 Carlyon Road. The appellant was then tendered for cross examination.

5. It was clarified at this stage that the appellant's son, who was in the hearing room would not be giving evidence and that there would be no reliance on his presence in the UK as part of the appellant's case.

6. In response to questions put by Mr Kotas, the appellant said he was in contact with his mother who lived in a beautiful house which she owned. He confirmed that his mother tongue was Punjabi and that he spoke it at home with his partner. He stated that his partner had no relatives in India but then said that she had distant family on her mother's side and had visited once for 4 weeks in 2015 accompanied by her mother. She had visited the appellant's sister on that occasion. Both she and the appellant were in good health.

7. The appellant said that his partner discovered his illegal status after they met. When asked to be more specific, he said they had met in 2012-2013. He then amended his reply to 2012. When the contents of his witness statement were put to him, he said he could not recall the date. He then said they had been acquainted before they began to cohabit. They met 2009-2010. That completed cross examination. There was no re-examination.

8. I then heard evidence in English from Surinder Kaur Lall. She adopted her witness statement of 2017 as accurate and true. Other than the arrival of the appellant's son, nothing had changed. She confirmed he was staying with them at Carlyon Road.

9. The sponsor said she had three children aged 36, 34 and 27. The eldest was married and had two children. The second one was also married and had a stepchild and a child of his own and his wife was expecting. The youngest had an eleven year old child. The sponsor said that she was very close to her children and grandchildren; her daughter lived in Isleworth and her sons lived in Hayes. She helped look after the grandchildren. Her family knew the appellant and although at first they were not keen on him, they had since accepted him. The grandchildren were very fond of him as were her mother and her former mother-in-law. She said he had supported her through many bad times. Her children and grandchildren were all healthy.

10. The sponsor was then cross-examined. She stated that she was last in India around 2014 for about two weeks. She travelled with her mother and met the appellant's family. She had also been there before but was in connection with the sale of family property. Her father had been in India and had property. Her mother was selling it so she had accompanied her mother who was now 85. Her mother still had some property there. The sponsor said that she did not stay more than two weeks as she did not like the climate. She said she was five when she came to the UK from Africa. There was no re-examination and that completed the oral evidence.

11. I then heard submissions. For the respondent, Mr Kotas relied on the refusal letter. He pointed out that it had been conceded that the appellant could not meet the requirements of the Immigration Rules and so the only issue was whether he qualified to remain on article 8 grounds. He relied on the judgment of Agyarko [2017] UKSC 11 (at 54-56). He pointed out that the relationship commenced at a time when the appellant was here unlawfully and his partner was aware of that. There was no attempt to present this as a Chikwamba type case. The contents of the witness statement showed nothing remarkable. Many sponsors had children and grandchildren in the UK. The appellant had family in India, his mother owned property as did the sponsor's family. Both spoke Punjabi. The sponsor's family did not live with her. What had been expressed was a preference for life here. It was not known on what basis the appellant's son obtained settlement and no weight could be given to his recent arrival. Whilst the relationship between the appellant and sponsor was accepted as genuine and subsisting, it did not advance the case. The appellant was not financially independent. Removal was proportionate. Although the appellant's conviction was now spent, it was a matter to bear in mind.

12. Ms Charlton relied on the skeleton argument. She said that the appellant had been here since 1998 and that the background to his flight from India had not been challenged. He had come here in fear and been here just short of 20 years. He had not seen his family in India for all that time. His son was now in the UK. The sponsor had suffered the loss of her husband and had raised her three children herself. The appellant had seen her through difficult times and was part of her life. He was akin to a grandfather to her grandchildren. The sponsor could not become accustomed to the climate in India or the way of life. Her family was in the UK and they relied on her. The appellant's removal would cause a disproportionate upheaval in all their lives. The conviction was spent. The relationship was accepted. The appellant's statements have a response to the decision letter and to the insurmountable obstacles

to returning to India. The appellant had not sought public funds and did not owe any money to the NHS. He spoke English. The appeal should be allowed.

Consideration

13. I have considered the oral and documentary evidence before me and the submissions made by the parties. I assess the facts as they are at the date of the hearing using the civil standard of proof and bearing in mind that it is for the appellant to make out his case save for the burden on the respondent to show that his conduct is such that his presence here is not conducive to the public good. As agreed, the only issue before me is the consideration and determination of the article 8 claim.

14. I follow the steps set out in Razgar [2004] UKHL 27 and find first of all that despite the conflicting evidence between the statements and the evidence of when the appellant and sponsor met, how they met and when they commenced cohabitation, there is family life between them. Indeed, this was not disputed by the respondent at the hearing. I accept that they have been living together in a relationship akin to marriage since some time in 2016. I also accept that the appellant has a good relationship with the sponsor's family. The appellant claims to have close friends in the UK and to have formed ties with this country. No details are given and there is no independent supporting evidence in that respect. I have also seen no evidence to show that the appellant has resided here since his clandestine arrival in 1998. He claims this is self evident because he has no travel document but I have no way of knowing whether that is true and, in any event, in this jurisdiction the Tribunal comes across many cases of unlawful travel. Moreover, the respondent refused the appellant's application for leave on the basis of long residency due to his inability to show continuous residence for the period claimed. Nevertheless, the appellant has been here for some years and so I accept that he had established some form of private life here. It follows that the answer to the question of whether the proposed removal would interfere with the exercise of his right to a private and family life is in the affirmative. I also find that the interference would be such as to potentially engage article 8 and that the interference would be in accordance with the law and is necessary for the economic well being of the country, the prevention of crime and disorder, health and morals or the protection of the rights and freedom of others.

15. Turning to the fifth and final question, I consider whether the interference is proportionate to the legitimate aim sought to be achieved.

16. Dealing first with the appellant's conviction for battery in February 2013 in relation to a domestic argument with his ex-wife, I note that the appellant received a non custodial punishment which is now spent. Without knowing the details of the offence or the circumstances in which it occurred, I cannot make a finding as to whether the appellant is likely to re-offend. No evidence about the offence and conviction was adduced, no oral evidence was called and I have seen no evidence of attempts at rehabilitation. The appellant refers to having "*taken steps to make amends*" (in his statement) however there is no elaboration. I also note that the offence would have occurred at a time when he claimed to be in a relationship with his current

partner which suggests that that relationship did not have a positive effect on his behaviour. Nevertheless, as the appellant's punishment was a community order and is now spent and as the appellant has not re-offended since then, I am satisfied that it is not conduct which merits a finding that the appellant's presence is not conducive to the public good. It is behaviour which cannot be condoned however it is not of such a serious nature as to preclude the appellant from the UK if he meets the requirements of the rules or if there are other good reasons for him to be granted leave

17. With respect to other facets of the appellant's behaviour and conduct, it is a fact that he has a very bad immigration history and that no excuse for his unlawful stay and evasion of the immigration laws has been offered. He claims to have entered clandestinely in 1998. There is reference to a flight from persecution in a statement from February 2015 but that is never mentioned again in any of his subsequent evidence as a reason he cannot return to India. Nor is there any explanation why, if that claim was true, he did not seek asylum when he entered. Instead he chose to remain unlawfully, work illegally throughout his stay (as he maintains in his statement at paragraph 22), pay no taxes and contribute nothing to the economic well being of the country. It was not until 2012, some 14 years after his claimed entry and 2 years after he met the sponsor that he sought to regularize his stay. One can have little sympathy for an individual who has deliberately flouted the laws of this country and remained knowing full well he had no right to be here. The sponsor's statements are silent on her views of the appellant's long term unlawful status.

18. The references in his evidence to applications for further leave to remain are plainly misconceived. Having never had leave of any kind, he could not have sought further leave.

19. It is also a fact that the appellant has been less than truthful in his evidence. In February 2015, he referred to his parents having been taken away by anti - Sikh elements and killed and his application form of that date confirms he had no family in India (at 10.5) but he now maintains that he has a mother and two sisters with whom he remains in contact. It is maintained that he speaks English but his evidence was given in Punjabi and in his 2015 application he gave Punjabi as the only language he spoke. No evidence of his ability to speak English, such as a test certificate, has been put forward.

20. I have seen no evidence of the basis on which the 2012 application was made or refused. I do not know if the sponsor was mentioned in that application.

21. The evidence regarding the appellant's previous wife is also contradictory. She appears to have come here to visit him in 2004, to have overstayed and then to have obtained indefinite leave to remain. The basis of this has not been disclosed nor was I told how the appellant's son, whom he claimed not to have any contact with for 20 years suddenly turned up four weeks ago and has been living with him since. Different dates are given for the appellant's divorce and no documentary evidence of this is available.

22. The letter of support referring to the appellant as honest and trustworthy carries little weight as there is no confirmation that the author was aware of the appellant's unlawful status. If she was, then her own view of honest behaviour is skewed.

23. There are repeated claims in the statements that the appellant would be an alien if returned to India, that he has lost touch with the culture, that he would be destitute and that he has forgotten the Indian way of life. I do not accept any of those assertions. The appellant lives within a Sikh community, his partner is a Sikh (albeit originally from Uganda), he continues to speak Punjabi, they share a common culture and have the same religion. There is contact with the gurdwara. The appellant has contact with his family in India, they were visited by his partner on her recent visit so their whereabouts are known and he has confirmed that his mother lives in her own "beautiful" house. The sponsor's mother also own property in India. He maintains that he has no property or business interests in India but he has none in the UK either. His business skills can be put to use in India to generate an income if required. There is nothing to support the assertion that the appellant would be destitute, homeless or be an alien in his own country.

24. Given the appellant's failure to claim asylum and the failure to put his fear of return forward in this appeal as a reason for not returning, I find that that is no longer a live issue, if indeed it ever was a genuine fear. Certainly, there is no evidence adduced to show that Sikhs would be at risk at the present time and there is no claim that any of the appellant's relatives have faced any problems.

25. I accept that the sponsor has three adult children in the UK and that she also has grandchildren and an elderly mother. I accept that her sister was previously unwell and that she had to assist with care but that no longer appears to be the case. I accept that she is involved in the care of her grandchildren, as are most grandparents, and I accept that whilst she has retired from her teaching career, she now works part time through a teaching agency. I accept that she has been in the UK since the age of five and that she is a British national. I also accept that it would be extremely disruptive to her life and the lives of her family members if she left the UK to accompany the UK to India. The question remains; would the interference in the family lives of the appellant and sponsor be proportionate.

26. The relationship commenced at a time when the appellant was in the UK unlawfully and both he and his partner were aware of this yet allowed the relationship to form and to develop. Given the appellant's unlawful status, the public interest has to be given substantial weight.

27. The appellant does not meet the requirements of the Immigration Rules. That is also a relevant consideration. Following the principles of Agyarko, upon which reliance was placed by the respondent, it is the case that the number of appellants succeeding under article 8 would be a very small minority (in accordance with Huang) and that the public law interests in removing an unlawful migrant would only be outweighed by exceptional circumstances. In other words: "*In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public*

interest in immigration control" (at 57). The courts have repeatedly held that states are entitled to control the entry of non-nationals into their territory and their residence there and that "*the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life whilst present in the host state unlawfully or temporarily, and then presenting it with a fait accompli*" (at 54 and in accordance with Jeunesse).

28. Exceptional circumstances have been defined by the court not as something unique or unusual but as circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal would not be appropriate. Little has been put forward for the appellant to demonstrate that removal would be unjustifiably harsh. He does not explain his poor conduct regarding his lack of immigration status in any way at all. The witness statements for these proceedings offer no excuse at all. Whilst the appellant maintains that he would be destitute and homeless if returned to India, I have found that such assertions are without any foundation. Not only does he have his own family there but his partner is in possession of very substantial savings some of which could assist him to resume a life there or cover his expenses whilst he makes an entry clearance to rejoin her.

29. Whilst the sponsor maintains that she could not leave her family and relocate to India, she gives no reasons why she could not accompany him there and remain whilst he makes an entry clearance application. Her children and grandchildren could be expected to manage temporarily in her absence; the children are all adults and have partners and the grandchildren have their parents. They may miss the appellant but they do not live with him and I was not given any information as to how frequently he has contact with them. The sponsor's employment is part time through an agency and could be put on hold or else she could travel during school holidays. The excuse that she does not like the weather in India is a poor one. She can be expected to put up with it in order to be with the appellant. Both the appellant and sponsor are in good health. Both are of working age.

30. Neither the appellant or sponsor have offered any evidence on why their relationship would end if removal took place or what they had expected would happen to it were the appellant's attempts to remain here to prove unsuccessful. Knowing his unlawful status from the outset, this is a matter they must have considered. Yet no evidence on this issue has been offered. The sponsor's claim that she did not know that the appellant worked here illegally is undermined by her evidence that she knew of his lack of status and also was plainly aware that he was working on her father's property and subsequently on her own property and that of her sister's.

31. It is the sponsor's choice as to whether or not she relocates to India permanently. It would be an upheaval but it could be done. She too has family property there, she has visited a few times and she has met the appellant's family who can be expected to assist with the process of transition. She speaks the language and is familiar with the culture. She is comfortably off financially and her pension itself would go a long way to supporting them in India until they are able to find employment. Alternatively, she could support an entry clearance application made by the appellant to join her.

32. With respect to the appellant's private life, I have been provided with no information other than his claims to have friends. Those friendships can be maintained through modern means of communication. These are all matters which I must take into account.

33. Having, therefore, considered all the factors put forward for the appellant and the sponsor and weighing them into the balance along with the public interest considerations including those in s.117B, I conclude that the appellant has failed to show any exceptional circumstances that would make removal disproportionate. Whilst I accept that his removal would result in disruption, given the appellant's blatant disregard for the laws of this country, the fact that his family and private lives were established when he knew that he was unlawfully in the UK and the absence of any exceptional circumstances appertaining, I conclude that the public interest outweighs the right to an enjoyment of article 8 rights in the UK.

Decision

34. The First-tier Tribunal made errors of law on article 8. I remake that decision and dismiss the appeal.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

19 February 2018