Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25245/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2019	**On 3 December 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KARAMBIR SINGH
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Trevelyan, of Counsel, instructed by D & A Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Cruthers on 19 July 2019 against the determination of First-tier Tribunal Judge Young-Harry, promulgated on 17 April 2019 following a hearing at Birmingham on 11 March 2019.

2. The appellant is an Indian national born on 4 January 1989. He entered the UK as a student on 15 November 2010 with leave until 30 November 2011. An application for further leave made on 2 November 2011 was refused on 5 October 2011. The appellant then overstayed. He did nothing to regularise his stay until 11 April 2018 when he made a private and family life application. That was refused on 22 November 2018.

3. The appellant lodged an appeal which came before the First-tier Tribunal at Birmingham on 11 March 2019. The judge considered the appellant's relationship with a non-resident woman and her daughter, accepted that they had a private but not a family life together, and concluded that the appellant could be expected to return to India and make an entry clearance application to re-join them once her status was resolved. She also considered that a temporary separation would not adversely affect the child's best interests. Accordingly, she dismissed the appeal.

4. Permission to appeal was granted on the basis that the judge had arguably not adequately assessed the best interests of the child. It was, however, pointed out that the grant of permission was not an indicator of success and the decision then proceeded to list several factors against the appellant.

5. There has been no Rule 24 response from the Secretary of State.

The Hearing

6. Mr Trevelyan submitted that there were three flaws in the judge's determination. First, she failed to consider the status of the appellant's partner's daughter as a British national and the impact his removal would have upon her. Secondly, she failed to consider the test set out in s.117B(6) as non-biological parents could still have a parental role in a child's upbringing and it would not be reasonable for the child to have to leave the UK. Further, when considering the child's best interests the judge relied on the adverse immigration history of the appellant as a countervailing factor which was against the guidance in case law. Thirdly, the judge when considering the issue of an entry clearance application as a solution wrongly found that the social worker's report was silent on the matter of a temporary separation. Moreover, as the sponsor had no settled status at the time, the option of making an entry clearance application was not available to the appellant.

7. Ms Cunha asked that the decision of the First-tier Tribunal Judge be upheld and the appeal dismissed. She submitted that the judge had found that a temporary separation would not disrupt

family life and so the judge was right to say that the social worker had not considered the issue of a temporary separation. Although the child was not the appellant's step-daughter, her best interests were considered at paragraphs 18-20 of the determination. The child was not blamed for the appellant's overstaying; the judge was looking at all the factors and an adverse immigration history was one of them. The appellant's status here was always precarious. There were no exceptional circumstances and the judge followed the correct approach. The judge was required to make objective findings following Lal [2019] EWCA Civ 1925 and it was not necessary to look at how long it would take to get entry clearance.

8. Mr Trevelyan replied. He repeated his submission that the report of the social worker was not silent on the issue of temporary separation and indeed the judge had agreed with all the social worker's conclusions. This was not a case where the judge preferred some evidence to other evidence but where she had disregarded it. She had also disregarded s.117B(6). The test had not been considered at all. On the matter of entry clearance, this was not even an option available to the appellant as at the date of the hearing the sponsor was waiting for her application for leave to be resolved.

9. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

10. I have considered all the evidence and the submissions made.

11. The judge accepted that there was private life between the appellant and his partner of just under three years and her child. She accepted that they had genuine feelings for each other and that there was a bond between the appellant and the sponsor's child. She found, however, that these relationships formed part of the appellant's private and not family life, but no reasons are given for why no family life was found other than that the appellant did not meet the partner requirements of the Immigration Rules.

12. Despite this lack of reasoning, however, the judge found that the decision interfered with the appellant's article 8 rights (at 11) and proceeded to undertake a balancing exercise covering all the factors put forward (at 12-25). She took account of the guidance in Hesham Ali [2016] UKSC 60 (at 12) and considered matters for and against the appellant, balancing his interests against that of the public. She found that the fact that the

appellant could not meet the requirements of the rules because he had not lived with his sponsor for more than two years at the relevant time, and because the sponsor did not have settled status and was not a British citizen or a refugee. She also had regard to the social worker's report but considered that it was silent on the matter of a temporary separation. She considered that such a separation would not have the same impact on the child as the permanent or long-term separation envisaged by the social worker and that her best interests would be served by remaining in the UK with her mother. She considered that the appellant should not be able to circumvent the rules because he had chosen to stay illegally in the UK. These are all matters that count heavily against the appellant.

13. I can see no errors of law in the judge's assessment of proportionality and indeed there are no matters that she failed to consider. Although the grounds complain that the child's British nationality was not considered at all, that is misleading and erroneous as the judge did indeed consider that she was a qualifying child (at 15). In the context of all these findings and the full consideration of all matters put forward, it makes no material difference that the judge did not find there was family life between the parties. The same balancing exercise would have been undertaken even if she had and indeed no complaint has been raised about this.

14. The grounds complain that the child's citizenship was "played down" but it is unclear what is meant by this. The judge was aware of the child's nationality and indeed even commented that it was likely that the sponsor would obtain further leave on the basis that she had a qualifying child. It is maintained that the judge failed to consider the principles of ZH (Tanzania) [2011] UKSC 4 but no reliance was placed on that judgment by the appellant and it is not explained how that would have made any difference. That case related to the removal of the mother of a child and considered in what circumstances it was permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the UK would also have to leave. It is also notable that the child was British not just by the "accident" of birth but by descent from a British father and that the parents had separated, and the child lived with the mother who was her primary carer. In the present case there is no requirement that the child, who is not British by descent, would have to leave the UK as she would be able to stay on with her mother. Her primary carer was not facing removal. The cases can be distinguished on these facts. Moreover, of course, the Supreme Court emphasised that nationality was not a trump card.

15. It is also argued that no consideration was given to the fact that the sponsor did not have settled status and that the entry clearance option was not available to him. That again is incorrect. The judge was aware of this (at 15, 19 and 20) and considered that the separation would be temporary as the mother was likely to obtain further leave due to the status of her child.

16. It was argued that the judge erred in finding that the social worker's report did not address the issue of temporary separation. Whilst Mr Trevelyan drew my attention to one sentence on the penultimate page of the report which he claimed did address the issue, I am unable to find that the brief extract referred to adequately, if at all, addresses the matter. It was open to the judge to find that family life would not be disrupted by the appellant's temporary removal and in all the circumstances, that was a conclusion she was entitled to reach.

17. Finally, it is argued in the grounds that the judge did not consider the fact that the sponsor was only able to work because the appellant provided child care and that the appellant's removal would mean the family would be living in poverty. This was not a claim made to the judge, however, and the social worker's report is also silent on this matter. Whilst there is reference to the sponsor's work as a beauty therapist, it is also a fact that the child attends school which would allow the sponsor to continue her work even if she reduces her hours. It is of note that her evidence to the judge was that she had worked part time and cared for her child before she met the appellant. Alternatively, she could seek support from the very many friends referred to in the report who are said to be like family and with whom the appellant, sponsor and her daughter spent most of their free time (at p.8). This is in direct contradiction to the claim in the grounds that there are no friends and family to turn to.

18. The appellant has to take responsibility for the situation he finds himself in. He overstayed his visa in 2011 and remained here illegally showing blatant disregard for the laws of this country. He commenced a relationship at a time when he and his sponsor were well aware that he had no lawful status. The judge was entitled to find that he was responsible for his actions and that it was against the public interest to allow him to jump the queue and remain even when he does not meet the requirements of the rules. It cannot be, as the grounds suggest, that the appellant's inability to meet the requirements of a partner due to his sponsor's non-resident status amounts to an exceptional factor which warrants a grant of leave.

19. The judge properly considered all the factors put forward and took full account of s.55 and the child's best interests. Of course,

this is not a trump card and the judge's conclusions were open to her on the evidence.

20. The decision shows no material errors of law and it is upheld.

21. Fresh documentary evidence has been submitted to show that the appellant has since married the sponsor and that she has obtained further leave. These are documents that were not before the First-tier Tribunal and cannot be admitted at this stage to undermine her findings. The appellant may wish to make a fresh application to the respondent on the basis of the change in his circumstances.

Decision

22. The decision of the First-tier Tribunal Judge is upheld and the appeal is dismissed.

Anonymity

23. No request for an anonymity order was made.

Signed

Upper Tribunal Judge

Date: 28 November 2019