Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/26710/2016
HU/26711/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th September 2018	**On 28th September 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

NANDAKUMAR [S] (FIRST APPELLANT)
JANANI [N] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Unrepresented
For the Respondent: Mr Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are husband and wife born on 19 August 1980 and 2 April 1986 respectively. They applied on 5 April 2016 for leave to remain in the United Kingdom on family and private life grounds. The appellant's wife had raised a medical condition and the couple had a newly born child. The application was refused by the Secretary of State on 23 November 2016. While it was accepted that the appellants were in a genuine and subsisting relationship it was not accepted that there were any insurmountable

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obstacles in continuing family life together in India and as their child was not a British citizen and had not lived continuously in the UK for at least seven years and it would be reasonable to expect the child to leave the UK with both parents. The couple did not meet the residential requirements and there were no very significant obstacles to integration into India. There were no exceptional circumstances and suitable medical treatment was available for back pain in India. The Secretary of State took into account the welfare of the appellants' child in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009. The respondent noted that the child would be returning to India together with the appellants who would be able to support him and there was a functioning education system in India.

2. The judge heard oral evidence from the first named appellant who decided not to call the second named appellant as her evidence would only duplicate his. The judge also heard evidence from a former landlord and neighbour of the appellants. Having correctly addressed himself on legal issues and having taken into account the provisions of Section 117B of the 2002 Act the judge made the following findings at paragraphs 33 and 34 of his decision:

> "33. The first appellant Mr Nandakumar [S] is a senior software engineer. He first gained entry in 2011 on a Tier 2 visa. He returned to his family in October 2011. He entered this country again in April 2013 I believe as a Tier 2 worker and his leave ended on 25 April 2016. He made his current application in April 2016 and his wife's application is dependent on his. They have one child who was one month old at the time of the application and is currently two years old. I have no reason to doubt that the appellant is a qualified and experienced person who has been working full-time in the United Kingdom and previously had leave to remain in the United Kingdom as a point-based migrant.
>
> 34. The appellant's wife Mrs Janani [N] had medical issues conceiving but this is now behind her. The first appellant is fit and well and his wife apart from chronic back pain is fit and well. She receives physiotherapy. They have concerns about the child's development but the child is not under the care of a paediatrician. These concerns must not therefore be major. His wife takes standard painkillers for a painful back. In India they have their parents and extended family."

The judge then turned to consider the issue of a claimed land dispute but noted that the appellant had not made an asylum claim and the grounds did not form part of the grounds of appeal and in any event the judge was unable to place great reliance upon such evidence as he had heard. The determination concludes as follows:

> "39. The appellant has a BSC in mathematics and studied computers for two years. He has worked in computers for 14 years and in a modern developing country such as India he has a very good skills which will enable him to obtain employment.

40. Parliament has passed laws to ensure that the immigration rules are satisfied and it is in the public interest that they are followed

41. As section 117(1) makes clear the issue is effective immigration control. I have found the appellant does not meet the immigration rules and therefore at the relevant date there is a public interest served by the refusal.

42. I find that the appellant does not meet the requirements in respect of private life under paragraph 276ADE (vi) and the appellant has failed to show there would be very significant obstacles to his integration into India. because he was 33 years old when he entered the UK and will have retained his knowledge of the customs, practices, traditions, culture, laws and languages in India.; He can settle in any part of India he wishes in order to seek work or establish himself in business and the appellant has family there. Therefore it is considered that he has a home to return to.

43. I note the following recent case Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 00013 (IAC) where it said

44. Mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of "very significant hurdles" in paragraph 276 ADE of the Immigration Rules.

45. I find in this case that the appellant's problems on return to his own country would amount to no more than mere hardship, mere difficulty, mere hurdles and mere inconvenience. As such he does not satisfy test set out in rule 276ADE

46. I take into account Section 55 of the UK Borders Act in the best interest of their child who is two years old. It is settled law that the best interests of the child in this case is to be with their parents and he is young enough to adapt to his new life in India. He is not a qualifying child

47. This is the case where a pleasant hard-working man has come to this country to obtain qualifications and worked lawfully. If he wishes to continue to work and live in this country he must return to India with his family to make an entry clearance application. I find it would not be unreasonable to expect him to do this as he does not comply with the immigration rules and there is no reason to go beyond the rules and allow the appeal under article 8. There are no major medical issues with his family and I dismiss the appeal."

3. There was a very lengthy application for permission to appeal. The grounds were considered by a Designated First-tier Tribunal Judge who noted that the main ground of application was an allegation that the hearing was unfair. The appellants had stated that the hearing took place at the end of the sitting day and lasted fifteen minutes and there was no Presenting Officer. They did not feel able to present their case properly because of the attitude of the First-tier Judge and they were unable to provide the additional documentary evidence they had brought to the

hearing. They were unable to explain that their previous legal representatives had failed to submit a bundle and it took time to have the documents returned to them. They claimed that the judge had failed to address the question of whether their child was stateless. The judge cautioned the appellants about being too hopeful about the outcome as the grounds revealed that they had limited understanding of the assessment of proportionality which required a balancing exercise to be undertaken and the need to factor in the question of effective immigration controls. Accordingly if there had been unfairness the appeals might still fail.

4. The First-tier Judge was asked for his comments given the claims made about unfairness at the hearing in accordance with the usual procedure and these have been circulated to the parties and I reproduce them here:

> "I have been asked to comment regarding the allegation that the appellant's hearing was unfair. I have not been asked to comment on the legal arguments they have put forward.
>
> The record shows that the hearing started at 3 o'clock and finished at 3.30. It was unusual in the sense that the presenting officer said that he needed 30 minutes to prepare the case and this would mean it would start after 3.30 when he was due to finish and had asked to be excused. As I have no control over the working practice of presenting officers' I had no alternative but to agree to this.
>
> The appellants say and I have no reason to doubt it that they came to court at 10 o'clock and waited until 3.05. They also say that the hearing lasted 15 minutes. The record does not show this. I have no control over the length of the hearing of the previous cases. I am not aware whether the case itself was in the floating list. I suspect it was as the presenting officer would have prepared the case. I seem to recall that if you are in the floating list you are advised not to come to court before 11 o'clock.
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> The appellant makes the point that no one else was in the court room and the evidence was not electronically recorded. They are quite right and I do feel it is inappropriate for me to be left alone with appellants. However, I am aware of staff shortages and never complain about this. I have experienced hearings in court rooms where the evidence was electronically recorded and in this sort of case it would be very useful to retrieve this information.
>
> I reject any suggestion that I was in a haste to end proceedings. I normally sit in Manchester and only come to Taylor House once a month to attend a meeting. As this meeting starts at 430 and I have no recording equipment to dictate my judgements when I attend Taylor House. I see no reason why I would rush to finish.
>
> There was no presenting officer and the Surendran guidance makes it clear that I should not conduct the hearing in an inquisitorial manner. The reason for refusal letter stands as the reasons for the objection and the grounds of appeal are the appellant's response.

The reason for refusal letter argues that the appellant could not comply with the rules. The grounds of appeal effectively argue that the appeal should be allowed outside the rules.

I note from my determination that I explained procedure to the appellant. This included the fact that we did not have a presenting officer. It is clear from the grounds of the application that the appellants are very articulate and well educated. The grounds of the application are extremely lengthy and argue their points very well. It was agreed that Mr [S] give evidence and that his wife's evidence was not necessary as it could have the same grounds. There is no record that they disagreed with this approach. The appellant, on my prompting went through his immigration history

He was asked whether he was fit and well and whether his wife was fit and well

He was asked if he has family in India and he mentioned a land dispute and threats to his father and son

He was asked about relocation as an alternative

I heard evidence from Zina Mohammed and a submission was made where I specifically asked the appellant it there was anything else he wanted to say and he gave me several reasons why he thinks he should stay in this country

The appellant is a very articulate well-educated person and my recollection of the hearing was that he was able to put across his views without problems

At paragraph 47 of my determination I note that I found that they were pleasant hard-working people who came to this country to work. Therefore, my reflection of the hearing that was conducted in a pleasant and informal manner.

They are very well educated and articulate and I reject my suggestion that the hearing was unfair. At no stage did they ask for an adjournment and I have no recollection that they asked for documents to be produced and I refused. For the record I can't remember the last time I refused to admit documents to a hearing.

There is some suggestion in the application that the documents had previously been submitted.

I have no control over the presenting officer's failure to attend the hearing and reject any suggestion that this prejudiced their case. On the contrary in my experience the absence of a presenting officer to put in alternative points increases their chance of succeeding

I have conducted many hearings without a presenting officer and I feel I gave the appellant every opportunity to present their case. I am sorry that they felt the experience of attending court was prejudicial to them.

> I felt I helped them present their case by asking a series of questions which elicited the information required and gave them an opportunity to add further comments. I do not restrict the evidence they presented or the length of their hearing.
>
> I did not refuse to hear their witness who can only offer hearsay testimony regarding the land dispute."

5. The appellants confirmed at the hearing before me that they already had been supplied with the comments of the First-tier Judge and Mr Tarlow was given the opportunity to see them.

6. The appellant explained that he had previously had solicitors and learnt that a bundle needed to be lodged with the First-tier Tribunal and this bundle had reached the judge but he claimed he had been given no opportunity to provide documents which he had brought with him. He claimed it was common knowledge that a child would be stateless if the birth was not registered and there were difficulties about getting the child registered in the light of technical difficulties such as presenting passports.

7. Mr Tarlow submitted that the grounds did no more than express disagreement. The judge had covered the issues raised in paragraphs 33 and 34 of his decision. There was no evidence that the stateless issue had been raised. The judge had dealt with all matters with which had been seized. The decision read as a whole was not flawed in any way or unfair as claimed. The material that it was claimed the judge had refused to consider was not contentious in any event. The appellant submitted that he had worked hard and had built up a position in a leadership team and he referred me to a recent testimonial. He submitted that all the work that he had undertaken would be in vain if he were to be returned to India at present. The First-tier Judge had adopted too narrow a spectrum when considering the issue of his wife's back problem. She was at high risk of a permanent disk slip. The treatment she had had in India had been no good in contrast to the good care his wife had had in the UK.

8. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me and the very lengthy grounds of appeal that have been filed in this case. I appreciate that the appellants had plainly had a difficult day before the First-tier Tribunal and had a long wait before the hearing commenced and I am sure it was scant consolation that their case was heard first before me. They had done their best to get the bundle before the judge and they were concerned about the absence of a Presenting Officer.

9. I do not feel that the appellants were prejudiced by the absence of a Presenting Officer. When considering the case the judge applied as he says the Surendran guidance which is set out in an annex to MNM (*Surendran* guidelines for Adjudicators) Kenya * [2000] UKIAT 00005). Further, the absence of a Presenting Officer is not ordinarily likely to increase an appellant's difficulties as the First-tier Judge observes. In my view the judge gave a full and satisfactory account of the hearing and I

have no reason to doubt what the judge said. I do not find any evidence of unfairness whatever. I agree with his assessment of the appellants being pleasant and hardworking people who were well-educated and very articulate. As the judge points out no adjournment was requested and I accept that the judge was not asked about documents and was not in the habit of refusing to admit documents at a hearing. As Mr Tarlow submits the documents do not appear to be contentious in any event. The appellants were given every opportunity to state their case. The appellants argue that the issue of statelessness was raised. No material was lodged to support such a claim. I am satisfied that the First-tier Judge dealt with all the salient points raised and that the hearing was perfectly fair.

10. I would comment that the appellant in making his case before me was understandably emotional about matters and I have the greatest sympathy for the family but I do not find that the hearing before the First-tier Judge was in any way unfair. I agree with the comments made when permission was granted about the eventual outcome, even if unfairness was established. In my view no such unfairness arose.

11. For the reasons I have given these appeals are dismissed and the decision of the First-tier Judge shall stand.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date: 26 September 2018

G Warr, Judge of the Upper Tribunal