IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000905

First-tier Tribunal No: HU/55918/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 August 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MANBIR SINGH
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Marshall-Bain, instructed by Gull Law Chambers Ltd
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 16 August 2023

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside, in a decision promulgated on 28 June 2023, of the decision of First-tier Tribunal Judge Dhanji.

2. The appellant is a national of India born on 6 July 1990. He entered the UK on 18 October 2010 with a Tier 4 student visa, valid until 31 December 2013, and then remained without leave after the expiry of his visa. On 20 July 2018 he made an application for asylum which was withdrawn on 11 March 2018.

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3. On 15 July 2021 the appellant made a human rights claim on the basis of his private life in the UK. His claim was refused on 22 August 2022. The respondent, in refusing the application, noted that the appellant had not mentioned a partner, parent or dependent children in the UK and therefore did not consider the family life rules under Appendix FM. The respondent considered that there were no very significant obstacles to the appellant's integration in India and found that the requirements of paragraph 276ADE(1) of the immigration rules were not met. The respondent noted the appellant's claim to suffer from depression, migraines, shortness of breath and back and joint pain, but did not consider that his removal to India would breach Article 3 as his condition did not meet the necessary threshold and there was medical treatment available in India in any event. The respondent considered there to be no exceptional or compelling circumstances justifying a grant of leave outside the immigration rules on Article 8 grounds.

4. The appellant appealed against that decision and produced a bundle of documents for the hearing which contained evidence of him having a partner in the UK, Ms Navreet Kaur, with whom he had had a child, born on 9 May 2022.

Hearing before First-tier Tribunal

5. The appellant's appeal was heard on 21 December 2022 by First-tier Tribunal Judge Dhanji. The appellant and his partner gave oral evidence before the judge through an interpreter.

6. Judge Dhanji did not accept that the appellant's medical condition met the high threshold to make out an Article 3 claim. He considered that there were no very significant obstacles to the appellant's integration in India and he also concluded that the requirements of paragraph 276ADE(1) of the immigration rules were not met. The judge noted that the appellant's partner had leave to remain until 6 August 2024 as a post-study migrant, having graduated with a Masters in Law in the UK. He accepted the appellant's claim that neither his nor his partner's family was accepting of the fact of their having had a child out of wedlock but he did not accept that he would have difficulties in India from wider society in India on that basis, nor that he would have problems arising from a previous relationship. When considering proportionality, the judge found that the statutory presumption in section 117B(4) of the Nationality, Immigration and Asylum Act 2002, for little weight to be given to family life, did not apply because neither Ms Kaur nor their child was a qualifying partner or child. The judge found that it was in the child's best interests to remain as part of the family unit with both parents and noted that Ms Kaur could not be required to leave the UK as she had leave to remain here.

7. However, Judge Dhanji went on to allow the appeal on Article 8 grounds, on the basis of the difficulties that separation would cause for Ms Kaur if the appellant were to leave the UK and leave her to care for their child alone when she had only just taken steps to return to work. He concluded that the appellant's removal would disproportionately interfere with the family's right to family life.

8. The respondent sought permission to appeal to the Upper Tribunal against Judge Dhani's decision on three grounds. Firstly, that the judge had failed to give adequate consideration to the public interest and to the fact that the appellant's relationship with his partner and the birth of their child had taken place whilst he was in the UK illegally, and that his finding in relation to section 117B(4) was a misdirection in law. Secondly, that the judge had failed to consider the option of the appellant's partner and their child joining him in India in order to maintain their family life. Thirdly, that

the judge had failed to consider the option of the appellant returning to India to make a proper application for entry clearance to join his partner in the UK.

Error of Law Hearing on 31 May 2023

9. Following a grant of permission to the respondent to appeal to the Upper Tribunal, the matter came before me on 31 May 2023. It was accepted on behalf of the respondent, with regard to the third ground, that there was no category under which the appellant could apply for entry clearance to join his partner in the UK since she only had limited leave to remain here by the appellant's representative. It was accepted by the appellant's representative, with regard to the second ground, that there had been no consideration of the question of the family returning to India as a unit.

10. Accordingly, I advised the parties that I would set aside Judge Dhanji's decision on the grounds that there had been no consideration of the question of the family returning to India as a unit. I also found merit in the first ground in regard to the judge's findings at [33] in relation to section 117B(4) of the NIAA 2002 and considered the judge's proportionality assessment as a whole to be flawed as a result.

11. I enquired of Ms Marshall-Bain as to why I could not simply re-make the decision myself today. She objected to such a course on the basis that the appellant and his partner would want to give oral evidence but required a Punjabi interpreter. I expressed some concern about the need for an interpreter, considering that Ms Kaur had graduated with a Masters in Law in the UK and that the appellant had come to the UK as a student some 13 years previously. I was also concerned as to what the appellant and his partner would add to the evidence already before me, given that the appeal before Judge Dhanji took place only five months previously. Ms Marshall-Bain advised me, having taken instructions from the appellant and his partner, that they wished to give evidence about the difficulties they would face in India as a couple with a child born out of wedlock and how that would affect their ability to find employment and to settle in India.

12. Although I had reservations about the need for an adjournment before re-making the decision in the appeal I decided to agree to the request in the interests of justice. I reminded Ms Marshall-Bain that Judge Dhanji's unchallenged findings on the immigration rules were preserved and that the only issue to be determined was proportionality under Article 8, with particular regard to the option of the appellant and his partner maintaining their family life together with their child in India.

13. I therefore allowed the Secretary of State's appeal and set aside Judge Dhanji's decision to the extent stated.

Re-Making Hearing on 16 August 2023

14. The matter then came before me for a resumed hearing on 16 August 2023 to re-make the decision in the appeal. A further bundle of evidence had been produced for the appellant, including further statements from the appellant and his partner, a hospital discharge report for their son and background country evidence relating to women in India.

15. The appellant and his partner both gave oral evidence before me, adopting their statements. The appellant's evidence was that he would have nowhere to live in India with his partner and child. He and his partner would not be accepted in society

because they had a child out of wedlock and would be living in an illegitimate relationship. A father would kill his daughter in such circumstances in an honour killing. They would be destitute. He would not be able to get work or accommodation. They could not rent a room as they would need to show that they were married. When cross-examined by Mr Terrell the appellant said that in the UK his partner worked and he looked after the baby. She owned her own construction company and had employees. They lived on the money from the business. The appellant confirmed that he received money from friends prior to his relationship with his partner, for a number of years, and they still helped him out at times when he needed help. It would be too difficult to start a business again in India in one of the big cities as they would need money and contacts and it was very expensive. It would be difficult for his friends to help him there as they had their own families to look after. The appellant said that he and his partner would not be permitted to marry in India as they had a child out of wedlock. They could not have a religious wedding in the UK for the same reason, but they could have a registry office wedding here. Mr Terrell asked the appellant, with reference to his earlier evidence about honour killings, if he actually believed his partner’s father would try to kill her. He replied that it could happen, as it would be shameful for him if they were there. It could happen either with him or society in general. When asked if he would be able to find a job in India, given that he was educated, the appellant said that he would have to re-start if he went back there after living here for 13 years and it would not be easy.

16.The appellant’s partner’s evidence was that it would be very difficult to return to India and live there because she was not married. She could not rent a property as she would be asked for her marriage certificate. Society would not treat her as a normal person because she had a child out of wedlock. Her child would be treated as illegitimate. Society would gossip about her. She would not be able to get paid work as a junior lawyer and there would be no financial support. Her family would not help her. They would step back because society would be gossiping about them. If she went to her family they would not accept her. She was aware of fathers killing their daughters in honour killings. She and her partner could not get married in India because they had a child. She could not move a new area where no one knew she was not married because she would have to reveal her status when looking for a school for her child. She would not be entitled to any legal rights as an unmarried person. Her son could be killed in an honour killing because of being illegitimate. Mr Terrell cross-examined Ms Kaur and put it to her that there would be no real risk of an honour killing if she moved to a metropolitan city. She responded that she and her family would not be accepted and that they could find her anywhere. She confirmed that she feared her family and society in general, but then said that she was not scared of her family. It was just a matter of them not accepting her. She could not get married in India or in the UK. She could not have a religious marriage and had enquired into a civil marriage but needed her passport which was with the Home Office. She would definitely have a civil marriage once she got her passport. Mr Terrell asked Ms Kaur about her business and the value of the business, to which she replied that she had given away her business at the end of June 2023. She was using her savings to support herself, which she confirmed to be about £4000. She said that that was ‘peanuts’ in India and was not enough to support her. In response to my enquiry, Ms Kaur said that she was about to start a new job on 28 August as a business analyst in an IT company.

17.Both parties then made submissions.

18.Mr Terrell relied on the preserved findings of Judge Dhanji. He submitted that little weight should be given to the appellant’s relationship as he was an overstayer and his partner’s immigration status was precarious. There was nothing to show that there

were insurmountable obstacles to family life continuing in India. The evidence about the circumstances on return to India had evolved and was not credible. The appellant and sponsor could re-establish themselves in one of the large metropolitan cities in India. They could have a civil marriage in the UK and the appellant could return to India and the sponsor could join him there. There was nothing in the country evidence produced in the appeal bundle to suggest that there would be any particular risk to the family. The respondent’s decision was not disproportionate.

19.Ms Marshall-Bain disagreed with Mr Terrell’s submissions. She submitted that the appellant feared gossiping and threats of killing if she returned to her village, but could not live in a big city as an unmarried person as she would be unable to access services such as a school for her son. It was wrong to assume that the appellant’s cousins and friends would continue to support him in India. The sponsor’s savings of £4000 were not sufficient. The welfare of the child had to be considered. There would be a stigma attached to him and he would be treated less favourably. The couple’s relationship was not acceptable to either of their families. It was a disproportionate interference to expect them to keep themselves hidden because they had a child outside marriage. Ms Marshall-Bain referred to parts of the country evidence relating to the adverse treatment of women who had transgressed social norms, to increased violence towards women and to honour killings and submitted that there would not be sufficient protection for the sponsor. There were therefore significant obstacles to the family integrating in India. When weighed together with the sponsor’s lawful residence here and her new job, the public interest was outweighed and the respondent’s decision was disproportionate.

Discussion

20.The focus of the re-making of the decision in the appellant’s appeal is the viability of the appellant, the sponsor and their child returning to India as a family unit. It is the case that neither Ms Kaur nor her son is currently required to return to India, given that she has leave to remain for another year which she anticipates will lead to settlement. However that is an option open to her to avoid separation from the appellant. It was the failure of Judge Dhani to consider that option when allowing the appellant’s appeal that led to his decision being set aside and for the need for the decision to be re-made.

21.As Mr Terrell submitted, Judge Dhanji made various findings which were unchallenged by the appellant and which are therefore preserved. Those include the following: that the appellant’s health concerns were not such as to give rise to a breach of Article 3 on return to India; that both the appellant and the sponsor were educated and that the appellant had worked occasionally in the UK, albeit without permission to do so, as a gardener; that the families of the appellant and the sponsor were not accepting of the fact that they had had a child out of wedlock; that the appellant had failed to show that there would be very significant obstacles to his integration in India and that he would be able to build a meaningful private life for himself in India; and that there was no evidence to show that the appellant would face difficulties from wider society in India as someone who had a child out of wedlock.

22.In the light of those findings, Ms Marshall-Bain understandably focussed on the situation of the sponsor as an unmarried woman with a child out of wedlock, submitting that she and her child would be stigmatised and that she would face difficulties in her home village as well as in a larger city in terms of services for her child, work and accommodation. However I am in agreement with Mr Terrell that the

evidence in that regard is wholly lacking in credibility and that the claim in regard to the adverse situation facing the sponsor in India was a complete exaggeration.

23.It is relevant, in that regard, to consider the evidence as originally presented to Judge Dhanji. The concerns in the appellant's and sponsor's statements before Judge Dhanji as to the situation on return to India were expressed in terms of a lack of financial and emotional support owing to their families severing ties with them as a result of them having a child out of wedlock, making their family situation "very tricky" in India. The oral evidence before Judge Dhanji similarly went no further than a claim that the families of the appellant and sponsor were not accepting of their situation and, as mentioned above, Judge Dhanji found there to be no evidence to show that the appellant would face difficulties from wider society in India as someone who had a child out of wedlock. Therefore the highest the claim was put was that there would be a lack of family support in India owing to the severance of family ties.

24.The updated statements of the appellant and sponsor for the case before me, dated 9 August 2023, are in almost identical terms and make the same claims.

25.However, the oral evidence before me was a significant escalation from that, with both the appellant and sponsor mentioning honour killings of daughters by fathers and the killing of children born outside wedlock. The evidence of both was in vague and general terms and Mr Terrell sought, rather unsuccessfully, to elicit a more specific account from both, yet neither would provide a direct response to his question as to whether they believed the sponsor's father posed a risk to her life or whether there was a risk of an honour killing if they relocated to a large metropolitan city. The sponsor's evidence was particularly lacking in credibility. She initially referred to her family "stepping back" and telling them not to come near them as they feared gossip from other people, but she then claimed she could be killed as she had heard on the news of fathers killing daughters in similar circumstances. When pressed by Mr Terrell to give a specific answer as to whether she feared her family would kill her, the sponsor initially said yes, she feared her family and society, but then when asked why she had not mentioned that in her witness statement, she changed her mind and said that she was not talking about her family but about society and she said that she was not scared of her family. It was apparent that the appellant and sponsor were seeking to exaggerate the risks they faced from both the sponsor's father and society in general as an unmarried couple with a child born out of wedlock, so much so that they gave the appearance of attempting to adapt their evidence to fit in with the country evidence in the appeal bundle, as opposed to relying upon that evidence to support their own genuine experiences. Indeed, Mr Terrell repeatedly objected to leading questions from Ms Marshall-Bain and she had to be reminded to desist from such lines of questioning. In the circumstances I reject entirely the suggestion that the appellant and sponsor feared anything other than some gossip from people and a lack of support from their own families.

26.As to the question of how they would support themselves in India, the evidence of the appellant and sponsor was again vague, inconsistent and lacking in credibility. They gave different accounts of the sponsor's current employment circumstances, with the sponsor claiming that the business she started had since closed, whilst the appellant claimed it was still operating and that they received an income from the business. That clearly impacted upon the overall consideration of their financial circumstances and the funds to which they would have access in order to re-establish themselves in India. The appellant and sponsor claimed that they would be denied access to jobs, services and accommodation as an unmarried couple, but appeared simply to be speculating. No evidence has been produced before me to support the

claim that they could not find accommodation or jobs or enter their child into school without a marriage certificate. In any event they were unable to provide a proper response to the suggestion that they returned to India after marrying in the UK, a matter they claimed to be in the process of organising. Neither was able to provide any credible response to Mr Terrell's suggestion that if they moved to a large metropolitan city there would be no reason for anyone to know that their child was born out of wedlock or would even be concerned if they went so far as to calculate the date of the marriage in relation to the birth of their child. Although both the appellant and sponsor repeatedly claimed that they would be unable to find work in India or afford to live and support themselves there neither provided a credible response to the suggestion that as educated people with qualifications and previous job experience they would be able to find employment and support themselves. Indeed they repeatedly avoided answering the question directly asked by Mr Terrell. As Mr Terrell submitted, there was no reason to believe that the relatives and friends who had supported the appellant for many years in the UK and continued to provide ad hoc support would be unable to assist them initially whilst they found work and to add to the savings they already had, until they were able to re-establish themselves. Both have previous work experience and qualifications which would assist them in finding employment. The sponsor is not settled in a job in the UK and, whilst she has graduated in law, she has not started upon a professional path on that basis. She has shown herself capable of starting up and running her own business in the UK and there is no reason why she and the appellant could not re-establish a business in India together, or alternatively find employment elsewhere.

27.In her submissions, Ms Marshall-Bain referred to the background country information to support the (belated) claim that the sponsor and her child would be at risk of being victims of honour crimes. She relied upon the Home Office Country Policy and Information Note (CPIN) "India: Women fearing gender-based violence" for November 2022. However it seems to me that she was rather selective in her references to the report, which focussed to a large extent on the situation for women in rural areas of India and from lower castes and minority religions, rather than educated, professional women living in large, metropolitan cities, a point which Mr Terrell made repeatedly in his questions and submissions. I refer in particular to paragraph 2.6.1 of the report in that regard. Whilst there are undoubtedly concerns in the report about the treatment of, and opportunities for, women in a patriarchal society such as India, there is nothing in the country evidence to which I was referred which supported the claims made about the extent of ill-treatment the sponsor and her child could expect to receive, and the difficulties the family would encounter, as an unmarried couple and/or a couple with a child born out of wedlock, if they were to live in one of the larger metropolitan cities.

28.In the circumstances the evidence does not demonstrate that there would be insurmountable obstacles to family life continuing in India. Judge Dhanji's finding as to no very significant obstacles to the appellant's integration in India stands and accordingly the appellant is unable to meet the requirements of the immigration rules on either family or private life grounds. Ms Marshall-Bain did not raise any other issues aside from those relevant to the question of insurmountable obstacles. No further submissions were made about the appellant's health issues, and I rely on Judge Dhanji's preserved findings in that respect in any event. There is no evidence of any compelling or exceptional circumstances which would render refusal of leave to remain a breach of Article 8 for the purposes of GEN.3.2 of Appendix FM. There is no evidence to suggest that the best interests of the appellant's and sponsor's child, who is currently just over one year old, would be best served by anything other than remaining with his parents as a family unit, whether in the UK or India. Whilst the

appellant's bundle included medical evidence relating to the child which post-dates the hearing before Judge Dhanji, that was simply a hospital discharge report confirming that the child was admitted to hospital on 30 January 2023 with a respiratory virus and was discharged three days later. There is no indication in the report of any long-term issues and no evidence of further problems and, indeed, Ms Marshall-Bain did not make any submissions in that regard. Her submissions in relation to the child focussed on the issue of the question of stigmatisation and ill-treatment owing to the status of the family, as unmarried with a child born out of wedlock. However as already discussed that was a claim which I have found was exaggerated and speculative and was not supported by independent evidence.

29.There is nothing in the public interest factors in section 117B of the NIAA 2002 which benefit the appellant. Although the sponsor is not a "qualifying partner" for the purposes of section 117B(4)(b), it is clear that the provisions in section 117B(4) intend that little weight ought to be given to the relationship between herself and the appellant and to any private life established by the appellant in the UK, given that he has been in the UK unlawfully for many years and that the relationship was formed at a time when he was an overstayer. It is also relevant to note that the sponsor herself has no guarantee that she would be able to remain in the UK after the expiry of her visa, albeit that she is on a route that could lead to settlement.

30. For all these reasons the appellant is unable to show that the respondent's decision is disproportionate. He has remained in the UK since 2013 as an overstayer, his relationship formed at a time when he had no basis of stay in the UK, and there is no reason why the sponsor and their child cannot return to India with him to continue their family life there. As mentioned above, there is no reason why they could not both find employment in one of the larger metropolitan cities and re-establish their lives there. The sponsor is not required to leave the UK as she has outstanding leave, but there is no reason why she could not do so, either at the same time as the appellant or shortly thereafter once he has found accommodation and employment and settled himself. There is nothing about the appellant's circumstances, or those of the sponsor or their child, which outweighs the public interest in maintaining a proper system of immigration control and there is no breach of Article 8 in the respondent's decision.

Notice of Decision

31.The decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 August 2023