Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18508/2018

THE IMMIGRATION ACTS

Heard at Bradford (via Skype)	**Decision & Reasons Promulgated**
On 3 March 2021	**On 9 March 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NESHALKUMAR DALSUKBHAI NANDHA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Malik instructed by Chancery Solicitors
For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 30 June 2020 the Upper Tribunal set aside a decision of the First-tier Tribunal, finding a judge of that Tribunal had erred in law in a manner material to the decision to dismiss the appeal by failing to properly conduct the article 8 proportionality assessment.

2. Directions were given for the provision of further documents to enable the Upper Tribunal to consider this matter afresh with a view to substituting a decision to either allow or dismiss the appeal.

Background

3. The appellant is a citizen of India born on 14 August 1986. There are a number of preserved findings from the First-tier decision including procedural history, the finding the appellant cannot establish 10 years lawful residence in the United Kingdom and that the appellant had worked in breach of a condition attached to his leave. It is also recorded as not being disputed that the appellant has family life in the United Kingdom with his wife and son in addition to his private life.
4. The Secretary of State filed her skeleton argument dated 18 September 2020 in which it is written:

> 3. The error of law decision preserves the findings that the Appellant did work in breach of his conditions and that his statement of additional grounds did not constitute an application which triggered an extension of leave under section 3C(2)(a). It is not known whether the Appellant still seeks to argue otherwise.
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> 4. It is envisaged therefore that the Tribunal will now provide a decision weighing the factors relevant Article 8 against the requirements of the relevant statute, including the best interests of the UK-born child Dishal Nandha, who has now been in the country for six years and eight months. Dishal barring the case making up good a case under paragraph 276 ADE, success can only follow a conclusion that the circumstances here are such as to compel a conclusion in the Appellant's favour.
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> Conclusion
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> 5. On the assumption that the matters preserved in the error of law decision remain intact, the Tribunal's task is to decide whether the circumstances make out a case that removal would be unlawful under section 6 (1) HRA. The Secretary States asserts that they do not.

5. It is also accepted that the appellant was never made liable to removal under section 10(1)(a) and that his leave was not curtailed, lawfully or otherwise. The respondent accepts there are errors on the face of the notice under challenge failing to recognise changes to section 10. This does not, however, change the fact that the appellant's leave expired on 2 May 2016.
6. A further development in relation to the factual matrix is that the appellant's child Dishal, who was born on 14 November 2013, became a 'qualifying child' on 14 November 2020 having completed seven years residence in the United Kingdom.

Discussion

7. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a

qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue will generally be whether it is not reasonable for that child to return.

8. The Court of Appeal have stated that the tribunal must ask the question whether it is reasonable to expect the child to leave the UK even if there is no question of the child actually leaving the UK. Singh LJ said in SSHD v AB (Jamaica) & AO (Nigeria) [2019] EWCA Civ 661 "*It is clear, in my view, that the question which the statute requires to be addressed is a single question: is it reasonable to expect the child to leave the UK? It does not consist of two questions, as suggested by the Secretary of State. If the answer to the single question is obvious, because it is common ground that the child will not be expected to leave the UK, that does not mean that the question does not have to be asked; it merely means that the answer to the question is: No.*" The Court of Appeal also made clear that the conduct of the parent is irrelevant to s 117B(6) of the 2002 Act unless of course the parent is the subject of deportation proceedings so that S117C is in play.
9. This is not a deportation appeal.
10. The appellant entered the United Kingdom lawfully in 2008 as a student. His wife entered the United Kingdom as a dependent in 2011 with their son being born in 2013.
11. The child has only lived in the United Kingdom and is completely dependent in respect of both his family life and the main core of his private life upon his mother and father, neither of whom have leave to remain in the United Kingdom in their own right. This is therefore not a case where reasonableness of the child's removal has to be considered against the background where one parent may remain in the United Kingdom.
12. It is necessary to consider the issue of reasonableness in the real world. The child, who remains an Indian national and who is the holder of an Indian passport, is said to only speak English whereas the appellant's evidence in cross examination was that he and his wife speak both English and Gujrati. The appellant's evidence in English was heavily accented and it may well be that the more common language used in the home environment is Gujarati as well as English, of which the child will have some knowledge.
13. Taking the appellant's case at its highest, that his son can only speaks English, it is not made out that this makes his leaving the UK to live in India unreasonable, per se. English is a language commonly spoken in India. Whilst Hindi is described as the official language English is the associated official language and is used widely throughout India. Mrs Pettersen's submission that the child could be educated in English, as a result of the presence of English language schools in India, was not countered by Mr Malik in his submissions.
14. The appellant described his son as a very bright boy. There is within the appeal bundle a report from Dishal's school based on learning between September 2019 – March 2020 indicating areas of expected attainment, science and other curricular activities with accelerated progress in relation to English reading and maths. The teachers end of year comments read:

> Dishal has been a pleasure to teach during Year 1. He has achieved above aged related expectations in maths and reading subjects and this is testimony to how hard he has worked throughout the year. Dishal is a pleasant, polite and well mannered child who appears happy at

school. He is developing self-confidence and becoming more independent in thought and action. Recently he has impressed me with his improved handwriting. During maths lessons Dishal appears to be more confident in responding to questions and enjoys practical work in maths.

…

15. Whilst it is accepted any change in school, let alone a different educational system in a different country, can be challenging there was no evidence provided to show that Dishal will be unable to cope with the same, especially with the support of his parents.
16. The appellant was particularly vocal about Dishal's interest in astronomy but his claim that he will not be able continue with such interest or learning if returned to India was not made out on the evidence. India has recently joined the 'space race' by sending a satellite into orbit and opportunities for those wishing to learn about such issues has not been shown not to be available to a child such as Dishal. It was not, in any event, made out that there would be any impairment to Dishal's ability to attain his best educationally, or beyond, if he left the United Kingdom.
17. There was little evidence led in relation to ties to school, friendship groups, or the wider community in the UK, to show Dishal's removal would have an unacceptable impact upon the child if the same was lost to him and he had to reform such bonds elsewhere.
18. In terms of having to move to a different country and adapt to a different lifestyle within that country, the foundation of Dishal's life is his relationship with his parents who lived in India and have experience of living there until they came to the United Kingdom, and who is not been shown will not be able to support and assist their son in making the necessary transition.
19. Mrs Petterson asked the appellant about the presence of family in India and it is clear that there are family members, from both sides. It was not made out such family would not be able to also provide assistance to Dishal if required in addition to providing support for the family generally whilst they re-establish themselves in India.
20. It was not made out that Dishal will experience destitution as both his father and mother are educated and it was not been shown they will be unable to secure employment; enabling them to provide adequately for their family's needs.
21. The best interests of Dishal are to remain with his parents. Although the family would prefer to remain in the United Kingdom to enable both the adults and Dishal to continue to benefit from all the UK offers, it is not made out it is not reasonable in all the circumstances to expect Dishal to leave United Kingdom to go to India with his parents or that the child's best interests require him to remain in the UK.
22. In relation to the family life aspect of the claim, as the family will return as a unit there will be no disruption with family life sufficient to warrant a finding that article 8 will be engaged on this basis.
23. In relation to the private life element, the appellant entered the United Kingdom as a student with his leave continuing until it expired on the 2 May 2016 as

noted above. The nature of the appellant's lawful leave was as a student which has always been of a temporary nature making his status in the United Kingdom precarious. The appellant's wife entered as a dependent upon him with leave in line. Her status has also been precarious too.

24. It is a preserved finding of the First-tier Tribunal that the appellant worked in breach of a condition of his entry to the United Kingdom. Whilst the appellant seeks to raise again his objection to this finding, repeating his claim that he was subject to abuse by the immigration officers who encountered him working in breach, this has not been shown to have any merit or to warrant the finding that the appellant had worked in breach of a condition of entry being overturned. As noted at [24] of the Error of Law decision:

> 24. Working in breach of a condition of entry is a serious matter as recognised by the Court of Appeal in ZS (Jamaica) [2012] EWCA Civ 1639 where it is written:
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> > 27. Overall, the judge seems to me, with all respect, to have approached the assessment of the best interests of the second appellant on an inadequate basis and also seems almost entirely to have downplayed the countervailing matters requiring assessment in the balancing exercise. Thus the judge virtually explains away the serious breach of the Immigration Rules by the first appellant – who as a Jamaican national had come to the United Kingdom for temporary purposes with no legitimate expectation of being allowed to remain permanently and with, as she knew, no right to work for the hours she did – by saying that it was driven "by necessity" and by describing it almost dismissively as a "transgression" which was not "so heinous" as to require removal. But this was on any view a serious matter and should have been accorded commensurate seriousness as a countervailing factor in the balancing exercise in the assessment of the proportionality of the proposed removal.

25. As submitted by Mrs Petterson the appellant is unable to meet the suitability requirements of the Immigration Rules as a result of his conduct.

26. It was not made out that the appellant or his wife could succeed under the Immigration Rules making the question whether any interference with the private life formed by the appellant and his wife in the United Kingdom, whilst accepting it engages article 8, will result in consequence is sufficiently serious to outweigh the public interest relied upon by the Secretary of State.

27. Section 117A and B of the Nationality, Immigration Asylum Act 2002 read:

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
(a) breaches a person's right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –
(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article8:public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
> *(a) are less of a burden on taxpayers, and*
> *(b) are better able to integrate into society.*
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
> *(a) are not a burden on taxpayers, and*
> *(b) are better able to integrate into society.*
> *(4) Little weight should be given to –*
> *(a) a private life, or*
> *(b) 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.*
> *(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*
> *(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*
> *(a) the person has a genuine and subsisting parental relationship with a qualifying child, and*
> *(b) it would not be reasonable to expect the child to leave the United Kingdom.*

28. The private life relied upon by the appellant and his wife is a private life that has been formed during a time when their immigration status is precarious. Whilst case law has made it clear that this is not a rigid test it is not made out on the facts of this appeal that there is any aspect of the appellant's private life that warrants other than little weight being attached to it.

29. Mr Malik submitted that even though the appellant's leave expired in 2016 he remained in the United Kingdom thereafter awaiting the outcome of various applications that he made as set out in his immigration history, leading to the refusal in 2018 of the application for indefinite leave to remain which was the refusal under appeal before the First-tier Tribunal. Those applications did not have the effect of conferring leave upon the appellant as the appellants letter of 15 February 2016 did not have the effect of extending his leave pursuant to section 3C of the Immigration Act 1971 (as amended); as section 3C is triggered specifically by an application which is undecided when leave expires whereas the letter of 15 February 2016 was not an application. The application process is governed by the immigration rules and includes a requirement that the relevant form is used and the fee paid neither of which occurred in this case. The letter did not seek leave to remain but rather to resist removal. Circumstances required to engage section 3C were not made out on the facts of this case. Nothing was established at the hearing to warrant a finding that the appellant's leave was anything other than precarious and expired on 2 May 2016.

30. Whilst the appellant speaks English and he and his wife have a good level of education the ability to speak English and to be financially independent is a neutral matter so far as the assessment is concerned in this case. The ability to speak English and be financially independent means no adverse finding is made against the appellant on the basis he is unable to satisfy either of these requirements.

31. The appellant has never been given any reason to believe that he will be permitted to remain in the United Kingdom unless he could establish lawful reason for so doing.
32. In this case it is not made out he will not have family support in India or be able to re-establish himself into a country where he lived prior to entry to the United Kingdom. It has not been made out there are insurmountable obstacles to his ability to reintegrate himself and his family. The appellant and his wife have contacts within India on both sides of the family, speak the language, and there was insufficient evidence to establish an entitlement to leave pursuant to paragraph 276ADE on the basis of insurmountable obstacles.
33. Mr Malik referred to paragraph EX.1. of the Immigration Rules but this is not a freestanding provision. The rule reads:

> EX.1. This paragraph applies if
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> 1. (a)
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> (i) the applicant has a genuine and subsisting parental relationship with a child who-
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> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
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> (bb) is in the UK;
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> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
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> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
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> 2. (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
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> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

34. As noted above the evidence does not support a finding that when taking into account the best interests of the child as a primary consideration it would not be reasonable to expect the child to leave the United Kingdom. Similarly, it has not been made out on the evidence that there are any insurmountable obstacles to the family as a whole returning to and re-establishing themselves in India or continuing the family life that they enjoy in the United Kingdom in India.
35. Whilst Mr Malik submitted that although the appellant had overstayed it was only for a limited period of time the fact is he did overstay. The finding the appellant worked in breach of the conditions of his leave is a serious matter as confirmed by the Court of Appeal.

36. It is not made out section 55 issues and the best interests of the child warrant a finding that the only option is for the child to remain in the United Kingdom even though the child has been born in this country and attends school. The question of whether it is reasonable for the child to leave the United Kingdom has been considered with the required degree of anxious scrutiny, but insufficient evidence provided, as noted above, to warrant a finding in the appellant's favour.

37. The question in all cases of this nature when one is assessing the proportionality balance is whether the weight given to those matters relied upon by the appellant outweigh the right of the Secretary of State to have an effective and workable immigration policy. In this case I find the Secretary of State has established that any interference in the private lives of any member of this family unit, including the child, is not enough. The evidence relied upon by the appellant in opposing the decision is insufficient to establish that the weight that can be attributed to the same is sufficient to outweigh the public interest in removal.

Decision

38. I dismiss the appeal.

Anonymity.

39. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 5 March 2021