Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05358/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 10 October 2019	**On 26 November 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

JIGNESH MADHUBHAI PARMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal instructed by Connaught Law
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India who is appealing against the decision of First-tier Tribunal Judge Row who in a decision and reasons promulgated on 5 July 2019 following a hearing at Birmingham Priory Courts two days earlier on 3 July dismissed the appellant's appeal against the decision of the respondent refusing to grant him leave to remain outside the Rules under Article 8.

2. The appellant had come to the United Kingdom as a student in September 2007 but had left the United Kingdom at some time between 5 April 2010

and 6 April 2011 when he returned to India. He apparently subsequently returned again as a student but his last valid leave expired on 28 January 2015. He subsequently applied on more than one occasion for leave to remain but those applications were unsuccessful and he was appeal rights exhausted on 8 July 2016. He applied again on 4 August 2016 on the basis of ten years' lawful residence (which it is accepted he did not have) and that application was refused on 8 August 2018. There is no appeal against the refusal under the Rules and it is not now submitted that he had been here lawfully for ten years. His appeal is on the basis that he should have been allowed to remain outside the Rules under Article 8.

3. In the course of his determination, Judge Row considered the submissions which had been made. The appellant is married to an Indian national who has also made an application for leave to remain; she also is attempting to appeal decisions made against her although this Tribunal has not been given details of this. Both the appellant and his wife are Indian nationals and they have a daughter who was born in the UK and is now about 2 years old. The application which the appellant made relied very strongly on his daughter's position, because at paragraphs 6 and 10 of his witness statement (which is at page 2 of his bundle before the First-tier Tribunal) he refers to his daughter who was born on 5 September 2017 (she is now 2 years old but was 1 at the time of the application) and maintains that "she is a stateless child". Under "family and private life" at paragraph 10 of his witness statement, he states that "I can confirm that my daughter's application for stateless child (FLR(S)) has been submitted on 19 June 2019 to the Home Office and is under process". The application itself is contained within his bundle at paragraphs 39 to 41.

4. Other than with regard to the position of the child there is no basis upon which an Article 8 claim could arguably be allowed. It is not suggested that there would be very significant obstacles to either the appellant or his wife returning to India which is the country they both grew up in, where they know the language and all the customs, and no doubt still have family and connections, and nor is it suggested that any of the other requirements set out within paragraph 276ADE(1)(iii) to (vi) of the Immigration Rules are satisfied. Accordingly, the only basis on which an application under Article 8 could possibly succeed would be if the appellant could show that there are factors in this case so compelling that exceptionally the appellant (and presumably the rest of his family as well) ought to be given permission to remain outside the Rules under Article 8.

5. A decision maker would of course have to have regard to Section 117B of the Nationality, Immigration and Asylum Act 2002, added with effect from July 2014 by Section 19 of the Immigration Act 2014 which sets out the public interest considerations applicable in all cases where an Article 8 claim has been made. In particular, at subparagraph (1) it is stated that "the maintenance of effective immigration controls is in the public interest". In other words, the default position will be that there is a public interest in removing people who have no right under the Rules to remain in this country.

6. This is an obvious point but it needs to be emphasised in this case because one of the grounds surprisingly as set out at paragraph 5 of the grounds (which in fairness to Mr Iqbal I emphasise were not settled by him) states as follows:

> "… The proposition [set out in *OA and Others (human rights; new matter; s.120) Nigeria* [2019] UKUT 00065] is clear, if the applicant meets the requirements of the Rules then the respondent will not be able to rely on the importance of maintain [sic] immigration controls as a factor weighing in favour of the respondent in the proportionality balance. This does not mean that failure to meet the requirements of the Rules, which is essentially why the appeal was argued outside the Rules, would automatically result in this factor being weighed against the applicant. There is no support for such a position, and such a position would in fact cause an irrational conclusion if every appeal outside the Rules would not succeed (or would face an initial uphill struggle) as there would be negative weight attributed against the applicant at the outset".

The position is, of course, that there is indeed an initial uphill struggle in cases where an applicant does not satisfy the requirements under the Rules because it is precisely in those cases that unless compelling reasons can be shown why exceptionally that applicant should be allowed to remain outside the Rules he or she would not be allowed to be. Section 117B(1) is clear on this.

7. The second ground relied upon is that the judge erred "in giving negative weight to the fact that the applicant's baby daughter required medical treatment". This was taken into account because one of the factors to which a decision maker will have to have regard under Section 117B(3) is that it is in the public interest that those who seek to enter or remain in the United Kingdom are financially independent, and in this case the appellant's daughter needs treatment for which payment has not been made, albeit that the appellant and his child, as people with no lawful right to remain, have no right to receive that treatment without payment.

8. Although in the grounds it is said at paragraph 9 that "whereas a reading of Section 117B(3) would entail that the IJ was correct to attribute negative weight to this aspect, whether doing so is humane and reasonable, the applicant would submit that it is not the case", it is not clear what legal basis there is for making this submission.

9. When opening his case, Mr Iqbal, on behalf of the appellant, reasonably stated as follows:

> "Being bound by my instructions, I do not abandon [these grounds] but I am not going to address you on them".

10. The reason why he sensibly chose not to address the Tribunal on these grounds is because clearly they are completely unarguable.

11. The basis upon which Mr Iqbal based his submissions was a very narrow one which is put slightly differently in ground 3 from the way in which it is now argued. At ground 3 of the written grounds it is suggested that Judge Row's conclusion at paragraph 15 is an irrational one. What the judge found was as follows:

> "I find that the appellant's daughter S is entitled to Indian citizenship. The birth could be registered with the Indian High Commission. She could obtain an Indian passport. I find that the appellant has not made any attempt to register her birth. He has failed to do so because he wishes S to remain unregistered so he can use this to his advantage".

In the grounds it is said that "this conclusion was clearly not open to the IJ to make, specially the harsh finding that the applicant has not made any attempt to register the birth and he only wishes for his daughter to remain unregistered is [sic] so he can use this to his advantage".

12. So far as this finding is concerned, the judge had regard to the evidence from the Indian High Commission which is merely to the effect that "the birth of the above child has not been registered as a citizen of India at the High Commission of India, London". (See page 64 of the appellant's bundle; this letter is dated 17 April 2019). The judge was entitled in my judgment to have regard to the obvious fact that this letter does not indicate that any application had even been made, and furthermore nowhere within the papers is there any indication of why the child should in fact be regarded either as being stateless or more importantly should be entitled to be registered as stateless. What the judge actually found at paragraph 15 was that the appellant's daughter "is entitled to Indian citizenship". He went on to find as follows:

> "The birth could be registered with the Indian High Commission. She could obtain an Indian passport".

13. He then goes on to make his finding "that the appellant has not made any attempt to register her birth. He has failed to do so because he wishes S to remain unregistered so he can use this to his advantage".

14. The judge then deals with the welfare of the child to which he is obliged to have regard (but not as a paramount issue) and at paragraph 17 under "the welfare of the child" finds as follows:

> "17. S is 1 year old. She is not a British citizen. I find that she is entitled to obtain Indian nationality and could obtain this. Her interests are to remain looked after by the appellant and his wife. [Her] welfare is served by her going where they go. She will no doubt in due course speak any languages that they speak".

15. The judge then goes on to make the obvious points that the appellant had left India when he was 27 years old, has an undergraduate maths qualification, and that his wife is also a graduate, and that both he and his wife could support themselves in India. Furthermore, his mother, father

and two brothers live in India and there would be "no difficulty integrating into that country. If the family returns to India S will be able to meet her grandparents and other relatives there. This would be to her advantage".

16. Following the decision of the Supreme Court in *KO* very recently, clearly from an Article 8 point of view the child would be expected to go with her parents to the country of their nationality.

17. Accordingly, the only possible basis upon which the application could be considered favourably is if somehow there is a legitimate reason why the appellant's daughter would be allowed to remain in this country. If indeed she would be unable to obtain Indian nationality, or of rather more relevance would not be allowed to return to India or to go to India with her parents, this would be a factor that the judge would have had to take into account. For this reason, it was necessary for the judge to consider whether or not on the balance of probabilities (and the judge set out correctly the burden and standard of proof at paragraph 5 of his decision) the child might be unable to return to India with her parents. As already noted, the judge found as a fact that the child was entitled to and could obtain Indian nationality.

18. The way in which Mr Iqbal makes his submission on ground 3 (the only submission he relies upon essentially) is that the decision or the finding as to whether or not S was in truth stateless was in his words "not one for this judge to take". His argument is that because this was a matter being considered by the respondent, it was not for the judge to second-guess what the decision would be.

19. The first weakness with this argument is that if this was indeed the appellant's position, he could have applied for an adjournment of the hearing pending consideration of this decision. However, he did not do so and Mr Iqbal very fairly accepted that this was a difficulty in his case, although he still maintained in his submissions that there was a jurisdictional point with regard to this decision.

20. More fundamental, however, is that this was a decision which the judge was effectively invited to make, because the appellant's case was put essentially on the basis that his daughter could not return to India with him. If the judge had failed to make a finding on this point, it would doubtless have been argued that the judge had failed to make a finding on a relevant matter.

21. During the course of argument, Mr Iqbal refined his submissions to stating that the judge could legitimately have simply made a finding that he was not satisfied on the balance of probabilities that the appellant had established that the child could not go back to India, without making a specific finding to this effect. In my judgment, this is merely a matter of semantics. What the judge's finding that S is entitled to obtain Indian nationality and could obtain this means, in the context of a decision made on the balance of probabilities, is precisely that the appellant has not satisfied him that she is not able to return with her family. The judge had

to make a finding on this point whatever the respondent might subsequently have found with regard to the application made on behalf of the child to be declared stateless and that was part and parcel of the decision.

22. I am told also now that in fact this application has in fact been refused by the respondent so even had I decided that there had been an error of law such that I had to re-make the decision there would still have been no basis upon which the decision could be made in favour of the appellant in this case. As it is, and subject to what I say below, there is no material error of law in Judge Row's decision; on the facts of this case there is simply no possible basis upon which an Article 8 claim could possibly have succeeded.

23. After the parties had made their submissions, I brought to the attention of the parties the 2017 decision made by the Vice President, Mr Ockelton in *R (on the application of MK) v SSHD* [2017] EWHC 1365 (Admin) in which the Vice President had considered the effect of the Indian rules on succession with relevance to cases where applications had been made for declarations of statelessness. Mr Ockelton recognised that in cases like *MK* (and also presumably cases like this) there was scope for abuse within the system in circumstances where parties deliberately did not make applications that were open to them to make for registration of a child as an Indian citizen. I considered it appropriate for the parties at least to consider what submissions should be made having regard to *MK* because even though that case was not cited to Judge Row, nonetheless it has binding effect on the First-tier Tribunal and if he ought to have had regard to matters within it, then these matters would need to be considered by this Tribunal.

24. Having considered the submissions which were made, I am satisfied that this authority does not assist (and in light of the subsequent refusal of the respondent to accept that the appellant's child is stateless on any rehearing, an Article 8 claim would be bound to fail as well). The reason why on the facts of this case *MK* would not assist is because that case turned upon the provision at paragraph 3 of Schedule 2 to the British Nationality Act 1981 which provides at Section 3(1)(c) that one of the requirements before a person can be registered under this paragraph of the Schedule to registration as stateless (and subsequently to be registered as a British citizen) is if that person has been within the United Kingdom for a period of five years prior to the application for registration. As the child was 1 year old at the time of the decision, and is now only 2, she clearly does not qualify.

25. Further, it is clear from the analysis within *MK* that unless there is an absence of documents, which does not appear to be the case here, the child would be entitled to be registered and it is in effect merely a rubber-stamping exercise. Where, as here, the child is born to Indian nationals who are married and who are outside India at the date of birth, provided an application is made registration will follow. Accordingly, not only was the judge's decision at paragraph 17 that S "is entitled to obtain Indian

nationality and could obtain this" a finding that the judge was entitled to make but on the evidence before him he could not realistically have come to any other conclusion.

26. It follows that the decision in *MK* does not assist the appellant in the circumstances of this case and the decision which I had provisionally reached, as set out above, that there is no material error of law in Judge Row's decision and that the decision that he made dismissing the appeal was the only decision on this evidence that any judge realistically could make must stand.

27. Accordingly, this appeal must be dismissed and I will so find.

Notice of Decision

There being no material error of law in the decision of the First-tier Tribunal, this appeal is dismissed and the decision of the First-tier Tribunal, dismissing the appellant's appeal against the respondent's refusal to grant him leave to remain under Article 8 is affirmed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 20 November 2019