Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI -2023-002134
First-tier Tribunal No: HU/52974/2021 (IA/12093/2021)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 July 2023	**On 1 August 2023**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NARENDRAKUMAR GORDHANBHAI PATEL
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Canter, Counsel, Richmond Chambers
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Even though it is the Respondent who has appealed to this Chamber, to avoid confusion we shall refer to the parties in the same way as they were referred to before the First-tier Tribunal, such that the Secretary of State for the Home Department is the 'Respondent'.

Background

2. The Appellant is a national of India. He arrived in the United Kingdom on 23 April 2007 with leave to enter as a visitor using a multi-visit visa valid until 16 October 2017. He has not had any leave since his visit visa expired. He claims to have made an application for leave to remain on 29 September 2012 but this is disputed by the Respondent.

3. He is treated as having applied for leave on 2 September 2015, having made representations in response to a section 120 notice served on him on 26 August 2015 after he was encountered by police. In that application, he requested that leave be granted on the basis of his private and family life pursuant to article 8 ECHR outside the immigration rules. His case has since developed through later submissions and in response to several requests for information. He says he is married and has a son in the UK who is also married with a child ('Dev'); he does not want to depart voluntarily as he has heart problems, diabetes and high blood pressure for which he is taking several medications. On 23 July 2018 Dev was registered as a British Citizen. On 25 April 2019 Dev's parents were granted leave to remain in the UK on the basis of family and private life until 25 October 2021. The Appellant says he is very close to Dev and plays a significant role in his life.

4. The Appellant's application was refused by the Respondent for reasons set out in a decision dated 6 May 2021. The Respondent said: the Appellant failed on grounds of suitability as he owed a debt of £1569.12 to London North West University Healthcare NHS Trust; his partner was an Indian national and had no leave to remain in the UK therefore he did not meet the eligibility requirements as a partner; EX.1.(b) did not apply for the same reasons of his partner's status and because there were no insurmountable obstacles to their family life continuing outside the UK; the requirements of paragraph 276ADE were not met given the Appellant's age and length of time in the UK and because there would be no very significant obstacles to his integration into India if he was required to leave the UK; whilst he had raised a fear of return to India, he had not made a claim for asylum, despite being given instructions on how to do so; there were no exceptional circumstances; the evidence did not suggest the relationships with his son and his family went beyond normal emotional ties and they could maintain relationships through modern means of communication; no claim under article 3 ECHR in medical terms had been made out.

5. The Appellant filed a late appeal on 22 June 2021, in respect of which an extension of time was granted. The Respondent undertook a review of the matter and maintained its position, having considered Dev's best interests and the factors in s.117B of the 2002 Act in further detail as part of that review.

6. The Appellant's appeal was allowed by First-tier Tribunal Judge Dempster ("the Judge") for reasons set out in a decision promulgated on 15 March 2023.

7. The Respondent appealed on the basis that the Judge had erred in making a material misdirection of law as regards the following factors:

    a. she failed to correctly undertake the proportionality balancing exercise when allowing the Appellant's appeal on Article 8 grounds;

    b. it was unclear why the proportionality balance was decided in the Appellant's favour, and had the balance sheet approach recommended in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016]

UKSC 60 and TZ (Pakistan) and PG (India) v SSHD [2018] EWCA civ 1109 been adopted, the balance of factors weighing against the Appellant would have far outweighed those in his favour;

c. the Judge placed weight on the Appellant's private life at [64], despite recognising at [59] that this factor should attach little weight in the proportionality balance, as stipulated at section 117B(4) of the 2002 Act;

d. the Judge made contradictory findings at [62] and [67] in relation to the continuation of Appellant's private and family life on return to India. At [62] she found the Appellant could maintain his relationships with his family and friends in the future, yet at [67] found that this, "...could not be reproduced by modern methods of communication"; this undermined the Judge's findings in relation to proportionality;

e. the Judge incorrectly treated the Appellant as having a parental relationship with his grandson, despite both parents being present in the child's life; this led to her attaching disproportionate weight to this factor in the balancing exercise; reliance placed on the findings of the Upper Tribunal in Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC)

f. the Judge incorrectly treated the best interests of the child as the paramount consideration, instead of a primary consideration contrary to the findings in [18] of AR (Pakistan) v SSHD [2010] EWCA Civ 816;

g. the Judge failed to attach little weight to the Appellant's family life when undertaking the proportionality balancing exercise, given it was established with both precarious and unlawful immigration status; reliance placed on the findings if the Upper Tribunal in Rajendran (s117B – family life) [2016] UKUT 00138 (IAC).

8. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Sills on 15 June 2023, reasoning:

> "1. The application is in time.
>
> 2. The final ground (1g) is arguable. It is arguable that the Judge failed to take into account the Appellant's immigration status when his family life developed with his son, daughter in law, and grandson, in considering the proportionality of the decision".

9. It is against that background that the appeal was listed for a hearing before us on 11 July 2023. No rule 24 response was filed.

The Hearing

10. It serves no purpose to recite the submissions in full here as they are a matter of record, but we set out the main points below.

11. Essentially, Ms Isherwood confirmed she was pursuing all grounds. She said issues had been raised in the review which unfortunately had not been taken forward in the grounds of appeal, which she did not draft. She appreciated she was 'bound' by the grounds in this respect and explained those grounds in detail. She accepted that no challenge had been made to the Judge's findings of there being family life between the Appellant and Dev. She made particular reference to the Judge having

found the Appellant not to be credible in several aspects of his account, which lack of credibility, she said, does not then seem to feature in the discussion of family life and proportionality exercise. She said no record could be found of the 2012 application.

12. Ms Isherwood's attention was drawn to [67] of the decision in saying:

> "The removal of the appellant would disrupt the family life he enjoys with his grandson which has endured for so long occasioned in part by the unexplained period of 6 years taken to process the appellant's application for leave to remain and l find, on the totality of the evidence, that such disruption would not be in the child's best interests."

13. Despite this, Ms Isherwood did not consider that the Judge had found in the Appellant's favour due to a delay in dealing with his application during which his relationship with Dev had developed (which finding had not been challenged in the grounds). Nor did she accept that such a finding was fundamental to the Judge's reasoning. Even if there were such a finding on delay, the Appellant's lack of leave and credibility were not properly taken into account, and nor was little weight attached to his family and private life established in precarious circumstances such that the proportionality exercise was not properly conducted. She said there was no clear explanation of why the relationship 'won' against the overall background. That background also included the Appellant not having taken forward an asylum claim and accruing a debt to the NHS; it is just not clear why the Judge finds the Appellant credible as regards his family when she finds him incredible on so many other things.

14. Mr Canter said that there was a finding on delay which had not been challenged; the Judge did set out clear findings which included factors which counted against the Appellant, and clearly referred to those in her overall assessment; stating this was done 'on the totality of the evidence'. He referred to paragraph 52 of R (on the application of Agyarko) v Secretary of State for the Home Department [2017] UKSC 11 which states:

> "It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse".

15. He said the decision would stand even without the finding as to delay; it was a matter for the Judge to weigh up the competing factors and she applied the correct structure and tests; the last paragraph of [67] is key and this followed analysis of the evidence concerning the Appellant's relationship with Dev.

16. At the end of the hearing, we reserved our decision.

Discussion and Findings

17. The focus in the grounds of appeal is on the proportionality exercise conducted by the Judge for the purposes of article 8, and the findings and weight she attached to factors concerning the Appellant's private and family life, with Dev in particular, that fed into that exercise. No challenge is made to any of the facts underlying

those findings, such as the Appellant's medical conditions, his living circumstances and the interaction he has with his family and friends in the UK, including with Dev.

18. At [2] – [5] of the decision, the Judge sets out the reasons for the Appellant's claim being refused, clearly referencing the Respondent's position concerning the Appellant's failure to meet the immigration rules, there being no article 3 medical claim made out and there not being anything beyond the realms of ordinary family ties concerning his family in the UK. At [17] she correctly identifies the issues in dispute and in [6] – [23] she correctly sets out the applicable legal framework, including specific reference in [9] to the questions in Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar [2004] UKHL 27 concerning the proportionality exercise to be conducted for article 8 ECHR. She reiterates, and goes into more detail, about this exercise in [52] – [54], including the application of part 5A of the Nationality Immigration and Asylum Act 2002.

19. At [24] she sets out the agreed facts which include mention of the Appellant and his wife being issued with removal notices after having been caught by police and before he made his claim, the subject of the appeal (which incident she covers in more detail in [31]). In [26] - [27] she details the Appellant's account of having a fear of moneylenders and dealings with the police in India. At [30] she discusses the circumstances around the application allegedly made in 2012. At [38] the debt to the NHS is acknowledged. At [43] she discusses the submissions by the Respondent's representative Mr Mustafa, which included those going to credibility. There is thus no question that the Judge was fully aware of those factors in the Appellant's immigration history and account which counted against him.

20. At [32], the Judge discusses the evidence concerning the Appellant's relationship with his family and his grandson Dev in particular, saying:

> "He was particularly close to Dev, his grandson, who slept at night in their bedroom. On most days, he was the one who would take Dev to school and collect him; his wife would do most of the cooking for the family. There was a letter from the headteacher of Dev's school dated 3 December 2021 which confirmed that the appellant would regularly bring and collect Dev from school".

Further evidence of that relationship is discussed in [41]. None of this evidence was challenged. We note that, whilst it is perhaps unusual for family life to be made out between grandparents and grandchildren where a child still lives with his/her biological parents, there is caselaw demonstrating that this is possible (for example, Marckx v. Belgium (A/31): 2 E.H.R.R. 330, at [45]).

21. In [44] the Judge says:

> "Concerning Article 8, I indicated that, on the evidence, the appellant had more than established that Article 8 was engaged; I regarded the primary issue to be one of proportionality"

to which no issue was taken by Mr Mustafa, his response being to again draw her attention to the proposed interference not being disproportionate in light of the Appellant's unlawful stay, the fact that he could maintain contact with his family and the factors in section 117B of the 2002 Act.

22. At [45], the submissions of the Appellant's representative (the same Mr Canter who is before us now) are detailed:

> "In considering whether the appellant's removal would result in unjustifiably harsh consequences, he urged me to consider the role played by the appellant in the life of his grandson which was, he submitted, a relationship of mutual dependency. He submitted the factual matrix of this case was such that removal would constitute a disproportionate interference with the appellant's right to family life"

Mr Canter having started by highlighting the length of time during which the Appellant had been away from India.

23. The Judge makes specific note at [46] that:

> "Neither advocate was able to explain the reasons for the delay between the application made in 2015 and the refusal decision in 2021".

24. Mr Mustafa for the Respondent was therefore aware at the hearing that this delay had been noted such that he could have taken the opportunity to raise argument about how it should or should not feature in the Judge's considerations when making her decision. However, we cannot see that it is mentioned in the description of his submissions at [43] and it is not said that this description is inaccurate.

25. At [47] the Judge discusses the Appellant's credibility and self-directs that:

> "I also remind myself that a person may be untruthful about one matter without necessarily being untruthful about another".

26. She goes on to discuss in detail at [48] why the Appellant's account of events in India is rejected. At [49] she then discusses whether the Appellant meets the immigration rules and finds he does not, having cited the correct test from Kamara v SSHD [2016] EWCA Civ 813 as to integration. None of the factors of the Appellant's health, absence from India and financial position were found to be significant obstacles to reintegration. Again, none of these findings have been challenged.

27. The Judge specifically notes the Appellant's failure to meet the rules in [50] when approaching the Razgar questions. Her findings at [51] concerning the existence of family life are confirmation of what she had indicated to be the case at the hearing, as detailed above. She says:

> "I find there to be clear evidence of mutual dependency between the appellant and his son and I accept the evidence, unchallenged by the respondent, that there exists a close bond between the appellant and Dev, the appellant having been a member of his family since the day he was born".

28. This is a key finding which, as she said, was not challenged at the time and has still not been challenged now. The Judge was therefore entitled to take this factor into account when conducting the proportionality exercise. As mentioned above, prior to undertaking that exercise, the Judge reminds herself again of the relevant legislative framework and caselaw concerning this exercise. At [55] – [63] she clearly sets out those factors which weigh against the Appellant, and at [64] – [65] she sets out those which apply in his favour. We find no error in the way the exercise was approached and conducted therefore.

29. The factors weighing against the Appellant were stated to be as follows:

> "55. I start with section 117B of the 2002 Act, namely that the maintenance of effective immigration controls is in the public interest.
>
> 56. The appellant has not met the requirements of the Immigration Rules (Heshem Ali (Iraq) v SSHD (2016) UKSC 60). This is a factor to which I must attach significant weight adverse to the appellant.
>
> 57. The appellant is unable to speak English (Section 117B(2)).
>
> 58. The appellant's evidence was that he was supported by his son and there is no evidence that he has availed himself of the benefits of the state but I treat this as a neutral factor (section 117B(3)).
>
> 59. I attach little weight to the private life the appellant has formed whilst he has been in the UK unlawfully (section 117B(4)).
>
> 60. The appellant spent the first 39 years of his life in India and there are no cultural barriers to his returning to that country;
>
> 61. The appellant would be returning with the support of his wife; additionally, there is no evidence that the appellant could not be provided with some financial support from the UK by his son; the appellant retains some family members in India;
>
> 62. There is no evidence that the appellant would be unable to keep in touch with his family and friends in the UK from India or that he would not be able to make applications to visit them in the future;
>
> 63. There is no evidence that the medical problems the appellant suffers from could not be treated in India"

30. It is clear that the Judge expressly says she did attach significant weight to the Appellant's failure to meet immigration rules, and that she did attach little weight to the Appellant's private life in the UK. Whilst more detail could have been inserted at this point about the length of the Appellant's unlawful stay and his immigration history, we consider this was unnecessary when it had been considered in detail earlier in the decision.

31. The factors weighing in the Appellant's favour were found to be:

> "64. Removal would disrupt the private life the appellant presently enjoys in the UK;
>
> 65. He would no longer be a close family member of the family unit in the UK; there has been no challenge to the evidence and I so find on balance that the appellant has been involved in the care of his grandson since he was born in 2011 and is a significant adult in his grandson's life who is now aged 12 years."

32. Had the matter been left there, we would have agreed that there was a lack of explanation as to how it was that the balance was tipped in the Appellant's favour. However, the Judge goes on to explain this in detail at [66]-[67]. We find her reasoning within those paragraphs to be that the Appellant succeeds because:

    a. there were significant periods between the Appellant making his claim in (at least) 2012 and the refusal decision in 2021 when there was no communication between the parties, leading the Judge to conclude:

    > "Had the appellant's application been dealt with in a more expeditious manner and refused, the appellant could have been removed from the UK at a time when his grandson was considerably younger".

b. because of this delay, the ties between the Appellant and his grandson Dev had developed such that:

> "The passage of time now is such that the appellant has become a person of some significance in his grandson's life".

c. being a British Citizen child, Dev's best interests fell to be assessed as a primary consideration pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. Whilst his best interests were to remain in the care of his parents in the family home with his sibling, they included

> "the fact that the appellant for the entirety of the child's life has been a significant care giver"

d. such that Dev needed the Appellant to remain with him in the UK.

33. As raised at the hearing, the Judge's key reasoning, and the point where she brings all of the threads together, is contained in [67] when she says (our emphasis in bold):

> "The removal of the appellant would disrupt the family life he enjoys with his grandson which has endured for so long occasioned in part by the unexplained period of 6 years taken to process the appellant's application for leave to remain and I find, **on the totality of the evidence**, that such disruption would not be in the child's best interests. The care and contact currently enjoyed by this child from his grandfather could not be reproduced by modern methods of communication. For these reasons, I find that the appellant's removal, and the disruption to his family life in the United Kingdom that would involve would result in unjustifiably harsh consequences and for the reasons stated above, I do find that there are **compelling reasons to offset the considerable public interest** in the removal of the appellant".

34. We detect no error in this reasoning. Whilst other Judges could reasonably have come to a different conclusion, the Judge was entitled to conclude as she did and saying that the wrong weight was attached to some factors is mere disagreement. Her conclusion was reached having expressly taken account of the Appellant's lack of credibility concerning events in India, the fact that he did not meet the requirements of the immigration rules and his private and family life having attracted little weight.

35. We do not find that Dev's best interests were treated as paramount or 'trumped' the other factors. The Judge refers to the correct law in the first sentence of [67] and sets out clearly that in these circumstances, the Appellant's relationship with Dev, in the context of it having developed due to inexplicable and significant delay, amounted to compelling circumstances which outweighed those other factors. In other words, the delay was integral to her decision; it was not just Dev's best interests that led to her conclusion.

36. We also do not agree that the Judge incorrectly treated the Appellant as having a parental relationship with his grandson. She describes the Appellant in as "a significant care giver" after acknowledging that it is in Dev's best interests to remain in the care of his parents in the family home. At no point it is suggested that the Appellant has a role equivalent to a parent or has taken the place of either of the parents. We therefore do not see how Ortega assists as the Judge's findings are not in contradiction with the guidance in that case.

37. We do not find the Judge's findings in [62] and [67] to be contradictory. Having found at [62] that modern methods of communication and visits could be used, the Judge goes on to say at [67] that this would not be appropriate as between the Appellant and Dev given the nature of their relationship.

38. In conclusion, we find none of the grounds are made out. The decision discloses no error(s) of law and as such, we dismiss the appeal.

Notice of Decision

39. There is no material error of law in the Judge's decision. The determination shall stand.

40. No anonymity direction is made.

Signed **L. Shepherd** Date 20 July 2023

Deputy Upper Tribunal Judge Shepherd