Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03200/2019
HU/09284/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2020	**On 4 February 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DEVANG ARVINDBHAI PATEL
MRS SUCHITABEN DEVANG PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms R Petterson , Senior Home Office Presenting Officer
For the Respondents: Mr J Gajjear, Counsel instructed by Law Lane Solicitors

DECISION AND REASONS

1. This hearing was held remotely via video link. Neither party objected to the hearing being held by video link. Both parties participated by UK Court Skype. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Both parties confirmed at the end of the hearing that it had been conducted fairly and there were no IT problems during the hearing.

Respondent's immigration history and History of the appeal

2. The respondents are citizens of India, born on 8 July 1974 and 2 August 1998 respectively. The first respondent arrived in the United Kingdom on 27 January 2009 as a Tier 4 Student with leave to remain until 2013. He then obtained further leave to remain as a Tier 4 Student until 12 July 2015. The second respondent entered the UK on 21 November 2014 with leave to remain in line with the first respondent as his dependant until 12 July 2015. On 9 July 2015 prior to the expiry of her leave, the second respondent applied for leave to remain as a Tier 2 Migrant with the first respondent as her dependent. This application was refused on 29 December 2016. The decision was maintained following an application for Administrative Review on 15 February 2017.

3. The respondents' immigration history subsequently became more complex. On 27 February 2017 the first respondent made a human rights application which was subsequently varied to a Tier 2 Migrant application on 26 September 2017 with the second respondent as his dependent. The application was refused on 2 January 2018. The decision was maintained on Administrative Review on 8 February 2018 and again 19 March 2018. On 21 March 2018, two days later, the first respondent made an application on the basis of his human rights outside of the immigration rules. The second respondent was dependent on this application. On 18 September 2018 the first respondent lodged a human rights application on the basis of long residence which varied the previous application. On 3 January 2019 the first respondent varied his application again by applying for indefinite leave to remain on the basis of ten year's continuous lawful residence in the UK. The second respondent was informed that she was not able to be a dependent on this application because she had not completed 10 years lawful residence and she lodged her own human rights application on 25 October 2018. Her application was refused on 12 February 2019 and certified as clearly unfounded. She submitted a pre-action protocol letter. On 9 March 2019 the respondent agreed to reconsider the application. The first respondent's application for indefinite leave to remain was refused on 2 February 2019. The second respondent's application was refused with a right of appeal on 13 May 2019.

4. The first respondent appealed against the decision dated 2 February 2019 on 20 February 2019. The second respondent appealed against the decision dated 13 May 2019 on 23 May 2019.

5. The appeals were linked and both decisions were before First-tier Tribunal Judge Stedman, although he refers only to the decision dated 2 February 2019. The appeals were heard on 20 August 2019 and in a decision dated 12 September 2019, the judge allowed the respondents' appeals on human rights grounds.

6. On 7 January 2020 First-tier Tribunal Judge Fisher granted permission to appeal.

7. The error of law hearing came before me on 21 February 2020. I set aside the decision on the basis that there had been a material error of law for the reasons in the decision dated 23 April 2020 appended to this decision, primarily on the basis that the judge had failed to consider whether the respondents met paragraph 276ADE(1)(vi) of the immigration rules which fed into his findings on the proportionality of the decision.

8. The appeal was adjourned for re-making with the findings of fact made by First-tier Tribunal Judge Stedman preserved as there was no challenge to the factual findings made by the judge. There was then a delay in listing the re-making appeal due to the disruption caused by the pandemic.

Decision under appeal

9. The decisions under appeal are a decision dated 2 February 2019 to refuse the first respondent's human right's claim and a decision dated 13 May 2019 to refuse the second respondent's human rights claim.

Reasons for Refusal

10. The Secretary of State's position is that the respondents do not satisfy the requirements of paragraph 276B of the Immigration Rules because they have not completed ten years' continuous lawful residence in the United Kingdom, nor do the respondents satisfy 276ADE(1)(vi) because there are no very significant obstacles to their integration to India. This is because the respondents have spent most of their formative years in India, have retained knowledge of the life, language and culture from their country of birth. In particular, Mrs Patel did not arrive in the United Kingdom until 2014. The couple's parents remain in India. Mrs Patel has only lived in the United Kingdom for five years and the couple have been to India on holiday where they have a strong family network. Any qualifications and skills gained whilst living and working in the United Kingdom can be used to reintegrate into life and society in India.

11. It is considered that there are no exceptional circumstances pursuant to paragraph GEN.3.2 which would render the refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for the respondents or their child.

Grounds of Appeal

12. The grounds of appeal assert that it would be a breach of Article 8 ECHR to remove the respondents from the United Kingdom.

The Burden and Standard of Proof

13. It is for the respondents to show that there has been or there will be if the Secretary of State acts as she intends, an interference with their human rights. If interference is established, it is then for the Secretary of State to establish that the interference is justified. The standard of proof is the balance of probabilities.

14. The relevant date for the determination of the Article 8 ECHR issue is the date of the hearing. This is agreed by all parties.

Documents in Evidence

15. I have before me the previous documents produced at the appeal before First-tier Tribunal Judge Steadman, including the Secretary of State's bundles, the respondents' original 115-page bundle, as well as the skeleton argument prepared by Mr Gajjear. There were no new documents before me. The respondents did not seek to adduce any further evidence.

The Hearing

16. Mr Gajjear did not call the respondents to give evidence and the hearing proceeded by legal submissions only, the factual findings in the previous decision having been preserved in full.

17. Both representatives made legal submissions which are set out in the Record of Proceedings. Mr Gajjear also relied on his previous skeleton argument.

Discussion and Analysis

Preserved Findings

18. The preserved findings are as follows:

19. The respondents are Indian nationals. The first respondent entered the UK on 27 January 2009 and has lived in the UK for 12 years. The second respondent joined her husband in the UK as his dependent on 21 November 2014 at the age of 26 and has lived in the UK for 6 years. The respondents have a child who was born in the UK on 29 July 2017 and has now lived in the UK for 3 years and six months.

20. The first respondent has not accrued ten year's lawful continuous residence in the UK [16].

21. In the UK, the first respondent completed a course in Business Management Level 7 from the London College of Excellence. He then obtained a Certificate of Acceptance of Studies ("CAS") to study at the School of Computing and Business Studies. By August 2013 he had completed the ACCA Advanced Business Diploma in Accounting and Business and the ACCA professional level. By way of supplementary study, he then completed a Lower Second Class BSC (Hons) degree in Applied Accountancy from Oxford Brookes University. He last studied in 2013. [24]. (From the bundle the Degree was awarded on 21 September 2015). Since then, he has completed some independent web-based studies [16]. The first respondent has not worked since 2015. He is familiar with the UK tax system.

22. The second respondent obtained a First-class MA degree in Economics from Sardar Patel University in India. She was previously working in an accountancy firm in the UK [26]. (The evidence in the respondent's bundle suggests that she has worked in

the UK in a jeweller shop and at Seameadows Supported Living and her Tier 2 Certificate of Sponsorship ("CoS") describes her proposed job as web design).

23. The first respondent has devoted his personal life, energy and ambition into his studies in the UK. The judge states at [31]; "This was an investment choice he made regarding the direction of his life when in India, coming here at the age of 20" and refers to the first respondent spending many tens of thousands of pounds on his studies. He is ambitious, hard-working and goal driven [34].

24. The first respondent would be devastated at having to leave the UK [35].

25. The respondents have strong ties to the UK. They have many friends in the UK and are committed to integrating in the UK [37].

26. If returned to India, both respondents would cope. They would be able to find employment and would be able to support themselves in India [36].

Appendix FM and paragraphs 276ADE(1)(vi) and 276B of the immigration rules

27. I first give consideration to the immigration rules as these are accepted to be a statement by the Secretary of State of where the balance should be struck between the need to maintain immigration control and an individual's right to respect for family and private life. This is the approach endorsed by the Upper Tribunal in Bossade (s117A-D – interrelationship with the rules) [2015] UKUT 415 (IAC). If the respondents can satisfy the immigration rules, this is dispositive of the human rights appeal as found in TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109.

Appendix FM

28. It is agreed by both parties that the first and second respondents are not able to meet the requirements of the immigration rules in respect of family life with a partner under Appendix FM because neither partner is a British citizen, settled in the UK or somebody who has been granted refugee leave or humanitarian protection. I find that EX1 can only be considered in conjunction with the remainder of the immigration rules at Appendix FM. I find on this basis that the first and second respondents cannot meet the requirements of R-LTRP 1.1. It is not asserted that either the first or second respondents can meet the requirements of the parent rules R - LTRPT or that the child can meet the requirements of the child rules and I agree that this is the case. Mr Gajjear did not seek to persuade me that either of the respondents can meet the requirements of Appendix FM of the immigration rules.

Paragraph 276B – ten year's continuous lawful residence

29. It is agreed by both parties that the respondents cannot satisfy paragraph 276B of the immigration rules because neither respondent has accrued ten years continuous lawful residence in the UK. It appears to be accepted by the Secretary of State in a letter dated 8 February 2018 that the respondents held 3C leave until 19 March 2018

because they made an application on 27 February 2017, within 14 days of their previous in -time application for Tier 2 leave being determined on 15 February 2017 when the Administrative Review was finalised. The 27 February 2017 application was finally concluded on 19 March 2018. In contrast in the decision under appeal dated 2 February 2019, it is said by the Secretary of State that 3C came to an end on 15 February 2017. Even giving the respondents the benefit of the doubt in respect of 3C leave in 2017, I find that their 3C leave came to an end on 19 March 2018 when the Administrative Review in respect of the first respondents' Tier 2 Migrant application was concluded. At this time, the first respondent had remained in the UK lawfully for 9 years which was short of the ten year's continuous lawful residence required. Mr Gajjear did not make any submissions to the effect that the first respondent satisfied paragraph 276B of the immigration rules because he had completed ten year's lawful residence in the UK.

30. For the sake of completeness, I find that 276B (v) of the rules (in respect of the first respondent's breach of the immigration laws in the period after 19 March 2018) does not operate to allow his period of overstaying to be disregarded, because although the first respondent made a further application within 14 days of the negative Administrative Review decision on 19 March 2018 (on 21 March 2018), it is clear that the previous application leading to the Administrative Review decision was itself made out of time and that paragraph 39E does not apply in these circumstances because the previous application needs to be made in time for the current overstaying to be disregarded.

Paragraph 276ADE(1)(vi)

31. I turn to the issue of whether the respondents can satisfy 276ADE(1)(vi) of the immigration rules in respect of private life. Mr Gajjear's submission is that the respondents can satisfy this provision.

32. Paragraph 276ADE(1)(vi) of the immigration rules states;

> (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

33. The first and second respondents must establish that there would be very significant obstacles to their integration to India, were they were to be returned there. In considering these rules my task is to assess the obstacles to integration relied on, whether characterised as hardship or difficulty and to decide whether they are 'very significant' (see Parveen v SSHD [2018] EWCA Civ 932). Parveen is also authority for the principle that assertions in relation to obstacles must be supported by evidence.

34. I have regard to the following principles. Firstly, in SSHD v Kamara [2016] EWCA Civ 813 it is said;

> "The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life'

35. In AS v SSHD [2017] EWCA Civ 1284 it is said;

> "Consideration as to obstacles to integration requires consideration of all relevant factors, including generic ones such as intelligence, employability and general robustness of character."

36. Mr Gajjear submitted that I should take a holistic approach to the issue of 'very significant obstacles'. He asked me to give weight to the fact that the first respondent has been residing in the UK for 12 years; that he came to the UK aged 20 and had been educated in the UK completing a post-graduate diploma in Business and a BSC in Applied Accountancy from Oxford Brookes as well as completing his ACCA qualifications. Mr Gajjear pointed to the fact that the first respondent's accountancy experience related to the UK tax system and that this would present an obstacle to the first respondent obtaining employment in India. The time and money spent on his studies would go to waste. He also argued that the reason that the second respondent's Tier 2 application was refused was because the sponsor's sponsorship licence was revoked in the 18-month period during which the application was pending. Mr Gajjear pointed to the first respondent's uncontested evidence that the first respondents' family do not accept the marriage because the first and second respondents are from different castes and that he has diminished family ties in India.

37. Mr Gajjear also pointed to the effect of the Covid pandemic in India where there are large numbers of cases and obstacles to travel. These would affect the respondents' ability to reintegrate into Indian society.

38. When assessing whether there are insurmountable obstacles to integration, I note and take into account that the first and second respondents have both spent the majority of their lives in India. The first respondent lived in India until the age of 20 and the second respondent until the age of 26. Both respondents are familiar with Indian culture. They speak Gujerati as well as English and they have many friends of Indian origin in the UK as indicated in the letters of support in their appeal bundle. They also have links with the Temple.

39. The first respondent asserts that his family does not approve of his marriage and this evidence is unchallenged by the Secretary of State. The second respondent still has close relatives in India including her parents. She does not assert that she has been rejected by her own family. There is no suggestion in the evidence that the couple have been threatened or are at risk on return. They have not claimed protection or

lodged an Article 3 ECHR claim. Mr Gajjaer did not make any submissions in respect of the couple being harmed by their families if they return to India.

40. Even if the first respondent cannot rely on the support of his family in India and this may present an initial difficulty for the respondents, I find on balance that they can rely on the support of the maternal uncles who have been supporting them in the UK over a period of several years. This assistance could not continue in India for a short period whilst the respondents settle themselves. The respondents have been able to support themselves financially for a period of two and a half years since 2018 during which they have had no status or work. Moreover, the respondents have been living in an independent family unit in the UK and I am satisfied that the family would be able to live independently as a family unit in India as they have done in the UK away from the first respondent's family if necessary.

41. It is agreed as a preserved fact that the respondents would be able to cope and find employment in India. Both respondents were educated to university level in India prior to coming to the UK. The first respondent is undoubtedly an intelligent and educated individual with experience in accountancy and business. He has transferrable education skills. Mr Gajjaer asserts that because the qualifications gained in the UK relate to the UK tax system there will be an obstacle to the first respondent obtaining employment in India but has not produced any supporting independent documentary evidence of this. I find that the first respondent undertook these qualifications in the first place in the knowledge that he would be expected to return to India at the end of his studies and furthermore the first respondent has shown himself to be a quick learner by completing his ACCA qualifications very quickly as found by First-tier Tribunal Judge Stedman. I am satisfied that he would be able to get to grips with the tax systems in other jurisdictions. The second respondent is similarly educated and intelligent and has work experience in the UK in accountancy. Her skills and education are also transferrable. Both respondents have, as observed by First-tier Tribunal Judge Stedman, shown sufficient ability and industry to be able to establish themselves in the UK and are resilient and capable.

42. I find that the respondents can use their financial resources and assistance from family members to set up initially in India and then seek employment to support themselves. Both respondents speak their own language, are literate and familiar with their own culture. They also speak fluent English. They are both healthy. Their child has not yet started school in the UK and could enter into the Indian education system. They are manifestly enough of insiders to be able to participate in Indian society, be accepted on a day to day basis and build up a variety of human relationships. Mr Gajjear did not submit otherwise. The situation may well be harder because of the current Covid crisis but the respondents did not produce additional documentary evidence at the hearing in respect of the extent of these difficulties.

43. Having taken all of the relevant factors into account in a holistic way, I find that the respondents can return to India without significant hardship. I accept that the move will cause some upheaval and disruption, but this can be mitigated with the assistance of their family and their own ability to use their skills to find employment.

Given the individual circumstances of the first and second respondents, I find that there would not be very significant obstacles to their integration to India. I find that neither the first nor second respondent can satisfy paragraph 276 ADE(1) (vi) of the immigration rules.

Article 8 ECHR

44. The House of Lords in the case of Huang v SSHD [2007] UKHL 11 states;

> "The ultimate question for the Appellate Immigration Authority is whether the refusal of leave to enter or remain in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8".

45. Lord Bingham in Razgar [2004] UKHL27 identified a number of step-by-step questions to be asked in Article 8 cases where an applicant has established a private or family life (or both). These questions are:

a. Will the proposed removal, be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?

b. If so, will the interference have consequences of such gravity as potentially to engage the operation of Article 8?

c. If so, is such interference in accordance with the law?

d. If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

e. If so, is such interference proportionate to the legitimate public aim sought to be achieved?

Family/Private Life

46. It is not dispute that the first and second respondents are in a genuine and subsisting relationship. They were married in India and the second respondent came to the UK as a dependent of the first respondent in 2014. The couple have a child together who was born in the UK on 29 July 2017. The couple have been married for several years and continue to live in a family unit with their child. I find that all of the family members have family life with all of the other members of the family. On this basis I am satisfied that Article 8 (1) is engaged in respect of family life. However, the proposed removal would involve limited interference with the respondents' family life as the family would be leaving the UK as a family unit and would be able to maintain their family life with each other. (see AM (S117B) Malawi [2015] UKUT 0260 (IAC).

47. Bearing in mind the low threshold of engagement set out in AG (Eritrea) [2007] EWCA Civ 801, I find that the respondents have established private life in the UK in terms of living in the UK for 12 years and 6 years respectively. The first respondent has studied in the UK from 2009 until 2015. Both respondents have worked in the UK and the couple have many friends and some family in the UK. I find that Article 8 (1) is also engaged in respect of private life.

48. I find that the removal of the respondents from the UK would constitute an interference in their Article 8 right to respect for family and private life.

49. With respect to the next stages of the Razgar test, I find that the decision is in accordance with the law and pursues a legitimate aim namely the economic wellbeing of the country often expressed as effective immigration control.

Proportionality assessment

50. I go onto consider the issue of proportionality.

51. In R (on the application of Agyarko and others v Secretary of State for the Home Department (2017) UKSC 11 it was said; *"The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. 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."*

52. It is asserted by Mr Gajjear that the balance of proportionality should fall in favour of the respondents because of the strength of their private life in the UK including the age that the first respondent came to the UK, his investment in his studies and his length of residence and the respondents' potential future contribution to the economy. His additional submission is that the weight to be accorded to the public interest in removal should be reduced by what he refers to as an 'historic injustice,' namely the refusal to award the second respondent a period of 60 days leave after her Tier 2 application was refused because her sponsorship licence was revoked.

53. In considering Article 8 ECHR outside of the rules, I am required by section 117A of the Nationality, Immigration and Asylum Act 2002 as amended by section 19 of the of Immigration Act 2014, when considering the issue of proportionality, to have regard to those factors set out at section 117B. Section 117A (3) confirms that the Tribunal is required to carry out a balancing exercise setting the gravity of the interference against the requirements of the public aims sought to be achieved.

54. The starting point is that the Secretary of State is entitled to control the entry of foreign nationals into the territory and that the maintenance of effective immigration control is in the public interest.

55. I adopt a balance sheet approach to Article 8 ECHR in accordance with Hesham Ali [2016] UKSC 60. I must strike a fair balance between competing public and private

interests in accordance with the principles in Agyarko and others v Secretary of State for the Home Department (2017) UKSC 11.

56. When considering the issue of proportionality, I must first take into account the best interests of any affected child (which is a primary but not determinative consideration) in accordance with ZH (Tanzania) v SSHD [2011] UKSC 4 s55 of the Borders, Citizenship and Immigration Act 2009 with reference to the numerous relevant factors set out in the various authorities.

57. I make this assessment taking into account the principles in KO Nigeria and others v SSHD [2018] UKSC 53 that the consideration of a child's best interests must be made without taking into consideration the immigration status of the children's parents but taking into account that in general it is in the best interests of the children to remain in a family unit with their parents. The question is whether it is reasonable to expect the child to follow the parent with no right to remain in the UK to the country of origin.

58. I note and take into account that the child is not a 'qualifying child' because the child is not British and has not lived in the UK for 7 years.

59. I first consider the child's nationality. The child is not a British national. He does not have a statutory right of abode in the UK. I note and take into account that nationality is an important factor in this assessment. He is said by Mr Gajjear to be stateless. There is a letter in the original respondents' bundle dated 3 May 2019 confirming that the child's birth has been not been registered at the Indian High Commission. There was nothing to suggest that the situation has moved on and I find that at the current time the child has no nationality. There was no explanation however in the evidence as to why two married Indian nationals whose child was born in the UK would not be able to register him as an Indian national and insufficient evidence was produced of either any failed attempts to register the child or evidence of legal obstacles to registration.

60. The child was born in the UK and has spent his entire life in the UK. The respondents did not provide any documentary evidence of the child's enrolment at school or nursey. Thus, there would be no disruption in his education in requiring the child to leave the UK. He would be able to start the education system in India. The child is healthy and does not have any special needs. At the age of 3 the main focus of the child will be his immediate family. I find that the child will not have formed strong, independent, social and cultural ties to the UK and that there is no deep level of integration to the UK.

61. The child currently lives with his parents in Wembley. Neither parent currently works and they are said to be supported by family members in the UK.

62. It is an accepted principle that it is in the best interests of all children as far as possible to grow up knowing and having a meaningful relationship with both parents. I find for the reasons set out above that this family can relocate to India as a unit. They have been able to live independently in the UK and I find that they could

do so in India, with the help of those family members who have been supporting them in the UK if necessary. I have already found that both respondents are highly educated and have work experience. They are both Indian nationals and have spent a considerable part of their lives living in India. Both members of the couple are familiar with the language and culture. I find that they are loving and responsible parents who would support their child to adjust. The child has some extended family in the UK but also has extended family in India.

63. Having considered all of the relevant circumstances, I find that it is in the best interests of the child to relocate with his parents to India, the country of their nationality.

Other factors relating to proportionality

64. I turn to other factors which weigh in the proportionality balance including the immigration status of the first and second respondents.

Historical injustice

65. Mr Gajjear's submission is that there has been "historic injustice" because the second respondent was not afforded a further 60 days leave in order to regularise her status after her sponsor's licence was revoked. In his skeleton argument he relies on Patel v ECO (Mumbai) [2010] EWCA Civ 17 and AP (India) v SSHD [2015] EWCA Civ 89.

66. The second respondent was assigned with a CoS in order to work as a full-time web designer for Falcon Solutions Ltd on 8 July 2015 and the Tier 2 application was made the following day on 9 July 2015. The job was due to start on 16 June 2015. At the date of the application the CoS was valid. It is said by the Secretary of State that the sponsor' licence was revoked in May 2016 after an investigation into the sponsor was commenced in August 2015 (shortly after the Tier 2 application was submitted) and the licence was suspended. There was a subsequent delay while the sponsor was investigated, and a decision was not made on the second respondent's application until 29 December 2016, some 18 months after the application was submitted and over 7 months after the sponsor's licence was revoked.

67. The second respondent's application was refused because she no longer had a valid CoS at the date of the decision. On Administrative Review the second respondent argued that she should have been awarded a 60-day grace period of leave in order to make a fresh application. The Administrative Review failed. The second respondent did not pursue the challenge further by way of judicial review.

68. There was very little evidence before me as to when the second respondent became aware that her sponsor's licence had been revoked although in the submissions it is said that she did not become aware of this until she received the decision on her Tier 2 application in January 2017. In circumstances when the second respondent had been offered a well-paid job which was due to start as soon as she submitted her application and in which she had been issued with a CoS for that purpose, it seems somewhat surprising that the second respondent would not have chased up the

sponsor during the subsequent 18 month period. She does not address in her witness statement or oral evidence when she became aware that there was a problem with the sponsorship licence, if she made any attempts to contact either her sponsor or indeed the respondent in this 18-month period or whether she attempted to find another sponsor.

69. Nevertheless, notwithstanding this lack of evidence, there has been no challenge to the second respondent's credibility by the Secretary of State and from R (Pathan) v SSHD [2018] UKSC 41 it seems that the respondent did not have a policy of notifying Tier 2 Migrants that their sponsor's sponsorship licences had been revoked until the date of the decision itself. I am therefore satisfied on the balance of probability that the second respondent was not aware that the sponsorship licence was revoked until she received the negative decision on her application which was taken on 27 December 2016.

70. In Pathan it was found that the respondent's failure to notify a Tier 2 Migrant as soon as possible that the sponsorship licence had been withdrawn was procedurally unfair, because it did not afford an applicant a fair opportunity to organise their affairs by submitting a further application, for instance. The Supreme Court however fell short of finding that the Secretary of State should have granted these migrants a further period of 60 days. The court also commented that the fact that the applicant in that case (like the respondents before me) had submitted other failed applications did not undermine the existence of the procedural unfairness. It is not possible to look back to predict what would have happened had the second respondent been notified in good time that her application would not succeed. It is not possible to say with any certainty that she would have obtained another Tier 2 sponsor or succeeded on another application. She would certainly have had the opportunity to vary her outstanding application and continue her 3C leave. (Although the Secretary of State appears to have subsequently accepted that 3C leave was extended by virtue of the subsequent application in any event.)

71. I am satisfied in accordance with Patel (historic injustice; NIAA Pt 5A) India [2020] UKUT 351 (IAC), that this procedural error did amount to historical injustice rather than historic injustice. I am satisfied that this historical injustice should be taken into account and that it has a bearing on the proportionality exercise. The failure to notify the second respondent was an error on the part of the Secretary of State. I give weight to this failure. This historical injustice on the part of the Secretary of State lessons the public interest in removing the respondents.

Immigration status and precariousness

72. I give weight to the fact that none of the family members meet the requirements of the immigration rules in respect of private or family life in accordance with R (on the application of Agyarko) v SSHD [2017] UKSC 11.

73. I note that the family initially lived lawfully in the UK. The first respondent was in the UK as a student from 2009 and his initial leave was valid until 2015. The second

respondent arrived in the UK in 2014 and also held leave as his dependent This was the last positive leave granted to the respondents. The respondents were entitled to apply to extend their leave under the rules and were permitted to remain lawfully in the UK by virtue of 3C leave pending the outcome of their applications. The Secretary of State accepts that 3C leave continued until March 2018 after which time the respondents remained unlawfully in the UK.

74. Notwithstanding the rejection of the second respondent's Tier 2 application, the first respondent was able to submit a further human rights application and vary that to his own Tier 2 Migrant application. Had the application been successful, the respondents would have been granted a further period of leave.

75. The first respondent's Tier 2 application could not succeed because he had not completed his degree qualification at the institution which had awarded him the CAS, rather he had completed it as a supplemental study. This meant that he was not exempt from the Resident Labour Market Test. His job had not been advertised at the Jobcentre etc and his application did not meet the stringent requirements of the rules. Understandably, in these circumstances his application did not succeed and neither did the subsequent Administrative Review applications. Similarly, the subsequent human rights application made in March 2018, when the respondents had been living in the UK for 7 years and 4 years respectively was not strong and when the first respondent first applied in September 2018 on the basis of long residence his application could not have succeeded under the immigration rules. The second respondent did not make a further Tier 2 application and the evidence does not throw light on the reasons for this. I give weight to the respondents' failure to meet the immigration rules.

76. The respondents have remained in the UK as overstayers for over two years since March 2018 and have chosen to submit further applications rather than return to India and apply to return to the UK under the immigration rules. Since that time, they have been aware that they have no basis on which to remain in the UK. The respondents have not returned to India because they prefer to remain in the UK and want to live here. It is worth restating that Article 8 ECHR does not protect a preference to live in a particular country. I give weight to the fact that the respondents remained unlawfully in the UK after their applications had been rejected.

77. Mr Gajjear submits that the public interest in removal is diluted by the fact that the respondent can apply to enter the UK as a Highly Skilled Migrant and that in the context of a global pandemic this should tip the balance of proportionality in his favour. Mr Gajjear did not specify under what category the respondents could return and this assertion is not supported by documentary evidence in the form of the documentation to demonstrate that either respondent can now satisfy the immigration rules in any category. I do not accept Mr Gajjear's submission for this reason.

78. The first respondents entered the UK in a temporary category knowing that he would need to return to India at the end of his studies unless he could meet another category of the immigration rules. His wife was also aware of this when she entered the UK in 2014. At that time the couple did not have a child and her visa was due to expire in about a year. Both respondents were aware that their immigration leave was time limited at all times since their arrival in the UK and that if they wanted to remain in the UK, they would need to meet the requirements of the immigration rules. Their private life was established when their immigration status was precarious and continued to be developed at a time when their status was either precarious or unlawful. In accordance with section 117B (5) of the Immigration Act 2014, I give little weight to the respondent's private life in these circumstances.

79. There is however a sliding scale. I note in accordance with Rhuppiah v SSHD [2018] UKSC 58 that the little weight provisions include a small degree of flexibility and can be overridden by particularly strong features of private life.

Private life

80. The respondents have strong links to their local community including their Temple and have family members and friends in the UK. They have integrated themselves to the UK. The first respondent has resided here for 12 years, has invested in his courses and speaks fluent English. However, any individual who invests money in a degree course and worked hard at that course to obtain their goals would find themselves in a similar position to Mr Patel. I am not satisfied that this type of investment would differ materially from that of any other student who has spent time and money pursuing degree level or post-degree level qualifications in the United Kingdom. All students are similarly expected to leave the United Kingdom at the end of their studies. Mrs Patel has been here for only five years and has strong ties in India with her immediate family.

81. Mr and Mrs Patel would suffer limited hardship in returning to India. Many migrants desperately wish to remain in the UK and have integrated themselves to life in the UK and may feel disappointed at having to leave. The circumstances of these respondents do not differ significantly from other migrants in similar circumstances who will also have formed ties with the community over an extended period of residence. I do not find that the respondents' private life has particularly strong features in the Rhuppiah sense. Neither of the respondents are unwell or have health problems and there is no individual in the UK who is financially, emotionally or psychologically reliant on them. The first respondent last studied over five years ago and has not worked for a long time. I do not find that this private life has such strong features that it outweighs the precarious nature of the respondent's immigration status.

Other factors

82. The first respondent has been involved with assisting the victims of the Grenfell Tower by making and collecting donations. There is insufficient evidence to

persuade me that the appellant's contributions are of significant value to the community such that the balance of proportionality would tip in his favour. I have had regard to RU (Sri Lanka) v SSHD [2008] EWCA Civ 754 and UE (Nigeria) & Ors v SSHD [2010] EWCA Civ 975 in this respect.

83. I find that section 117B(6) does not apply because child is not British, nor has he been living continuously in the UK for 7 years. The child is not a qualifying child for the purposes of this statutory provision. This is a neutral factor.

84. I find that the respondents do speak English which is in the public interest in accordance with section 117B(2) but I also take into account that this factor on its own is not sufficient for the respondents to be granted leave to remain in the UK.

85. I consider section 117B(3). The respondents are financially independent because they are supported by the uncles of the first respondent. They claim that if they are allowed to remain in the UK, they will work hard contribute to the economy and pay tax and I have no doubt that this would be the case. I find that that is a positive factor in their favour and I give weight to it. I note however that the public interest in firm immigration control is not diluted by the appellant's self-sufficiency. Forman (ss 117 A – C considerations) [2015] UKUT 412 (IAC).

86. I take into account that the respondents have no criminal convictions. I find that this is a neutral factor.

87. I have not accepted that the respondents will face problems in India as a result of being estranged from the first respondent's family. I have found that they will live in an independent financial unit. There is insufficient evidence before me that the child would not be able to obtain an Indian nationality were the parents to apply for it.

88. I take into account that the first respondent has invested a considerable amount of money studying in the UK and that he feels rooted in the UK and has a strong desire to stay here. I also find that he has good friends and would in his wife's words be "devastated" at having to return to India. However, there was no medical evidence from a health care professional to indicate that he has mental health issues or that he would suffer a rapid and irreversible decline in his mental health if he were to return to India. I do not find that this factor on its own outweighs the Secretary of State's imperative to maintain immigration control in a fair and consistent way.

89. I also find that if the respondents' assertions are realistic in respect of obtaining visas to re-enter, it is open to them to return to India in order to apply for the appropriate work or entrepreneur visa and enter the UK lawfully with their child.

90. Having taken into consideration all the competing factors, including the legitimate aim of a fair and consistent immigration system as well as the economic well-being of the UK as well as all of the circumstances of the family, including the fact that none of the members of this family are British, the child is not a qualifying child, that it is in the best interests of the affected child to return to India with his parents, the precariousness of the appellants' immigration status in the UK, and taking into

account the positive factors including the financial independence of the family and the devastation and disappointment the family will experience, as well as the reduced weight to the public interest as a result of the historical injustice in not notifying the second respondent promptly that the sponsor's licence had been revoked, I find that the balance of proportionality falls in favour of the Secretary of State.

Notice of Decision

The appeals are dismissed on human rights grounds.

Signed *R J Owens* Date 2 February 2021

Upper Tribunal Judge Owens

ANNEX

IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03200/2019
HU/09284/2019

THE IMMIGRATION ACTS

Heard at Field House
On 21 February 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DEVANG ARVINDBHAI PATEL
MRS SUCHITABEN DEVANG PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondents: Mr J Gajjar, Counsel instructed by Law Lane Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Stedman sent on 12 September 2019 allowing the respondents' human rights appeals. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 7 January 2020.

Background

2. The first respondent arrived in the United Kingdom on 27 January 2009 as a Tier 4 Student with leave to remain until 2013. He then obtained further leave to remain as a Tier 4 Student until 12 July 2015. The second respondent was granted leave to remain in line with the first respondent as his dependant until 12 July 2015. On 9 July 2015 the second respondent applied for leave to remain as a Tier 2 Migrant. This application was refused on 29 December 2016 and an application for administrative review was refused on 15 February 2017. On 27 February 2017 the couple made a human rights application. The first respondent then varied the application on 26 September 2017 to a Tier 2 application. This was refused on 2 January 2018. The application for administrative review was refused on 19 March 2018. On 21 March 2018 the respondents lodged a human rights claim which was refused on 2 February 2019. This is the decision which was the subject of the appeal before First tier Tribunal Judge Stedman.

3. The Secretary of State's position was that the respondents do not satisfy the requirements of paragraph 276B of the Immigration Rules because they have not completed ten years' continuous lawful residence in the United Kingdom, nor do the respondents satisfy 276ADE(vi) because there are no very significant obstacles to their integration to India. This is because the respondents have spent most of their formative years in India, have retained knowledge of the life, language and culture from their country of birth. In particular, Mrs Patel did not arrive in the United Kingdom until 2014. The couple's parents remain in India. Mrs Patel has only lived in the United Kingdom for five years and the couple frequently go to India on holiday where they have a strong family network. Any qualifications and skills gained whilst living and working in the United Kingdom could be used to reintegrate into life and society in India. It was considered that there were no exceptional circumstances which would warrant a grant of leave outside the Immigration Rules.

The Decision of the First-tier Tribunal

4. The judge allowed the respondents' appeals on the basis that their removal from the United Kingdom would constitute a disproportionate interference in their private life. The judge referred to the fact that Mr Patel had lived in the United Kingdom for ten years. The judge took into account Mr Patel's hard work, energy, ambition, investment into his studies in the United Kingdom, his impressive academic history and the fact that he would be devastated to return to India.

Grounds of Appeal

5. The grounds assert that the First-tier Tribunal Judge has erred in law in his assessment of Article 8 ECHR. It is submitted that the judge misdirected himself in his use of the "compelling circumstances test" as outlined in **Bossade (s117A-D interrelationship with rules) (2015) UKUT 415** and **Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 00013 (IAC)**. The judge accepted in the decision that the respondents could return to India and that 'it was

hard to see that they would be unable to support themselves'. The decision that there would be a disproportionate interference in the couple's private life was irrational. The Secretary of State submits that economic hardship or a preference for living in the United Kingdom are not exceptional reasons sufficient to warrant a grant of leave outside of the Rules. Mr Patel came to the UK as a student and should not have had any reasonable expectation that his leave would lead to settlement. The judge has in fact adopted the 'near miss' principle. The fact that over the years an economic migrant to the United Kingdom has worked hard to achieve his goals and integrate into British culture does not create a disproportionate interference in his private life. It is open to the respondents to apply to return to the United Kingdom.

Permission to appeal

6. Permission to appeal was granted by First-tier Tribunal Judge Fisher on the basis that it is arguable that the judge failed to apply the appropriate test of 'compelling circumstances'.

The Hearing

7. Mr Tarlow submitted that whilst the judge clearly had sympathy with the respondents because of the time, money and effort they had spent in the United Kingdom, the judge had made findings which were not open to him. He misapplied the law by failing to apply the appropriate test of 'compelling circumstances'. The appellants did not meet the Immigration Rules in respect of family or private life and the judge concluded that they would be able to return to India.

8. Mr Gajjar relied on the Rule 24 reply. His argument is that it is clear from [18] to [22] of the decision that the judge has properly directed himself to the weight to be given to the Immigration Rules. The judge, as the finder of fact properly considered the evidence, identified the issues and adopted the correct approach in relation to Article 8 outside of the Rules. He submitted that the question of weight was a matter for the First-tier Tribunal and should be left undisturbed.

9. He submitted that the decision of the judge was not infected by irrationality. At [30] the judge draws attention to the particularly strong features of the respondent's private life and goes on to specifically label compelling features in relation to the respondents including the fact that Mr Patel had come to the UK at the age of 20, had completed his ACCA degree and ACCA qualification by 2013, had not simply invested financially but had made a personal and emotional investment into life in the United Kingdom. His life is described as being 'deeply interwoven' into the fabric of life in the United Kingdom. The judge took into account the emotional impact on Mr Patel of leaving the UK.

10. In summary, Mr Gajjar submitted that this was a properly reasoned and balanced decision. He also submitted that since the Secretary of State did not certify the application as bound to fail, the findings of the judge were within a rational range of responses. The judge has regard to section 117B of the Immigration Rules at [22] and correctly states that the lack of a burden on the tax payer and the ability to speak

English are positive but neutral factors. The judge has taken into account the public interest at [27] but points to the particularly strong features of private life at [30]. Mr Gajjar's primary submission was that the reasoning was not irrational nor perverse. The mere fact that another judge might come to a different view does not lead to a material error. The Secretary of State's application for permission to appeal is a mere disagreement with the judge's conclusions.

Decision on Error of Law

11. I am satisfied that the judge correctly firstly considered Mr and Mrs Patel's Article 8 claim, under paragraph 276 (i) (a) of the Immigration Rules. At [13] the judge acknowledged that Mr Patel had not accrued ten year's lawful continuous residence stating "The evidence showed quite clearly that there were significant gaps where the appellants had exhausted appeal rights and could not benefit from 3C leave", and at [16] "it is plain then that the appellants do not meet the criteria for ten years' continuous lawful residence under paragraph 276(i)(a) of the Rules and the Article 8 appeal therefore by reference to the Rules must fail."

12. The judge then at [17] says:

> "the failure to meet the requirement of the Rules as reflecting the respondent's expressed position on proportionality and the public interest, may well only be a starting point in a broad evaluative judgment of Article 8, but it nevertheless will weigh heavily in the balancing exercise I must undertake. I am bound to give the public interest element significant weight and I do so."

13. The judge then turns to consider Article 8 outside of the Rules having regard to those statutory factors set out at 117B of the Nationality, Immigration, Asylum and Act 2002.

14. The judge fails to have specific regard to 276ADE of the Immigration Rules and does not make specific findings on whether there would be would be 'very significant obstacles' to Mr and Mrs Patel's integration to India. Although the judge does not explicitly give consideration to this issue, at [36] the judge states:

> "By the same token I found I was not in entire agreement with Ms Gledhill who formulated the question for me thus: 'there is no reason why they cannot go back. They could go back and work.' Practically, logistically that statement may well be true. I have no doubt that if returned to India this family would cope. It is hard to see that they would remain unemployed or ultimately be unable to support themselves thereafter all the appellant had shown sufficient ability and industry to come to the UK and carve a life for himself quite successfully."

15. I am satisfied that the judge failed specifically to address the issue of whether there are any 'very significant obstacles' to the respondents' private life taking place in India and that the determination is flawed in this respect. This issue was dealt with by the Secretary of State in the reasons for refusal and it was incumbent on the judge when deciding whether the appellant met any of the Immigration Rules in respect of private life to consider not only the ten year route under 276(i)(a) but also paragraph 276ADE of the Immigration Rules. I am also satisfied that had the judge directed his mind to this issue, it is clear from [36] that the

judge would have found that there were no very significant obstacles to the respondents' integration in circumstances where the judge found that the family would be able to cope and would be able to support themselves in India.

16. The judge goes on to consider Article 8 outside of the ambit of the Immigration Rules. The judge states at [20]:

> "There is no threshold test for Article 8 to be engaged outside the Rules. In **R (on the application of Agyarko) v SSHD [2017] UKSC 11**, the Supreme Court explained that the ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved applying a proportionality test."

17. The judge then goes on to say;

> "The Immigration Rules and IDIs do not depart from that position and are compatible with Article 8 ECHR. Appendix FM is said to reflect how the balance will be struck under Article 8, so if an applicant fails to meet the Rules, it should only be in genuinely exceptional circumstances that there would be a breach of Article 8. The Rules set out the Secretary of State's policy and as such, must be given considerable weight."

18. The judge then goes on to set out the relevant provisions of the Article 8 public interest considerations at section 117B of the Nationality, Immigration and Asylum Act 2002, applicable in all cases and considers those factors. Having accepted the appellant's evidence, the judge found that Mr Patel had completed and passed his ACCA examinations and had last been able to study in the United Kingdom in 2013 and since then had continued to study online. Mrs Patel had an MA in economics in India and had previously worked in an accountancy firm in the United Kingdom. The judge found that Mr Patel had devoted himself, his personal life, his energy, ambition into his studies in the United Kingdom. The Judge comments that it was;

> "essentially an investment choice [Mr Patel] made regarding the direction of his life when in India and coming here at the age of 20 where he consecrated himself to his studies. His hard work proved fruitful: he obtained qualifications culminating in obtaining a degree and his ACCA examinations by 2013-just four years after his arrival here."

19. At [33] the judge said:

> "There can be no question that the appellant has spent very many tens of thousands of pounds of his own money either directly from his own previous earnings and savings or by way of support from his maternal uncle to pay for his university courses and for the ACCA. He has also needed to be financially independent over the past decade which he has demonstrated. The cost financially to him and his family overall would have been very significant."

20. The judge accepted Mrs Patel's evidence about the impact that removal would have on her husband. She stated it would 'devastate' him and the judge did not find this claim to be an exaggeration. The judge states at [35]:

> "In my view removal from the UK would have a significant impact on the appellant. His hard work and dedication as well as his financial investment, if brought to an end, would have a very personal and serious impact on him and, by virtue of that, on the second appellant and child."

21. The judge then went onto consider whether these factors amounted to compelling or exceptional circumstances. At [37] he stated:

> "The evaluation of a specific set of circumstances relating to an individual's private life will, even adopting the structured approach as far as possible, lead to results which may seem appear generous on a narrower interpretation of the legal framework. In this case I have been wholly impressed by the determination, ambition and historic success of this appellant and I have equally been impressed with this family's committed integration to British life and society which is abundantly clear from their evidence including photographs of them as a family and in the diverse range of letters of support".

21. And at [38]

> "The appellant has been in this country for a decade and that is not an insignificant amount of time. In the scheme of the appellant's life it is also significant, representing almost a half of his adult life. While in no way do I seek to adopt a 'near miss' principle by reference to the ten year route to settlement, I do have regard to the length of time he has been here and that included the past five years or so with the second appellant who has also left her previous life to establish herself here with her husband. I find that the interference with the appellant's right to private life will be substantial and given what he has already invested of himself, his time and resources, the impact on him personally (and ergo his family) amounts in my view to very compelling or exceptional circumstances."

22. In my view what the judge has failed to do is to consider firstly the requirements of paragraph 276ADE(vi) of the Rules which require that where an applicant has not resided in the United Kingdom unlawfully for twenty years he would need to demonstrate that there would be very significant obstacles to his integration to the country of return. I am satisfied from this decision the judge's conclusion on this issue was that there were no such obstacles given the level of Mr Patel and Mrs Patel's education, their ability and industry, the way they have carved out a life for themselves in the United Kingdom and his conclusions at [36] that if returned to India this family would cope.

23. Having found that Mr and Mrs Patel did not reach this test, he should have gone on to consider the test of 'compelling circumstances' in line with **Treebhawon and Others**. This notes the following at headnote (I): " Where the case of a foreign national who is not an offender does not satisfy the requirements of the Article 8 ECHR regime of the immigration rules, the test to be applied is that of 'compelling circumstances".

24. I am satisfied that the judge has misdirected himself in respect of the 'compelling circumstances test' given his findings of fact in respect of the appellants and that this constitutes an error of law which renders the decision of the First-tier Tribunal unsafe. The error is material and I set aside the decision. The facts as found by First-tier Judge Stedman are preserved.

Remaking

25. Mr Gajjar submitted that were I to find that there was a material error of law the appeal should be remitted back to the First-tier Tribunal. Mr Tarlow submitted that since all of the evidence was in the bundle and the facts were agreed that it would be possible to remake the decision in the Upper Tribunal. I am satisfied that it is appropriate to remake this decision in the Upper Tribunal because the facts are not in dispute and it is a matter of applying the correct legal tests.

Notice of Decision

26. The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

27. The decision of the First-tier Tribunal is set aside.

28. The appeal is adjourned for re-making in front of the Upper Tribunal.

29. No anonymity direction is made in this appeal.

Signed *R J Owens* Date 23 April 2020

Upper Tribunal Judge Owens