IAC-AH-LEM/CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00221/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 June 2015	**30 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

NARINDHER PAL SINGH MADAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greg Ó Ceallaigh, Counsel instructed by Samars Solicitors
For the Respondent: Ms A Everett, Specialist Appeals Team

DECISION AND REASONS

1. This is the rehearing of the appellant's appeal against the decision by the Secretary of State to refuse to grant him leave to remain as the spouse of a person present and settled here, by reference to paragraph 353 of HC 395 (as amended), and to make directions for his removal from the United Kingdom as an overstayer. The First-tier Tribunal did not make an anonymity direction, and I do not consider the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of India, who was born on 7 January 1979. He came to the United Kingdom as a visitor in 2004 and later varied his leave to remain as a dependant of his then wife, a Russian national. According to Home Office records, his leave to remain in this capacity expired on 5 May 2009, and he became an overstayer. A subsequent application for leave to remain on private life grounds made in January 2011 was refused with no right of appeal on 9 March 2011.

3. In October 2012 the appellant applied through his current solicitors for leave to remain on the basis of his relationship with Ms P. In a covering letter dated 28 September 2012, the solicitors set out the facts upon which the appellant relied.

4. After completing his A levels in India in 1997, he had left for Russia in 1999 on a work permit to work in his paternal uncle's large-scale business in Moscow. In or about January 2001 he met a young Russian woman who was very interested in Sikhism. They had got married, and he had subsequently entered the UK as her dependant spouse. Following his separation from his first wife in or about 2008, the appellant had established himself in the UK as a businessman. Before his spousal leave to remain expired on 30 May 2009, he made an application as a Highly Skilled Migrant under the points-based system. His application was unsuccessful as he was not allowed to apply for HSMP within the UK as he had initially entered the country as a dependant of his wife. He appealed against the refusal decision, but his appeal was unsuccessful. Thereafter he made an application for private life grounds outside the Rules, and this application was refused on 9 June 2009.

5. The appellant was the director of two businesses, namely Veer Jewellers Limited, which was established in 2009 and Glitters UK Limited, which was established in 2008. He had never been a burden on the state and had contributed his fair share to the British economy.

6. In about February 2012 he met Ms P at the Guru Naak Darbar Sikh temple in Southall. She was a young woman who belonged to the Sikh faith and ethnicity and who had been subjected to harassment and torture on that account in Afghanistan. She and her family decided to flee the country in order to avoid danger but were separated on their way to a safe country. She claimed asylum in the UK, and had been recognised as a refugee. Both Ms P and the appellant were devout Sikhs who attended the Sikh temple regularly and took part in sewo as well as community and charity work organised by the temple. They became friends and their personal circumstances brought them together and soon they fell in love. The couple were married on 1 May 2012 in a religious ceremony at the temple in Hounslow with the blessings of her siblings settled here and of friends and acquaintances of the appellant. Since their marriage they have lived together as husband and wife in the flat above their business premises.

7. As a recognised refugee in the UK, Ms P had the right to stay here. She had once been uprooted from Afghanistan, and it was unreasonable to expect her to uproot for the second time to go and live with her husband in India, a country which she had never visited. On the other hand, the appellant's family in India had disowned him

because they had strongly objected to him marrying a Russian on 3 November 2002, when they wanted him to marry a young lady from India. He had grown apart from his family and had not had any contact with them:

> "He is sad to learn they are even not happy with his second marriage as our client is a Sikh female who had been subjected to sexual abuse. Therefore, the couple will not receive any emotional, logistical or financial support from them in India and instead they will look down upon them."

8. The appellant was over the age of 18 and had continuously lived in the UK for more than eight and a half years, and he had very limited social and cultural ties with India. He had not had any family ties since 2001. He left India some twelve years ago, and had not been to India for the last four years. His last two journeys to India had been purely for religious purposes to visit the Golden Temple in Amritsar, Punjab.

The Refusal Decision

9. On 8 November 2013 the Secretary of State gave her reasons for refusing to grant the appellant leave to remain on the basis of his relationship with Ms P. From the information provided, he had only been living with Ms P since their Sikh marriage in May 2012. He provided a certificate of marriage from a Sikh ceremony, but provided no evidence that they had registered this at a civil registry office. So he did not fulfil the definition of a partner as defined in paragraph GEN.1.2 of Appendix FM, and so could not meet the requirements of Section R-LTRP. She had considered whether EX.1 applied to his application. But his application fell for refusal under the eligibility requirements of the Rules as set out earlier. These are mandatory requirements that apply to all applicants regardless of whether the EX.1 criteria were met. As he had failed to meet those eligibility requirements, he could not benefit from the criteria set out at EX.1.

10. It has also been considered whether the particular circumstances set out in his application constituted exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 ECHR, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Rules. It had been decided that they did not. Although he had provided evidence that his claimed partner had refugee status as an Afghan national, this would not prevent them from continuing their relationship in India.

Subsequent developments

11. By a letter dated 15 November 2013 Samars Solicitors invited the respondent to take enforcement action so as to trigger a right of appeal for their client. The appellant was served with an IS15A notice on 10 December 2013 in which it was asserted that he had had no valid leave since 5 May 2009, and therefore had overstayed since then contrary to Section 10 of the Immigration and Asylum Act 1999. But the appellant

was not served with an IS15B notice, and the position initially taken by the respondent was that he had no in country right of appeal.

12. In the grounds of appeal to the First-tier Tribunal settled by the appellant's solicitors on 19 December 2013, they referred to the appellant's arrest in the early hours of 10 December 2013. They said that both the appellant and his wife were at home and the sudden appearance of the officers made his pregnant wife who was cooking at the time very frightened and upset. She had had to seek medical attention because of the fear instilled in her as a result of the sudden appearance of the officers, and also the decision to remove the appellant. She was a rape victim and the incident on the 10th brought her difficult memories back in respect of which she had had to seek medical attention. She had been referred to a consultant. She suffered from diabetes, as well as being six months' pregnant. So she had to attend hospital for tests every week, and it was very important that she was accompanied by her husband and that he continued to stay with her to enable them to enjoy their family life together.

The Hearing Before, and the Decision of, the First-tier Tribunal

13. The appellant's appeal came before Judge Seelhoff sitting at Richmond Magistrates' Court on 4 October 2014. The appellant was represented by Mr Ó Ceallaigh of Counsel, and Mr Grennan, a Home Office Presenting Officer, appeared on behalf of the respondent.

14. In paragraphs 10 to 13 of his subsequent decision, Judge Seelhoff noted the extensive documentary evidence that had been collated by the appellant's solicitors. This included a birth certificate for the couple's first child, a son by the name of Parbah, who had been born on 3 April 2014; and a recent medical report from Laura O'Hanlon on the perinatal mental health team at East London NHS dated 19 September 2014 which talked about Ms P's problems with stress and depression.

15. The judge received oral evidence from, among others the appellant and his wife, and a summary of the evidence given is contained in paragraphs 14 to 23 of his decision. The appellant said that having to go to India would ruin his life and stop his business because his wife was not capable of running the business while their baby was young. He also suggested that they could not move to India because he had been away for fifteen to sixteen years and his parents were still angry at him for marrying a Russian the first time and an Afghan, rather than an Indian, this time. The appellant claimed that he could not live away from his family because no one would help him financially, and because it would be a brand new community for his wife. In cross-examination, the appellant insisted that his wife had had no contact with his family beyond a few telephone conversations. He confirmed that he still talked to his parents by phone and to his siblings from time to time.

16. The appellant's wife gave evidence with the assistance of an interpreter. She confirmed that she would be devastated if her husband went to India and said it would not be feasible for her to go and live there as she had not been there. She insisted her husband's family would not accept her if they were to move to India. In cross-examination she conceded that she spoke Punjabi but she said she was finding

it difficult to run the business while raising a small child and whilst her husband could not help.

17. The judge heard from the appellant's British sister-in-law Jagjit who claimed that on a recent visit to India she had bumped into the appellant's mother by chance at a festival at a gurdwara. Jagjit said she attempted to introduce herself to the appellant's mother to congratulate her on the birth of her grandson, but the appellant's family were very rude to her.

18. In his closing submissions on behalf of the respondent, Mr Grennan said it would be manifestly unfair to allow the appeal given the appellant's conduct since his arrival. He had been working here illegally from 2009, instead of returning to India. His wife had married him knowing he was here illegally. The business skills involved in running a shop and selling garments in the UK should be readily transferable to India given that the appellant's clients' base was predominantly Asian. In reply, Mr Ó Ceallaigh relied on his skeleton argument and said that the appeal should be allowed. He pointed out that the appellant came to the UK lawfully, started working lawfully, including setting up the business lawfully, but was then refused leave to remain at a later date. He drew the judge's attention to his wife's history as a refugee and as a rape victim, and said this could present problems for her with her in-laws, especially as no dowry had been paid and as there was an issue with her being of a different caste to her husband.

19. The judge's findings are set out at paragraphs 24 onwards. Whilst the overall narrative of the case was not contentious, he was concerned that the appellant and his family had not taken all reasonable steps open to them to provide accurate information about the business. The appellant told him that the stock of his business had no value then his business had no value if it was sold. He found this answer on this question was simply dishonest and was an example of an attempt to suggest that moving to India would be far harder than it truly would be. The appellant claimed that the business made a profit of £30,000 a year for the last financial year and that he was entitled to claim 70 per cent of that profit. That, the judge observed, would give an income of £21,000. This would be after the wages that his wife had drawn from the business. Looking at the pay slips for the appellant's wife as of 28 February 2014, she had claimed wages totalling nearly £5,000 for the financial year. That would give the couple an income of £26,000 for tax purposes, which was in excess of the £22,400 the appellant would need to show should he apply for entry clearance from India under Appendix FM. If the appellant was making an application for entry clearance, his income would be calculated as a combination of salary and dividend payments received in the last financial year which would on the face of it mean that he would be eligible for a partner visa under Appendix FM, provided he sat an A1 English test.

20. In respect of the evidence of the sister-in-law, he found it a remarkable coincidence that on a one-off visit to India she could happen to bump into the appellant's mother, and recognise her having never met her before. He also found it hard to accept that the appellant's parents would still be talking to him regularly if they had disowned him, or that they were as unwilling to help as he suggested they were: "Whilst the

evidence may be limited I did not find the account of the ongoing estrangement between the appellant and his family to be credible."

21. The judge found that if their account of their income was true then actually what they were faced with was a choice between being allowed to circumvent the Immigration Rules or the appellant returning to India for a short period of time to make an application for entry clearance which would be appropriate because he was in the UK illegally and had been for some time. An application for entry clearance ought to succeed in fairly short order given that the couple had now lived together for two years, as they were qualified to be recognised as unmarried partners for the purposes of Appendix FM. He confirmed for the avoidance of doubt that he accepted the relationship was a genuine one and it would be inappropriate for an Entry Clearance Officer to dispute that finding without significant additional evidence.

22. The judge continued:

> 42. I am conscious of the appellant's wife's traumatic history in Afghanistan and her evidence that she would find it incredibly distressing coping without the appellant. However it seems clear to me that the appellant's assets in terms of stock alone in the business is over £400,000 of which his share is 70 per cent. If the couple were to relocate to India having realised just £200,000 of the value of the stock they would be in a position to set up without support from any family members in any part of the country they chose to. The reality of the circumstances this family would be facing in India is very different from what they sought to portray at the hearing. They would not be forced to seek support from his family if his family have truly ostracised him and they would not be forced to live close to his family.
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> 43. The appellant's wife said she would find it difficult to adjust to a new country but she has clearly adjusted to the UK fairly quickly already albeit I note that this is with the support of her brothers and her sisters around her. The core of the case is the fact the appellant's wife chose to marry someone she knew was in the country illegally and chose to have a baby at a time when she knew her husband had no permission to be in the UK. In these circumstances she cannot have had any reasonable expectation that the appellant would be allowed to remain in the UK and [she] is to [a] certain extent the author of the misfortune she may encounter as a consequence of that decision.

Reasons for Finding an Error of Law

23. Following an error of law hearing on 25 February 2014, Deputy Upper Tribunal Judge I A Lewis ruled in the appellant's favour that the decision of Judge Seelhoff was vitiated by a material error of law such that it should be set aside and remade in the Upper Tribunal. I reproduce his error of law decision promulgated on 3 March 2015 below.

> **Consideration: Error of Law**
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> 8. The First-tier Tribunal Judge considered Article 8 from two perspectives. Firstly, on the premise that the Appellant could leave the UK to apply for entry clearance as a partner (decision at paragraphs 29-40 and 44). Secondly, in the alternative,

the Judge considered the possibility of the family relocating to India (paragraphs 42-43 and 44).

9. The Judge's conclusions in this regard are set out at paragraph 44:

"In all the circumstances of this case I find that it is entirely proportionate for the Appellant to be expected to return to India to make an application to come to the UK under Appendix FM as he does on the face of his own evidence and that of his family meet the income level required by the Immigration Rules. If he cannot meet the requirements of the Rules given the considerable value of his business I find that he would comfortably be able to fund the family relocating."

10. In respect of the Judge's analysis that the Appellant could leave the UK for a relatively limited period in order to make an application for entry clearance as a partner, complaint is made to the Upper Tribunal that the Judge erred in a number of respects including in particular by failing to have proper regard to the best interests of the couple's child, and failing to apply the principles and guidance in **Chikwamaba**.

11. There is however a more fundamental problem – not identified in the grounds in support of the application for permission to appeal or otherwise raised by Ms Mellon – but which upon discussion both representatives acknowledged and accepted. The Judge has plainly premised his considerations on the earnings of the Appellant from his business being such that he will satisfy the financial requirements of the Rules. However this is entirely to disregard that the requirements of the Rules in respect of income from employment or self-employment are that it the income of the UK-based partner that is relevant, not the income or potential earning capacity of the applicant.

12. It follows that the Judge's analysis and conclusion that there would only be a relatively limited interference in family life were the Appellant to leave the United Kingdom in order to pursue an application for entry clearance from abroad, is fundamentally and fatally flawed.

13. The focus in the case, therefore, moves to the issue of relocation of the family to India.

14. I am just persuaded that the First-tier Tribunal Judge has erred in this regard too.

15. Without at this stage deciding the matters – I do not see any obvious merit in the submissions based on the Appellant's partner's status as a refugee, or her not being a national of India – in this latter regard it would be necessary for the Appellant to show that Indian immigration law would prevent the entry of the spouse of an Indian national. However, it seems to me that there is substance in the submission to the following effect: the Appellant's partner's mental health might be adversely affected by relocation to an extent that would impact on her ability to care for her child, and therefore removal of the family would be contrary to the child's best interests. This submission is approximately articulated in the Skeleton Argument First-tier Tribunal – e.g. see paragraph 24(iii).

16. Whilst the First-tier Tribunal Judge identifies that he is "*conscious of the Appellants wife's traumatic history*" (paragraph 42), and also acknowledges that her adjustment in the UK was with the support of her siblings (paragraph 43), he is, in my judgment, unduly dismissive of any difficulties in adjusting to life in India at paragraph 43 by seemingly answering the point by reference to her knowledge

that she was marrying somebody present in the UK without leave and could therefore not have any reasonable expectation that the Appellant would be allowed to remain. This is not to engage with the issue of adjustment. Moreover the Judge's analysis does not involve a consideration of, or the making of any findings upon, the medical evidence that has been filed in support of the appeal. This evidence in part expresses concerns over "*the idea of change and fear of her life being disrupted*" (Appellant's bundle page 153, psychologist's letter, East London NHS, 26 February 2014).

17. In such circumstances I find that the First-tier Tribunal Judge materially erred, and that the decision of the First-tier Tribunal must be set aside.

18. For the avoidance of doubt, save in respect of the very narrow basis upon which the child's best interests might be impacted in the process of relocation, I did not find in the context of 'error of law' there to be any merit in the submission that the Judge had not had due regard to the child's best interests. Ms Mellon sought to amplify 'Ground 1' of the grounds in support of the application for permission to appeal by reference to **JO and others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC)**. It was submitted that the Judge should have made more enquiry in order to ensure that he was properly informed in respect of the position of the child. It is to be noted from the head note in **JO** that the question whether the duties imposed by section 55 of been duly performed "*will invariably be an intensely fact sensitive and contextual one*", and in practical terms may be confined to the details of any application or submission made by the appellant and the Respondent's stated position in any decision letter. The birth of the child hearing postdated the Respondent's decision and so, necessarily, the actual circumstances of the child did not feature in either the application or the decision. The supporting evidence in respect of the child before the First-tier Tribunal did not go much beyond evidence of the fact of his birth some few months prior to the hearing. It was not suggested before the First-tier Tribunal Judge, and Ms Mellon confirmed the position to me, that there was anything of concern or otherwise unusual in respect of the child that required particular consideration. I do not accept that in those circumstances the Judge's evaluation that "*as an infant his interests do not extend significantly beyond being allowed to remain with his parents*" was in any way in error, incomplete, or inadequate.

19. Nor is there anything of substance, in my judgment, in the criticism of the Judge's finding in respect of the Appellant's sister-in-law's evidence as to her chance meeting with the Appellant's family at a festival she attended in India: see decision at paragraphs 20 and 31. It was not necessary for the Judge to put to the witness any sense of incredulity, or unlikeliness, prior to evaluating the evidence as part of his reasoning in determining that he did not accept that the Appellant was estranged from his own family.

20. In respect of the criticism made in the grounds in support of the application for permission to appeal that the Judge erred in proceeding on the basis that the Appellant had conceded that he could not qualify under the Rules, when in fact his Counsel had made no such concession and had advanced an argument in respect of paragraph EX.1 of Appendix FM, I note the following. The submission in the Skeleton Argument is based on paragraph EX.1 as a 'freestanding' provision. It is not a freestanding provision. No other submission was advanced as to how the Appellant might meet any of the rules under Appendix FM, and his case under paragraph 276ADE was expressly conceded (Skeleton at

paragraph 7). In reality the Appellant was not advancing a complete submission in respect of the Rules. Necessarily it follows that any misunderstanding on the part of the Judge as to whether the point was being conceded or not was immaterial: the Appellant had no case under the Rules.

Future Conduct of the Appeal

21. There is no real issue between the parties in respect of the primary facts, and as such it is not necessary to reconvene a full fact-finding hearing before the First-tier Tribunal. It is appropriate that the decision in the appeal be remade before the Upper Tribunal. After brief discussion with the representatives I decided that the appeal should be adjourned, to provide the Appellant with a further opportunity to file any relevant evidence in respect of the issue of relocation to India.

22. I gave an oral direction at the hearing – which I repeat here – that any further evidence upon which the Appellant wishes to rely should be filed and serve within 28 days of the date of hearing (i.e. 28 days from 25 February 2015).

Notice of Decision

23. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

24. The decision in the appeal is to be remade before the Upper Tribunal confined to the issue of Article 8 in the context of the Appellant, his wife, and child, relocating as a family unit to India.

The Resumed Hearing

24. For the purposes of the remaking of the decision, Mr Ó Ceallaigh did not call further evidence from the appellant or his wife. I noted that the claim that his wife was from a different caste had not featured in the witness statements of the appellant or his wife that were placed before the First-tier Tribunal. Mr Ó Ceallaigh explained that this claim had been advanced in the course of oral evidence before the First-tier Tribunal. He confirmed that his instructions were that the appellant had not been in contact with his family.

25. Mr Ó Ceallaigh drew my attention to a short report from Dr Charles Musters, consultant psychiatrist, who responded to a request from the appellant's solicitors made on 9 March 2015. Dr Charles Musters is a member of the perinatal mental health team at Newham University NHS Trust. He had been unable to provide a comprehensive report, as he needed to charge a fee for such report as it fell outside his NHS responsibilities. As Ms P was self-funding, local policy prevented him from accepting any form of payment from her. This meant that he was restricted to writing the present brief report summarising her care in the perinatal mental health team since her referral in December 2013, and addressing the two questions which they had raised in their letter.

26. She was first referred to the perinatal team in December 2013 by a midwife, who noted a background of significant childhood trauma, and considerable long-going anxieties in relation to her husband's threatened deportation from the UK. She was initially assessed on 16 January 2014 and then had a series of appointments

throughout the remainder of her pregnancy and over in the next year. She received ten sessions of psychological therapy from 13 June to 19 September and was then seen again in the perinatal team on 14 October 2014, 5 November 2014 and again for a final appointment on 17 February 2015. Throughout this period she suffered from symptoms of depression and PTSD, which varied in intensity. She made good use of the services which were offered to her, particularly in regards to bonding with her unborn baby antenatally, and that she continued to exhibit marked symptoms of anxiety and hyper-vigilance at times when someone came and knocked on the door, and this was always closely linked to the strong fear that her husband may be deported.

27. In the opinion of the therapist, her previous traumas have been reactivated by these ongoing fears about her husband's immigration status, in a way that was highly disruptive to her life. She had had suicidal thoughts in the past and an ongoing concern in the perinatal team was that these might return if she faced further adverse life events, or the deportation of her husband. When she was seen for her final appointment in February 2015, a decision was taken to discharge her fully from mental health services. With her child nearly a year old she was no longer eligible for treatment in the perinatal mental health team, and her ongoing difficulties were not of a severity which would necessitate a need for the general adult community mental health team.

28. It was his view, and the view of the team as a whole, that Ms P was currently well, and was likely to remain so for as long as she was living in the UK and her social circumstances were stable. She had demonstrated objectively a tendency to become significantly depressed and anxious at times when the threats of deportation or relocation increased. For this reason he was extremely confident that if the family was broken up, or if the whole family relocated to India, there would be a significant deterioration in Ms P's mental health, accompanied by a risk of suicidal thoughts. When she was intensely distressed and anxious she was distracted and preoccupied by her own thoughts and so her capacity to provide appropriate and responsive care to her child was reduced.

29. Mr Ó Ceallaigh also drew my attention to the India 2013 Human Rights report, in particular to page 40. The law prohibits discrimination on the basis of race, gender, disability, language, place of birth, caste or social status. The government worked with varying degrees of success to enforce these provisions. On the topic of women and rape, observers considered rape an underreported crime. Law enforcement and legal avenues for rape victims were inadequate, overtaxed, and were unable to address the problem effectively. Doctors sometimes further abuse rape victims who reported the crimes by using the two fingered test to speculate on their sexual history. The Supreme Court ruled in May that this practice violated the rape victim's right to privacy and asked the government to provide better alternatives.

30. On 25 March 2015 Mr Robert Simpson, independent social worker, prepared a report on the appellant's family. Ms P was dependent on her husband, financially, practically and emotionally. As he was not permitted to work at the moment, this

was having an adverse impact on the couple's income. The appellant would be seen by his parents as a man who had not only married a woman from outside their faith, but a damaged woman. The risk to the appellant's wife should this information be discovered would be significant. Given that she managed to escape from Afghanistan, and had been given refuge in the United Kingdom, a safe haven, it would seem incredulous to ask her to consider moving to a country with such a well publicised record of the appalling treatment of women such as India. There was growing momentum to the view that women in India are protected by no-one. The appellant's wife would not be accepted culturally as his wife, based upon the past conduct of how they became in a union.

31. He observed that, during the interview, the child followed his father around the room with his eyes, and when closer physically, the child moved towards his father. The child took a brief nap, and when he woke, the child headed straight for his father. The child was fully reliant on his parents for all his needs, and his mother was currently reliant upon the appellant while she addressed her own health issues subsequent to her experiences in Afghanistan. Hence the removal of the child's father would invariably lead to trauma and he did not believe that removal of the appellant from the child's life would be in the child's best interests. The attachment of the child to his father was very visibly obvious. At his current age, there was a real risk that he would not be able to be cared for by his mother, if his father was not present. The appellant's support of his wife enabled her to care for the child. He felt that the appellant's wife was not yet well enough to care for the child alone. She had a number of mental and emotional health issues which were being treated, but would certainly require an assessment with the local authority's social services to enable that she was able to parent her child safely without the support of her husband.

32. Mr Ó Ceallaigh agreed that the report of Mr Simpson was primarily directed at the impact on the child of the appellant's removal to India, as opposed to the impact on the child of the family relocating as a family unit to India.

33. In his closing submissions, Mr Ó Ceallaigh referred me to his extensive skeleton argument in which he submitted that there were insurmountable obstacles to the appellant relocating to India with his spouse. These were, as listed in paragraph 34 of the skeleton argument, as follows:

    (i) Ms P was a national of Afghanistan;

    (ii) she suffered from PTSD and depression which was likely to worsen significantly if she had to leave the country, which might result in a risk of suicide and an increased inability to look after her child;

    (iii) she had refugee status in the United Kingdom and no right at all to live in India where she had never been;

    (iv) she was heavily reliant on family members in the United Kingdom due to her traumatic history and young child;

(v) the family's income came from a business which was in the United Kingdom and it could not simply be moved;

(vi) the appellant's wife was of a different caste and was a victim of rape and the couple would face discrimination (at best) in India, and would be ostracised by the appellant's family.

Discussion and Findings

34. The necessary starting point is the recognition that the primary findings of fact made by Judge Seelhoff have been preserved by Judge Lewis in his error of law ruling. In particular, Judge Lewis did not purport to set aside the judge's finding that the appellant had sufficient resources to re-establish himself in India without any financial support from his family there; and that the appellant was in contact with his family in India, who not ostracised him on account of his marriage to an Afghan national. The one error identified by Judge Lewis in the judge's assessment of the potential obstacles to the family's relocation was that the judge had not adequately engaged with the issue of the ability of the appellant's wife to adjust to a new life in India, in the light of the medical evidence.

35. I accept that the brief report from Dr Charles Musters has independent probative value. But on a holistic assessment of the evidence, I find that the appellant has not established to the lower standard of proof that relocating to India with his wife and child would expose his wife to a real risk of suicide or self-harm; or, that it would lead to a flagrant violation of her physical and moral integrity such as to breach her rights under Article 8 ECHR. As acknowledged in the psychiatrist's report, Ms P's condition is simply not serious enough to warrant continuing intervention by a mental health team. The report of Mr Simpson only serves to highlight a clear theme which runs through the medical evidence which is that the trigger of, and the main driver for, these symptoms of mental ill health has been the threat of her husband's removal to India, and her being left behind to cope on her own with the business and their baby. This would be a significant disruption of her settled life in the UK. I accept that relocating to India would also represent a significant disruption of P's life. But the the asserted obstacles to her adjustment to life in India, and her integration into the Sikh community in Punjab Province (which would be the couple's obvious destination, given their common Sikh heritage), are not credible or well-founded.

36. It is simply not credible that the appellant's family are displeased with the appellant's choice of bride, given that she is a fellow adherent to the Sikh faith. There is no objective evidence to support the proposition that because she is an Afghan national, as opposed to being an Indian national, this would count against her in circumstances where she shares the same faith and hence the same cultural and religious heritage of Sikhs in the Punjab Province of India.

37. I also attach no credence to the claim, introduced for the first time in oral evidence before the First-tier Tribunal, that the appellant's family in India reject Ms P because she is of a different caste. If there was any truth in this claim, it is reasonable to

expect that it would have been raised in the witness statements before the First-tier Tribunal. Judge Seelhoff found that the appellant was dishonest, and was exaggerating the difficulties which they would face on relocation to India. In line with his undisturbed findings, I find that the alleged ostracism of Ms P on the grounds of caste is a fabrication.

38. Judge Seelhoff accepted that P had had a traumatic history in Afghanistan, and that she had been a victim of rape there. While it is credible that she should have revealed her traumatic history to her husband, it is not credible that she has publicised her history to the world at large. Similarly, it is not credible that the appellant would have informed his family that his new wife had been a victim of rape. Indian law, no less than English law, acknowledges the right of privacy for rape victims, and it is very difficult to see how details of Ms P's traumatic history in Afghanistan would become known to the appellant's family in India, still less to wider society, unless and insofar as Ms P herself chose to forgo her right of privacy. There is no reason to suppose that she would do so, and there are not substantial grounds for believing that Ms P will be exposed to societal stigma and discrimination in India as a result of it being revealed to the world that she is a former victim of rape.

39. As canvassed in Mr Simpson's report, the appellant is essential to his wife's wellbeing and mental stability. Since there are no legal, linguistic, cultural or financial barriers to the family's relocation to India, there are not substantial grounds for believing that P's fragile mental state will lead to a very serious hardship in adjusting to life in India when she will have the continued presence and support of her husband. In conclusion, the appellant does not come within the scope of the exemption criteria contained in EX.1.

40. Turning to an Article 8 assessment outside the Rules, I accept that questions 1 and 2 of the **Razgar** test should be answered in the appellant's favour with regard to establishment of private life here. But the refusal decision does not engender serious interference with family life, as there are not insurmountable obstacles to the appellant's wife and child accompanying him to India.

41. Questions 3 and 4 of the **Razgar** test should be answered in favour of the respondent, and so the crucial question is whether the decision appealed against is a proportionate one. As the appellant cannot bring himself within EX.1, he has to identify compelling circumstances outside the Rules which justify the grant of Article 8 relief.

42. The best interests of an affected child are a primary consideration in the proportionality assessment. Given the child's age and nationality, his best interests plainly lie with him remaining with his mother and father, wherever they happen to be. The only factor potentially militating against the child going with his mother to India was the alleged adverse impact on her mental health, and thus her consequential ability to care for him. For the reasons given above, I find there is no substance in this proposition. Even when her mental health symptoms were more

acute, she was apparently able to provide adequate care for her child, with the support of her husband. Now that her condition has stabilised, there are not substantial grounds for believing that the quality of care that she would give to her child would in any way be compromised on relocation to India.

43. I have taken into account the public interest considerations arising under Section 117B of the 2002 Act, and I acknowledge that it is in the appellant's favour that he speaks good English. It is also in the appellant's favour that he is financially independent, although it must also be recognised that his financial independence stems in part from him working illegally after 5 May 2009. Although his wife is now a qualifying partner, little weight can be attached to family life which is established whilst the applicant is here unlawfully. As found by Judge Seelhoff, the relationship began after the appellant became an overstayer, and Ms P knew when she married the appellant at a Sikh ceremony in May 2012 that he was present in the UK unlawfully, and so her ability to carry on family life with him in the UK, as opposed to elsewhere, was highly precarious.

44. In conclusion, I find that there are not sufficiently compelling circumstances such as to justify the appellant being granted Article 8 relief outside the Rules. I find that the decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the appellant, his wife and child, and extended family members here, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Conclusion

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

This appeal is dismissed under the Rules and under Article 8 ECHR.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson