IAC-FH-CK-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/07320/2019**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10 November 2020** | **On 07 December 2020** |

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**
**DEPUTY UPPER TRIBUNAL JUDGE TROWLER**

**Between**

**MR DHARMENDRAKUMAR GHANSHYAMBHAI PATEL**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Not represented
For the Respondent: Ms S Cunha, Home Office Presenting Officer

**DECISION AND REASONS**

The Appellant is a citizen of India and his date of birth is 30 May 1983.

The Appellant was granted a multi visit student visa in 2009. He came to the UK on 9 February 2010. Thereafter he made a number of unsuccessful applications including an application for leave as a student which was refused by the Secretary of State. The Appellant appealed against this decision. The First-tier Tribunal dismissed his appeal on 26 August 2012. Applications to appeal against the decision of the First-tier Tribunal were refused. The

Appellant became appeal rights exhausted on 8 February 2013. Since that time he has remained in the UK without leave.

On 17 August 2018 the Appellant made an application on Article 8 grounds on the basis of private life. The application was refused by the Secretary of State on 8 April 2019. The Appellant appealed. His appeal was dismissed by Judge of the First-tier Tribunal Rose in a decision promulgated on 5 December 2019 following a hearing on 8 November 2019. The Appellant was granted permission on 14 April 2020. Upper Tribunal Judge Hanson took a provisional view that the error of law matter could be determined on the papers. The matter then came before Upper Tribunal Judge Smith. She decided that the matter should be listed for a face-to-face hearing. The Appellant had not responded to Judge Hanson's directions. She took into account that the Appellant, though represented before the First-tier Tribunal, is now a litigant in person.

The matter came before us to determine whether the First-tier Tribunal made an error of law. The Appellant did not attend the hearing. The last communication from the Appellant was a letter from him on 17 January 2020 informing the Upper Tribunal of a change of address. A notice of hearing was sent to the Appellant from the Upper Tribunal by post on 7 October 2020 to this address. Judge Hanson and Judge Smith's decisions were also sent to the Appellant. We were satisfied that the Appellant has been notified of the hearing before us. Properly applying Rule 2 of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules") we decided that it was in the interests of justice to proceed with the hearing in accordance with Rule 38 of the 2008 Rules.

The decision of the First-tier Tribunal

The First-tier Tribunal heard evidence from the Appellant. There were no other witnesses. The judge set out the law at paragraphs 3, 4 and 5 including the five- step approach to follow in Article 8 cases set out in Razgar [2004] UKHL 27. She also set out the relevant parts of s.117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and paragraph 276ADE (1) (vi) of the Immigration Rules. The judge said as follows:-

> "6. I had the benefit of bundles for the Appellant and the Respondent. The Appellant gave evidence before me. He told me that, contrary to the findings of IJ Flynn in 2012, the documents he had supplied from the Jalandhar Central Co-operative Bank were genuine.
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> 7. In cross-examination, he told me that he had worked in the UK as a shopkeeper. He also told me that he had been financially supported by two friends. He said that he was no longer supported by his father and did not have any relationship with him or his family in India. They all lived together in India but he had not spoken to them for about a year. However, he also said that he had not spoken to his Father about whether he could return to live with him. He said that, when in India, he worked as a mechanic, however he said that it had been too long for him to go back to that.

8. Thereafter I heard helpful submissions from both parties."

The judge made conclusions at paragraphs 9 and 10 which read as follows:

> "9. The principle issue in this case is whether or not the Appellant would encounter very significant obstacles in returning to India. I find, on the balance of probabilities, that he would not. While he has undoubtedly had a strained relationship with his Father, he has made no efforts to see if he could return to live with his family and there is nothing to suggest that his relationship with his family has reached the point that they would not welcome him back into the home. In any event, he is experienced in mechanics and in retail and therefore is employable.
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> 10. Looking at his case outside of the rules, it is clear that he has minimal private life in the UK and no family life. It follows that there is no basis for the Appellant arguing that his removal would be a breach of his Art. 8 ECHR rights."

The grounds of appeal

The grounds of appeal can be summarised. The judge failed to make adequate findings of fact. There is reference to the Appellant having not attended a hearing and the judge not considering the provenance of bank statements. (It is clear to us that this relates to the 2012 decision of the First-tier Tribunal and not the decision which was the subject of the appeal before Judge Rose).

The Appellant relies on MM (Lebanon) [2017] UKSC 10. He concedes in the grounds of appeal that he would have an "uphill struggle justifying leave outside of the Rules." However, his submission is that a finding against him is not inevitable. It is asserted that the judge did not carry out the five- step approach in Razgar and did not take account of the Appellant's lengthy residence in the UK.

Submissions

Ms Cunha conceded that the judge made an error of law in respect of the finding that there were no very significant obstacles to integration under paragraph 276ADE (1) (vi) of the Immigration Rules ("the Rules") and Article 8 outside of the Rules. However, she said that the error is not material to the outcome. Ms Cunha submitted that the Appellant's private life does not engage Article 8 (1) and therefore does not get past the first *Razgar* step.

Error of law

The judge correctly directed herself on the law at paragraphs 3, 4 and 5. However, she did not apply her self-direction. It was incumbent on the First-tier Tribunal to make a full assessment of Article 8 outside of the Rules in accordance with Razgar. Paragraph 10 of the decision discloses that it did not do so. This is a material error of law.

Insofar as the grounds seek to challenge the 2012 decision of the First-tier Tribunal that the Appellant had exercised deception, there is no right of appeal against that decision.

In the grounds of appeal the Appellant did not specifically challenge the decision that there would not be very significant obstacles to integration. However, in the light of Ms Cunha's concession we conclude that the judge materially erred in the assessment of very significant obstacles to integration and Article 8 generally. We are unable to say with certainty that should the judge have properly considered Article 8 the appeal would have been dismissed.

We set aside the decision of the First-tier Tribunal to dismiss the Appellant's appeal pursuant to s12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007. We remake the decision pursuant to s12 (2) (b) of the same Act properly applying paragraphs 7.2 and 7.3 of the Practice Statement of the Senior President of Tribunals of 25 September 2012 and the overriding objective at Rule 2 of the 2008 Rules. The Appellant had decided not to participate in the proceedings and had not submitted any further evidence. We could fairly remake the decision on the evidence before the First-tier Tribunal.

The Appellant relied on a witness statement dated 4 November 2019. He submitted a statement with his application in 2018. We have taken account of both documents. His evidence can be summarised. He does not have ties in India. His family (including his wife and children) has disowned him. He has wasted a lot of money on education here. The thrust of his evidence is that he is integrated and considers the UK his home. He has many social ties here. He has friends here and has been away from India (at the time of making his witness statement) for a period of ten years. He has skills and expertise as a shopkeeper. He has not claimed public funds.

The Appellant in his witness statement refers to friends here in the UK and relationships that he has developed here. However, there was no evidence before the First-tier Tribunal from any of these people. It is asserted by the Appellant that witnesses were not prepared to come forward and give evidence because they feared losing British citizenship.

Findings and reasons

The challenge to the judge's decision in the grounds of appeal in so far as the Rules are concerned is not easy to follow. However, Ms Cunha conceded an error of law in relation to the very significant obstacles decision. We should determine whether the Appellant's appeal can succeed under Article 8 as informed by the Rules before moving on, if necessary, to consider the appeal outside of the Rules. Properly applying the guidance in the case of The Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813. The Appellant has failed to establish that there are very significant obstacles to integration. While he has been away for a significant period, he left India as an adult. He is employable and will be able to assimilate and integrate on his return. The Appellant would not be an outsider returning to India. He would be

able to properly participate in society there. Taking a broad evaluative judgment, the Appellant has not established, taking his evidence at the highest, that there would be very significant obstacles on return to India.

From the evidence before us we conclude that the Appellant has a private life here. While the evidence as to the substance of this is thin on the ground, the Appellant has now been here for eleven years. We reject Ms Cunha's submission and accept that his private life engages Article 8 (1). The determinative question is whether his removal is proportionate.

There are a number of matters that weigh in favour of the Appellant. He had been here for over ten years. He does not have family in the UK. His evidence is that he is estranged from family in India. However, there is some contradiction in his evidence about the relationship that he has with his father. His evidence in his witness statement was that he provided support to an elderly father in India. However, this was not entirely consistent with his evidence that he has been disowned. Nevertheless, we find that the Appellant as a single male who is (on his own evidence) employable. It can be reasonably inferred that he would be able to return to India and find employment. He could develop a private life in a similar way to how he has developed a private life here in the UK. It is likely that he has made friendships here; however, the evidence does not support that these are significant. We do not accept that potential witnesses feared deprivation of British citizenship should they support the Appellant which explains why they did not give evidence. The Appellant was represented before the First-tier Tribunal. In any event there is no support for the Secretary of State depriving citizenship on this basis or for anyone fearing this as a possibility.

The Appellant's evidence is that he has been targeted by his family in India. There is nothing to support this. He has not made a claim under Article 3 or on protection grounds nor were these issues raised in the grounds of appeal before the First-tier Tribunal. If the Appellant is of the view that he is at risk on return it is open to him to make such an application.

The evidence before us does not establish that the Appellant would be targeted by his family. When considering proportionality, it does not assist the Appellant that there has been a finding by the First-tier Tribunal in 2012 that he engaged in deception. It is a lawful and sustainable finding and there is no reason for us to go behind it. However, that finding is not material as far as the outcome of this appeal is concerned because there is very little that is capable of tipping the balance of the scales in the Appellant's favour in this case. He has not had leave since 2013. The maintenance of effective immigration controls is in the public interest (see s.117 B (2)). Section 117B(4) of the 2002 Act provides that little weight should be attached to private life established when the person has been in the UK unlawfully. The Appellant has been here unlawfully since 2013. At that point in time he had been here for only three years. All in all, considering the evidence in the round, the interference to the Appellant's private life is not such that it outweighs the public interest in the maintenance of immigration control having properly applied *Razgar* and the statutory regime.

We remake the decision and dismiss the Appellant's appeal under Article 8.

**Notice of Decision**

The appeal is dismissed on Article 8 grounds.

No anonymity direction is made.

Signed Joanna McWilliam Date 30 November 2020

Upper Tribunal Judge McWilliam