Upper Tribunal (Immigration and Asylum Chamber) **Appeal Numbers: HU/24765/2018 HU/24931/2018**

THE IMMIGRATION ACTS

Heard remotely at Field House On the 16 September 2021 **Decision & Reasons Promulgated On the 08 November 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MANJIT KAUR BISLA
PAVITAR SINGH BISLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Allison, of counsel, instructed by Tilson Solicitors
For the Respondent: Ms S Cunha, Senior Presenting Officer

DECISION AND REASONS

1. On 29 January 2020, Judge Rimington and I decided that the First-tier Tribunal had erred materially in law when it decided to dismiss the appellants' appeals on human rights grounds. We preserved the unchallenged findings under the Immigration Rules and we ordered that the decision on the appeal would be remade in the Upper Tribunal.

2. Progress in the appeal has subsequently been dogged by delay. That was largely attributable to the pandemic but, as I shall explain, there was also a need to adjourn a hearing in May this year because the respondent required an opportunity to consider a new point raised by

Mr Allison of counsel. Ultimately, however, the appeal returned before me on 16 September and what follows is my decision on the competing cases advanced on that date.

The Appellants' Family

3. The first appellant was born on 20 March 1965. She is married to a man named Jagtar Singh. They were married in December 1986. The second appellant is their son. He was born on 12 November 1993 and is 27 years old. They have another son named Harpreet Singh Bisla and a daughter named Lovejit Kaur Bisla Harpreet is 33 years old. Lovejit is 31 years old.

4. Jagtar Singh has limited leave to remain in the United Kingdom. Harpreet and Lovejit have Indefinite Leave to Remain, acquired on the basis of marriage to persons present and settled in the UK.

The Appellants' Immigration History

5. The appellants entered the United Kingdom with entry clearance as visitors in August 2006. Harpreet and Lovejit came with them. They all overstayed at the end of their visas. The appellants made applications to regularise their positions in 2014 and 2015. These applications were refused but the appellants remained in the UK.

6. In November 2018, the appellants made a third application for leave to remain on human rights grounds. They relied on the private and family lives they had developed during their twelve years' unlawful stay in the United Kingdom. They relied particularly on the first appellant's relationship with Jagtar Singh, on the second appellant's significant integration to the UK, and on their ongoing relationship with Harpreet and Lovejit, whom they continued to see regularly. Those applications were refused a year later. It was against those decisions that these appeals were brought.

Jagtar Singh's Immigration History

7. Unusually, but for reasons which will shortly become clear, it is necessary to set out a rather fulsome summary of Jagtar Singh's immigration history. He entered the United Kingdom clandestinely in October 1998 and claimed asylum. That claim was refused on 23 November 1998. An appeal against that refusal was dismissed and Mr Singh absconded from bail after exhausting his appeal rights.

8. Mr Singh made contact with the Home Office in 2008 and 2009, requesting updates on his case. He made further submissions in 2010 but these were refused with a right of appeal in 2013. His appeal was heard by Judge Traynor, sitting at Hatton Cross, on 16 June 2014.

9. Judge Traynor noted at [7] that there had been some confusion over Mr Singh's identity. There was a suggestion that he had returned to India and applied for entry clearance in 2007 but the judge was satisfied that the person in question was not the same Jagtar Singh: [7].

10. At [8] of his decision, Judge Traynor noted that Jagtar Singh had been sent a letter by the respondent on 11 November 2011. The letter stated as follows:

> Subject to final security checks our decision is to grant you leave in line with current immigration rules. Before we dispatch the details and confirmation of your leave, to ensure that we have the correct details for you, we require you to confirm certain details on the attached pro-forma and return to the address at the bottom of this form. Once we have received your completed pro-forma and are satisfied with the results of our security checks, we will issue the relevant paperwork.

11. Ms Smeaton of counsel, who represented Mr Singh at that hearing, demonstrated to the satisfaction of the judge that a full and prompt response to that letter had been sent. She submitted that Mr Singh had fallen thereafter to be granted leave under the 'Legacy programme' to which the letter of 11 November 2011 related. She submitted that the respondent had been acting contrary to Mr Singh's legitimate expectation at all points thereafter and that the decision under appeal before Judge Traynor was unlawful as a result: [10]. Judge Traynor accepted these submissions and found (as he was entitled to find at that stage) that the respondent's decision was not in accordance with the law. His reasons for so finding were summarised in the following paragraph:

> More importantly, there is correspondence provided in the appellant's bundle in the form of the letter from the Home Office addressed to the appellant on 11 November 2011 which states in the clearest and most unequivocal terms that the appellant's application had been positively considered in his favour pending finalisation of a few formalities. I agree with Ms Smeaton that the appellant, because of that letter, has a legitimate expectation that his claim under the legacy would have been considered favourably and in any event after proper consideration of his true circumstances.

12. Judge Traynor helpfully ended his decision with an explanation that the effect of it was that 'the appellant's application remains outstanding awaiting a lawful decision.' His decision was issued on 16 June 2014.

13. There was then something of a delay. The respondent sought further information from Mr Singh on several occasions during 2016 but no status was issued, despite the involvement of his Member of Parliament. His solicitors sought progress updates to no avail. It was only in July 2018 that Mr Singh received a fresh decision on the application he had made eight years earlier.

14. The decision made by the respondent in the summer of 2018 related to Mr Singh and the first appellant, who the respondent had been persuaded to join as a dependent. She noted that the second

appellant also sought to be joined to his father's application but she declined to do so because he had by that stage attained his majority. The respondent did not accept that Mr Singh and the first appellant met the Immigration Rules. There was no reference to the letter of 11 November 2011. The respondent instead conducted what might properly be described as a *de novo* assessment under the Legacy programme, concluding that Mr Singh's immigration history was such that he should not be afforded leave.

15. On 12 November 2018, Jagtar Singh was granted leave to remain for 30 months. That decision was wholly unrelated to any claim under the Legacy Programme. It was prompted, instead, by an application he had made on the basis of his 20 years' residence in the United Kingdom. He did not therefore pursue the question of his treatment under the Legacy Programme any further.

16. That question was initially little more than part of the backdrop to this appeal. In preparation for the hearing before me in May, however, it came to the fore. In the skeleton argument Mr Allison prepared for that hearing, he submitted that the frustration of Mr Singh's legitimate expectation had placed the appellants at a material disadvantage and that this was relevant to the Upper Tribunal's assessment of proportionality under Article 8 ECHR. Mr Avery – who represented the respondent at that stage – had had no time to consider and respond to the point. He needed to consider the paper and electronic records held in connection with Mr Singh and to shed light, if possible, on why he had not been granted leave to remain after the letter of November 2011.

17. In compliance with the Tribunal's directions, Mr Avery undertook a detailed review of Mr Singh's records. In concise written submissions dated 22 June 2021, Mr Avery stated that leave was not granted following the November 2011 letter because the respondent mistakenly believed that Mr Singh had left the UK. There was no issue arising from the security checks which took place but there was 'continuing confusion' over Mr Singh's identity, notwithstanding what had been found by Judge Traynor. Mr Avery's note continued as follows:

> After an extensive review of the papers in this case, the Secretary of State accepts that the appellant's husband was the intended recipient of the 2011 letter, that there were no issues arising from the security checks and that leave should have been granted to Mr Singh under the legacy policy at the time. On the facts of the case it seems likely that the leave granted would have been limited leave under the Discretionary Leave policy but it is accepted that by the time of the appellant's current application it is probable that Mr Singh would have obtained Indefinite Leave.

Submissions

18. Mr Allison began his submissions by confirming that I had received a small amount of additional evidence from his instructing solicitors. I

had received that evidence, which comprised two letters from the respondent to Mr Singh dated 20 June 2013 and 10 August 2015. Ms Cunha had also received that material. She was not placed in any difficulty by it and was content to proceed with the hearing.

19. Mr Allison relied on his skeleton argument. He submitted that the letter of June 2013 was the decision under challenge before Judge Traynor. The immigration history which was set out in that letter made no reference to the November 2011 letter and that was the foundation of Judge Traynor's concern. It was clear from the letter of August 2015 that the respondent continued to labour under the misapprehension as to Mr Singh's identity even after Judge Traynor had resolved that point in his favour. Any doubt in that regard had been settled by Mr Avery's note.

20. It was accepted that the appellants would not have succeeded under the Immigration Rules even if Jagtar Singh had been granted ILR. There was no evidence to show that they would have met the English Language or Financial Requirements of the Immigration Rules, for example. But this remained a case about Article 8 ECHR outside the Immigration Rules and the respondent's failure to take any account of her past failures. The recent decision in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC) was relevant and it would be necessary to consider how the historical injustice against Jagtar Singh bore on the weight to be attached to immigration control on the facts of this case. It was quite a significant historical injustice to which he had been subjected and no one could be clear what would have happened if he had been granted leave. It was to be noted that Jagtar Singh had worked but that his health had recently deteriorated to the point that he was unable to do so. Had he been granted ILR, he would have worked and sponsored his family. Had he been granted Discretionary Leave, the respondent would have been bound to consider the position of the family as a whole.

21. The historical injustice in this case was one factor to be considered. It reduced the weight to be afforded to immigration control. The remaining factors had been listed at [9] of the skeleton argument. It would be particularly difficult for the appellants to return to India on their own after so much time had passed. It was also relevant to note that the second appellant was not at fault, as a child, in the decision to remain in the UK without leave.

22. I asked Mr Allison about the ability of Jagtar Singh to return to India with the appellants. He submitted that there was a medical issue which suggested that this would not be possible but he accepted that there was no evidence of the same. It had been found by the FtT there was a alck of evidence that Mr Singh was unable to return to India but the judge had concluded that he would be unlikely to leave the UK in the event that his family was required to do so: [23] and [37].

23. Ms Cunha submitted that the appellants' only legitimate expectation was to have their applications considered properly. They were aware that Jagtar Singh's status was unresolved and that their immigration status was precarious. They had no legitimate expectation that they

would be granted any form of leave in line with Mr Singh, whether or not the respondent had treated him fairly.

24. It was to be recalled, Ms Cunha submitted, that what was required in a case such as the present was something exceptional. There was also a need to deal with cases consistently. There was a dinstinction between cases of historic injustice and historical injustice, as the President had explained in Patel. The injustice caused to the sponsor in this case had been addressed as he had been granted limited leave to remain. That remained his status and there was no reason to think that he could not return to India with the appellants. Nor was there any reason to think that the appellants would experience very significant obstacles to their reintegration to India. No reduction in the weight which was ordinarily to be afforded to the maintenance of immigration control was necessary or appropriate. There was no evidence of Jagtar Singh's claimed medical condition. The ECHR did not provide a family with the opportunity to choose the location in which it enjoyed family life and what mattered was that the family life was not ruptured. There was a clear public interest in preventing people such as the appellants remaining unlawfully in the United Kingdom.

25. In response, Mr Allison acknowledged that there was no evidence in relation to Jagtar Singh's medical condition; he had only raised the point in answer to a question from the Bench. The most significant issue in this case was the historical injustice. It was incorrect to submit that the problem had been remedied by the grant of limited leave to remain. That was particularly so in respect of the second appellant, who had not been able to make an application for leave before his eighteenth birthday. It was necessary to examine the consequences for the family as a whole with great care. As had been said in Ahsan v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531, it was not always possible to reconstruct the word as it would have been without the injustice in question. The reality was that the family as a whole had been disadvantaged by the improper treatment of Mr Singh and the appeals fell to be allowed.

Discussion

26. As will be apparent from my summary of the submissions made by Mr Allison and Ms Cunha, this is not a case in which the remaking of the decision extends to considering the Immigration Rules. The conclusions reached by the FtT in that respect were preserved in the decision issued by Judge Rimington and me in 2020. Those conclusions are necessarily the starting point for my consideration outside the Rules, however, and I should summarise them before turning to the balance sheet assessment of Article 8 ECHR.

27. The appellants have no claim under Appendix FM of the Immigration Rules. There are a number of reasons for that. Jagtar Singh is not settled and is not therefore able to act as a sponsor. There is no evidence that the first appellant is able to meet the English Language Requirements. There is no evidence to show that the family can meet the Financial Requirements. In the case of the second appellant, he is

not a child. There is no proper basis upon which it could be asserted that he meets the requirements for leave as an Adult Dependent Relative.

28. The FtT found that neither of the appellants were able to meet the requirements of paragraph 276ADE(1) of the Immigration Rules. The FtT undertook a detailed evaluation of the obstacles to integration which both appellants would experience in India and concluded that the 'very significant obstacles' threshold in paragraph 276ADE(1)(vi) was not met. There was no challenge to that finding in the grounds of appeal to the Upper Tribunal and it was expressly preserved in the decision issued by Judge Rimington and me.

29. It was not contended before the FtT or the Upper Tribunal that the second appellant met the requirements of paragraph 276ADE(1)(v) of the Immigration Rules, which provides that a person aged between 18-25 at the date of application who has spent more than half of their life in the UK falls (all things being equal) to be granted leave on private life grounds. The decision not to pursue that argument was plainly correct, since the second appellant was over 25 and had not spent more than half of his life in the UK at the date of the application.

30. The Immigration Rules not having been met, what the appellants are required to show is that their removal would be in breach of Article 8 ECHR. It is not in dispute that they have a private and family life in the UK so that Article 8 ECHR is engaged. They must establish, therefore, that their removal would bring about unjustifiably harsh consequences. Whilst Ms Cunha submitted that the appellants were required to show that theirs was an exceptional case, I bear carefully in mind what was said by Green LJ (with whom Simler LJ agreed) in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630, at [27]-[32]. In particular, I recall that the test for an assessment outside the Rules is whether a fair balance has been struck between the competing interests; that this is a proportionality test; and that references in the Rules or policy to a case being 'exceptional' must be read as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test.

31. In order to conduct that proportionality assessment, I set out the factors that weigh in favour of the appellants' private and family life and weigh them against the factors which weigh in favour of immigration control. In setting out the factors in favour of the appellants, I have been greatly assisted by the skeleton arguments prepared by Ms Smeaton and Mr Allison. I note in particular the helpful list of factors which are said by Mr Allison to militate in the appellants' favour, at [9] of his skeleton argument of 21 May 2021, and the consideration which follows owes much to that paragraph.

32. I accept that the appellants have established a significant family and private life in the United Kingdom. In respect of the first appellant, the most important ingredient in the equation is undoubtedly her family life with Jagtar Singh, her husband of 34 years. As noted by the judge in the FtT, they lived together in India between 1986 and 1998 and in the UK between 2006 and the present. I note also the ongoing

relationships she has with Harpreet and Lovejit and their respective families in the United Kingdom.

33. In respect of the second appellant, who is now 27 years old, I accept that he has an ongoing family life with his parents (with whom he continues to live) but he also has a significant connection to the UK by reason of his education and upbringing in this country since the age of 12. Judge Rimington and I explained in our first decision why it was wrong to suggest that the second appellant had grown up believing himself to be British but it is easy to lose sight of realities when considering such labels. The inescapable fact is that the second appellant has now been living in the UK for more than half of his life and he received all of his secondary education in this country. On any proper view, he has deep ties to the UK.

34. In the event that the appellants were removed, the second appellant would be removed from his private life in the UK. It is clear that the appellants' relationship with Harpreet and Lovejit would also come to an end, since they are settled in the UK with their respective spouses and their British children. I note also the likelihood of there being severance of the relationship between the appellants and Harpreet and Lovejit's children. They could remain in contact via telephone, Zoom etc (as many have during the pandemic) but that is no substitute for the close family relationship which exists at present, as considered in the Upper Tribunal's first decision.

35. As to the prospect of Jagtar Singh following the appellants to India, the finding of the FtT was that it would 'appear unlikely' that the first appellant would be able to persuade her husband to relocate to India and that the respondent's decision would consequently prevent her living with her husband. I take that 'real world' consequence of the respondent's decision into account. I also recall that what I must assess is the consequences for this family as a whole.

36. As Mr Allison notes in his skeleton, Jagtar Singh has been in the UK for very many years and has an established life in this country. He has also been granted limited leave to remain on account of his length of residence in the UK, although the submissions made by Ms Smeaton before the FtT risk overstating the significance of that decision. Mr Singh was not granted limited leave because the respondent accepted that to return him to India would be in breach of Article 8 ECHR; she granted him leave because he had accrued twenty years' residence in the UK. That is now the point at which the respondent accepts that she should not enforce an individual's removal from the United Kingdom. The number of years was previously fourteen and was found in paragraph 276B of the Immigration Rules. These are convenient yardsticks for junior officials considering the cases of those who have remained beneath the radar for many years; the formulation of Immigration Rules in these terms does not represent a blanket acceptance that the removal of an individual who has accrued such residence will necessarily amount to a breach of Article 8 ECHR.

37. As the FtT recognised, however, the reality is that Mr Singh is a man who chose to leave his wife and young family so that he could move to

the UK. He lived without them in this country for a number of years and he has lived with them in this country for rather longer. He is getting no younger. He owns a home in the UK and I am told (although I have been shown no evidence) that his health is deteriorating. It does seem likely that he would choose to remain in the UK with Harpeet and Lovejit rather than returning to India with his wife and youngest son.

38. For the reasons given in the Upper Tribunal's first decision, I accept Mr Allison's submission that there is no prospect of the appellants being granted entry clearance in reliance on their relationships with family members in the UK. What is under contemplation in this case, therefore, is permanent separation of the appellants from their family in the United Kingdom.

39. Whilst there are no very significant obstacles to the appellants' reintegration to India, I do not consider that it will be particularly easy for them to return to that country after an absence of 15 years. The FtT accepted that there is an ongoing dispute over family land and that there would be no property for them to return to. They will need to arrange accommodation and resettle there. As the FtT noted though, they receive financial support from their family in the UK at present and there is no reason why they cannot continue to do so upon return to India. Nor can it properly be said, as the FtT found for cogent reasons, that the second appellant has no cultural connection to India. For both appellants, there will be difficulties to reintegrating into India after so many years but, taking proper account of the support they have in the UK and the connections which both will have retained to their country of nationality, those difficulties will not be particularly significant.

40. The cumulative difficulties which will be experienced by the appellant and their family must be balanced against the interests of the state, which must establish that the decision to remove them represents a fair balance between the interests at stake. I turn to the public interest considerations set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 in this connection. I am obliged by s117A of that Act to have regard to each of the considerations listed in s117B.

41. The first of those considerations is that the maintenance of effective immigration controls is in the public interest. The weight which is to be attached to that consideration is by no means a fixity, however, and there are arguments on both sides in relation to the amount of weight which it should be given. I can deal comparatively briefly with the argument initially advanced by Ms Smeaton in the FtT because that argument received detailed scrutiny in the Upper Tribunal's first decision. For the reasons set out at [16]-[18] of that decision, I do not accept that the second appellant's 'near-miss' under paragraph 276ADE(1)(v) of the Immigration Rules is a matter which reduces the weight to be attached to immigration control in this case.

42. Mr Allison's major submission in this regard, however, is that Jagtar Singh was the victim of a historical injustice, as considered in Patel [2020] UKUT 351 (IAC). He submits that the errors which are now

accepted to have occurred in the consideration of Mr Singh's case had an effect on the appellants and that the weight which should be attached to immigration control in their cases should be reduced accordingly. In order to evaluate that submission, it is necessary to consider what *should* have happened in Mr Singh's case.

43. I need not repeat the detailed chronology which I have set out above. The important point for present purposes is that it is now accepted by the respondent that a clear and unequivocal representation devoid of relevant qualification was given to Mr Singh. He was assured that he would be granted leave, subject to the successful completion of security checks (and, seemingly, further enquiries as to his identity). It is accepted by Mr Avery that there was nothing adverse in the security checks and that any ongoing confusion about this identity was erroneous. The upshot, in sum, is that Mr Singh should have been granted leave within a reasonable period of the letter which was sent in November 2011.

44. Neither party was in a position to provide definitive submissions on what form of leave should have been granted by the Secretary of State to a beneficiary of the Legacy Programme at that time. The answer to that question is quite clear from the decision of King J in R (Geraldo) v SSHD [2013] EWHC 2703 (Admin); [2014] Imm AR 400. As set out in that judgment, the respondent's policy in respect of Legacy cases changed on 20 July 2011. Before that point, ILR was granted to a beneficiary. After that point, 3 years' Discretionary Leave to Remain ("DLR") was granted. There is no argument before me that any form of transitional arrangement should have applied or, as in Geraldo, that the respondent was somehow obliged to continue to apply the policy previously in force. In Mr Singh's case, therefore, there can be no doubt that the leave he would have received, had the respondent acted lawfully after the letter she wrote to him in November 2011, was 3 years' DLR.

45. It was not argued before me that either of the appellants should have been granted leave in line with Mr Singh under the Legacy Programme. I would have been surprised had such a submission been made, since the programme related to those who made an asylum claim prior to 5 March 2007: Geraldo refers, at [43]. There has never been any suggestion in this case that family members who were not dependent upon the initial asylum claim could benefit from a subsequent grant under the programme.

46. In the final analysis, therefore, Mr Allison's submission was that the appellants would have been in a better position if Mr Singh had been granted leave under the Legacy programme. He does not submit that they would themselves have been granted leave in line with Mr Singh but, instead, that they would have been in a preferable position because they had a sponsoring family member with some form of status.

47. For the reasons I have given above, I reach the clear view that Mr Singh should have been granted DLR for three years. That grant should have been made within a reasonable period of the November

2011 letter and I proceed on the basis that leave should properly have been granted on or before 11 February 2012; three months after the letter was sent. What was likely to have happened thereafter is that Mr Singh would have been granted further DLR in 2015 and ILR in 2018 (that being the respondent's policy at the time, and there being no contra-indications such as criminality to weigh against such a decision). Mr Avery accepted as much, as set out above.

48. All of the above results from a process of deduction, based on what is known about the respondent's policies as they relate to the position of Mr Singh at the material points in time. In order to make good his submission that the historical injustice experienced by Mr Singh should reduce the weight accorded to immigration control in the appellant's cases, however, Mr Allison must go somewhat further. The fact that a person has been disadvantaged by a malfunctioning system does not, in other words, necessarily establish that their family member has been disadvantaged. To consider the impact of Mr Singh's treatment on the weight which attaches to immigration control, it is necessary to move from the concrete to the realm of speculation. Mr Avery's submission in this regard was as follows:

> The Secretary of State has considered the submissions contained in the skeleton argument provided on behalf of the appellant. It is noted that it is not being argued that had Mr Singh been granted ILR the appellant would succeed under the rules but that her case would have fallen for consideration within that framework. The Secretary of State does not accept that the evidence shows that the rules would have been met, there is insufficient evidence to show that the appellant could meet the financial requirements not does she consider that the evidence establishes that there are insurmountable obstacles to family life with Mr Singh continuing outside the United Kingdom.

49. For the appellants, Mr Allison submits that the appellants could have made applications in reliance on the grant of status which Mr Singh should have received in 2012. Because I have concluded that Mr Singh could only have been granted DLR at that time, there is little merit in that submission insofar as it relates to the Immigration Rules. Mr Singh would not have been a settled sponsor at that time and there would have been no basis under the Immigration Rules on which he could have sponsored his wife. The same goes for his son, who (as Mr Allison acknowledged in his post hearing note to the Tribunal) had also attained his majority on 12 November 2011 – the day after Mr Singh was sent the letter about the likely grant of status.

50. Had the respondent resolved Mr Singh's status under the Legacy Programme properly, the appellants would have been able to make an application for leave to remain outside the Immigration Rules in reliance on Article 8 ECHR between 2012 and 2018. I cannot see any sensible basis upon which such an application might have been granted, however. The appellants had been present unlawfully in the UK for some years. The second appellant was no longer a child. Mr Singh had been granted limited leave under a concessionary policy.

There was no sensible basis upon which it could be contended that the family life they enjoyed at that time could not continue in India. Even if Mr Singh had been granted DLR in 2012, there is no realistic possibility that the appellants would have secured a grant of limited leave to remain in reliance on his sponsorship.

51. The proper focus of this necessarily speculative exercise, therefore, must be on the appellants' position at the point that Mr Singh should have been granted ILR. For the reasons I have given above, I treat that as being in early 2018. If he had been granted ILR at that point, he would have been able to sponsor the first appellant as his spouse under the Immigration Rules. The prospects of success of any such application under the Immigration Rules are quite clear. She would not have been able to meet the Immigration Status Requirements of Appendix FM, having been unlawfully present in the UK for 12 years. There would have been likely to be further difficulties under the Five-Year Route in Appendix FM in any event. There is no proper evidential foundation for the submission that Mr Singh might have been able to earn enough to meet the Financial Requirements under the Immigration Rules. And there is no evidence to show that the first appellant would have met the English Language requirements of Appendix FM.

52. Under the Immigration Rules, therefore, the first appellant would have been bound to rely on a submission that there were insurmountable obstacles to the continuation of family life in India. As Mr Avery submitted in writing, however, no such obstacles existed then, just as they do not exist now. Mr Singh might choose not to return to India with the first appellant but that does not establish that there are (or were) insurmountable obstacles to his doing so. Confronted with Mr Avery's submission in writing, Mr Allison did not seek to submit that the respondent was wrong in her assertion that there was an absence of insurmountable obstacles, whether in 2018 or at the present time.

53. As for the second appellant, his position under the Immigration Rules would not be materially different if his father had received ILR in early 2018. He was well into his 20s by then and could not have been his father's dependent child. There can be no suggestion that he even arguably meets the requirements for leave as an Adult Dependent Relative.

54. Even if Mr Singh had been granted ILR in early 2018, therefore, neither of the appellants could have had an arguable case for leave to remain under the Immigration Rules. All that they could have done thereafter would have been to make an application for leave to remain on Article 8 ECHR grounds, which is exactly what they did in any event in 2018. In the circumstances, I cannot see any proper basis upon which the respondent's improper treatment of Jagtar Singh placed the appellants at any meaningful disadvantage or should serve to reduce the weight which is otherwise attached to the public interest in maintaining effective immigration controls.

55. Having concluded that the appellants' submissions do not serve to *reduce* the weight which should be attributed to the consideration in

s117B(1), it remains for me to consider the weight which should *actually* be attached to that consideration in this case. In certain cases, it will press particularly hard on the scales of proportionality whereas in others it might have only a limited effect on that assessment. In my judgment, significant weight should be attached to the maintenance of effective immigration controls in both appeals. The first appellant decided in 2006 to leave India with her children and join her husband, who was already unlawfully present here. In my judgment, this was planned, unlawful migration. The children received an education to which they were not entitled. No application was made to regularise their position until 2014. That application and a subsequent one in 2015 were refused and the appellants nevertheless remained in the UK.

56. I accept the submission that the second appellant was not to blame for the actions of his mother (and presumably his father) in deciding to migrate unlawfully to the UK. In law, that must be the position until he attained his majority in November 2011. As an adult, however, he appreciates that he has been unlawfully present in the United Kingdom for many years.

57. For many years, therefore, both appellants have remained in the United Kingdom without leave pursuant to what was evidently a plan to migrate without permission to the United Kingdom and to benefit from the quality of life in this country. Conduct such as that is inimical to the maintenance of effective immigration controls and that must be reflected by attaching significant weight to that consideration in the scales of proportionality. The weight I attach to that consideration is lessened in the case of the second appellant by reference to his minority between 2006 and 2011 but it is nevertheless significant in both appeals.

58. In respect of the first appellant, it is accepted by Mr Allison that she has a lack of fluency in the English Language (skeleton argument at [9](iii)). He submits that this should not weigh against her because she is unlikely to become a burden on public funds and because she has integrated into her local community. Whilst I recognise the basis of that submission, premised as it is on the statutory justifications in s117B(2), I do not accept that it reduces the weight which should be attached to a failure to speak the English language. The broader concepts of social cohesion which underpin that consideration are not undermined by either the family support the first appellant receives or the contacts she has within the local Indian diaspora. In respect of the first appellant, therefore, I weigh against her her inability to speak English. The second appellant speaks fluent English, however, and this is a neutral factor in his case.

59. There is no evidence that the appellants represent a burden on public funds. The support they receive comes from family members in the UK and s117B(3) represents a neutral consideration in the scales of proportionality.

60. The appellants' immigration status has never been precarious so as to engage s117B(5). Mr Allison is wrong when he submits in writing that

this provision relates to the immigration status of the sponsor; it clearly relates only to the circumstances of the individual who applies for leave to remain on Article 8 ECHR grounds. What was said by Green LJ at [34] of GM (Sri Lanka) does not relate to s117B(4); it relates, as he explained in the opening sentence of that paragraph, to the rights of the non-appellant family members. I have already made reference to the fact that Mr Singh has a right to remain in the UK, and to the fact that he ought by rights to have ILR by now. Section 117B(5) is of no application to the facts of this case.

61. The appellants' presence in the UK has been unlawful throughout and this falls to be considered under s117B(4). The effect of that provision, read together with s117A(2)(a), was considered at [49] of Rhuppiah v SSHD [2018] UKSC 58; [2019] Imm AR 452. The intention of Parliament is that decision makers should have regard to the considerations mentioned in s117B, not that they should be put in a straitjacket which requires them to consider claims inconsistently with Article 8 ECHR itself. Section 117A(2)(a) provides a limited degree of flexibility to override the general normative statement that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

62. I can discern no particularly strong features in this case which suffice to override the general, normative statement in s117B(4). Section 117B(4)(b) does not apply to the first appellant's relationship with Mr Singh, however, as that is not a relationship with a *qualifying* partner. It does apply to the private lives of the first and second appellant, although I recall once again that the second appellant was a child when he first came to this country. That said, he has remained unlawfully in the UK as an adult and it is appropriate to discount the weight which might otherwise attach to his private life as a result of that unlawful presence between November 2011 and the present.

63. Balancing the competing cases in order to achieve the necessary fair balance between the interests of the family (as a whole) and the state, I come to the clear conclusion that it is the interests of immigration control which must prevail. The consequences of removal will be serious for both appellants, as I have sought to explain above. There will also be serious consequences for the family in the UK, and Mr Singh in particular, who is unlikely to choose to return to India with his wife and son. But the public interest in the removal of the appellants is significant, for the reasons I have set out at some length above. The weight which is properly to be attached to that consideration is not to be reduced significantly by any of the arguments relied upon in the Upper Tribunal or in the FtT. Stripped to its essential foundations, this is the type of case contemplated by Lord Reed, citing the decision of the ECtHR in Jeunesse v The Netherlands (2015) 60 EHRR 17, at [54] of R (Agyarko) v SSHD [2017] UKSC 11; [2017] Imm AR 764:

> ….the Convention is not intended to undermine [a state's right to control the entry of non-nationals into its territory and their residence there] by enabling non-nationals to evade immigration control by establishing a family life while

> present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-nationals family member by the authorities would be incompatible with article 8 only in exceptional circumstances.

64. Difficult though it will be for the appellants and their family, the interests of immigration control prevail by some margin over their private and family lives and these appeals are dismissed.

Notice of Decision

The decision of the FtT having been set aside in part, I remake the decision on the appeals by dismissing both appeals.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 October 2021