Upper Tribunal
(Immigration and Asylum Chamber)

CS and Others (Proof of Foreign Law) India [2017] UKUT 00199 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 04 April 2017	.....

Before

The Hon. Mr Justice McCloskey, President
Deputy Upper Tribunal Judge Norton-Taylor

Between

CS (INDIA) AND 4 OTHERS
(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ANONYMITY

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

Appellants: In person, unrepresented
Respondent: Mr P Singh, Senior Home Office Presenting Officer

The content of any material foreign law is a question of fact normally determined on the basis of expert evidence.

DECISION

Introduction

1. We hereby undertake the exercise of remaking the decision of the First-tier Tribunal (the "FtT"), this appeal having travelled via a relatively elaborate route through the United Kingdom legal system.

The Appellants

2. Some basic understanding of the family unit comprised by the five Appellants is essential:

   (a) The first Appellant, the father, is a national of India, a civil engineer by profession, now aged 42 years.

   (b) The second Appellant, the mother, is a national of Pakistan, a BA graduate, now aged 39 years.

   (c) There are three children of the family, all born in the United Kingdom. They are aged 8, 4, and 2 years respectively.

3. The parents met for the first time in the United Kingdom and were married in this jurisdiction. The father of the family was lawfully resident in the United Kingdom during some seven years, from September 2003 to April 2010. The mother was lawfully resident here between September 2006 and December 2009. They were married on 09 October 2008.

4. At this juncture it is of some significance to note the following, which is not contentious:

   (a) Both the father and the oldest child of the family are nationals of India.

(b) The mother is a national of Pakistan.

(c) The second and third children do not have nationality of either India or Pakistan.

(d) None of the children is a British national.

The First Legal Challenge

5. The first element of the elaborate litigation jigsaw in which the Appellants have become involved crystallised in July 2013 when they brought an application for judicial review challenging the decision of the Respondent, the Secretary of State for the Home Department ("the Secretary of State"), refusing their leave to remain application based on their Article 8 ECHR rights. Their judicial review challenge had a favourable outcome, giving rise to a consent order dated 11 April 2014 whereby the Secretary of State undertook to reconsider the decision challenged.

The Impugned Decision

6. The challenge noted above generated the impugned decision, which is dated 01 July 2014. By this decision the refusal of leave to remain in respect of all five Appellants was maintained. The Appellants were, simultaneously, formally notified of their vulnerability to removal from the United Kingdom.

7. It is necessary at this point to highlight the following, which is not contentious and is linked to [4] above:

(a) The Secretary of State is proposing to remove the father and oldest daughter to India.

(b) The Secretary of State is proposing to remove the mother and the other two children to Pakistan. In passing, while the Secretary of States written decision intimated an intention to remove the second child to India with her father, this was expressly modified by Mr Singh (representing the Secretary of State) on enquiry from the bench at the hearing.

It follows that if the Secretary of State's removal decisions are lawful the family will be fragmented, subject to our assessment and determination of certain nationality issues below.

FtT Decision

8. The FtT dismissed the appeals, which were pursued exclusively under Article 8 ECHR. It is appropriate to highlight the following passage in the Tribunal's decision, at [27]:

> *"Accordingly for the purposes of the application and the appeal I proceed on the basis that all four Appellants ought to be treated as Indian nationals or as people who can be removed to India."*

As appears from what we have stated above, in tandem with what follows, this was a misconception.

Upper Tribunal Error of Law Decision

9. The Upper Tribunal ("UT") concluded that there was no error of law afflicting the decision of the FtT and dismissed the appeal accordingly. Unlike the FtT, the UT was alert to the family separation issue noted in [7] above. However, its decision did not really engage with the single facet of separation which was then acknowledged, namely that the mother would have to be removed to Pakistan. Nor did the decision grapple with the proposed removal destination of the second and third children.

Decision of the Court of Appeal

10. On further appeal the Secretary of State ultimately conceded that the decision of the UT was unsustainable in law. The Statement of Reasons accompanying the order of the Court of Appeal dated 02 June 2016 records, in material part:

> *"… The decision of the Upper Tribunal is flawed to the extent that it did not fully consider the question of the immigration law of India."*

The court ordered that the appeal be remitted to a different constitution of the UT, with no findings of fact preserved.

Our Decision

11. The framework of the exercise which we now undertake has been established by the decision making and litigation history which we have rehearsed. We highlight in particular [4] and [7] above. While two of the hallmarks of this appeal are the voluminous documentary evidence and the lengthy submissions of the two sides, we have disentangled from the bulk a single and fundamental question: will it be reasonably possible for the

long established family life of these five Appellants to be maintained, or re-established, in the wake of the removal action which the Secretary of State is proposing to take? The answer to this question, in turn, provides the key to our resolution of the issues arising under Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act").

12. The answer to the central question formulated above turns not on United Kingdom law. It is, rather, dependent upon the material provisions of the domestic laws of a foreign state, namely India: see [16] *infra.*

13. It is unfortunate for the Appellants that at this advanced stage of their journey through the English legal system they no longer have legal representation. They explained to us that they could no longer afford it. It is clear from the various materials assembled that they were well served by their former legal representatives. Notwithstanding this handicap the mother and father acquitted themselves admirably, in both the compilation of documentary evidence and the crystallisation of certain issues at the hearing.

14. Given the elongated history noted above it was a matter of some little surprise that the Secretary of State's representative still did not have full and conclusive answers to certain important questions relating to the domestic laws of India and Pakistan. Mr Singh, very candidly, was driven to withdraw part of his written submission in consequence. We received no expert evidence on the laws of either of the foreign states concerned. Ultimately, both sides found themselves formulating arguments in relation to the meaning of the available evidence of the two legal systems under scrutiny which we shall address below.

15. We preface our evaluation of the evidence with the following. As noted, it is common case that the Secretary of State's removal plans will fragment this family. It will result in the father and eldest daughter being removed to India, while the mother and the other two children are removed to Pakistan. The Appellants' case is that this will infringe their rights, individually and collectively, under Article 8 ECHR and, further, will be in contravention of section 55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act"). The central focus of this case has become whether, in the post-removal scenario

outlined above, the mother and the two younger children will be able to reunite with the father and oldest child in India. This question, in turn, has resulted in attention being focused on Indian immigration laws.

16. It is long settled that in United Kingdom legal proceedings, foreign law is capable of being proved by the evidence of a person possessing demonstrated expert credentials. This, in our experience, is the norm in a broad range of litigation fields. It is illustrated in the recently reported decision of the Upper Tribunal in R (Hassan and Karada) (Returns to Malta – Dublin Regulation) IJR [2016] UKUT 00452 (IAC). Evidence presented in this way need not necessarily be *viva voce*. Rather, an expert's report, satisfactory in both form and content, can be acceptable. The burden of proof rests on the party relying upon the relevant foreign law. Any question of foreign law is one of fact. Judicial notice of foreign law is rarely appropriate. The general principles are rehearsed in Halsbury's Laws of England (2015), Volume 12 (2015) at [746].

17. The Tribunal has received no expert evidence of the immigration laws of India. There is not, however, an outright dearth of evidence of such laws. Two separate pieces of documentary evidence fall to be considered.

18. On behalf of the Secretary of State Mr Singh brought to our attention a document which, on its face, was generated by an unidentified unit of the Home Office entitled "Response to Country of Origin Information (COI) Request", dated 06 October 2016. We shall assume that the request was made by the Home Office Presenting Officer's Unit for the purpose of this appeal, in the wake of the Court of Appeal Order. This document rehearses the questions posed. These included the following key question:

> "*In particular, can a Pakistani male married to an Indian female with children obtain a spousal visa?*"

Regrettably, but unassailably, this question was fundamentally misconceived: see [4] above. For this reason alone we must treat with caution and scrutinise with particular care the text which follows.

19. The "Response" identifies as its source a document which we shall consider in [20] – [21] below. Within this section it is stated that Pakistani women married to Indian nationals "*… would initially travel to India on a short term entry visa or tourist visa*". As we shall explain, we find nothing in the second document supporting or confirming this assertion. The remainder of the document is correctly described as vague and non-specific, exemplified by unparticularised phrases such as "*Visa restrictions*" and "*Indian visas*". Furthermore, we note that the document contains a species of disclaimer:

> "*The Indian High Commission in London may have to be approached for clarification on the above*".

There is no evidence that this step was taken. Finally, it is abundantly clear that the author of the Home Office document professes no expertise in Indian immigration laws.

20. The document, to which the unidentified Home Office official was referring, on its face, emanates from the Indian Ministry of Home Affairs. It is endorsed with the words "Updated as on 16th September 2014". It appears to be an instrument of guidance to State Government Officials and others processing visa applications. The document is unsigned and its author undisclosed. There is no indication that the author professes any degree of expertise in Indian immigration laws. Furthermore, the document does not reproduce any of the relevant laws. Rather, it takes the form of an analysis, or summary, of unidentified source material.

21. The aforementioned document, giving its words their ordinary and natural meaning, invites the following analysis:

    (i) The section (paragraph 2) relating to temporary extensions of visas does not support the Home Office assertion (*supra*) that the mother of this family could "*… travel to India on a short term entry visa or tourist visa*". Furthermore, both documents are silent as regards the two younger children.

    (ii) The first section dealing with tourist visas (paragraph 7) is of no application to this family as it is concerned with "*re-entry permission*".

    (iii) The remaining "tourist visa" sections (paragraphs 8 and 9) are plainly of no application to this family.

(iv) The first of two sections relating to "Long Term Visa (Pakistani nationals)" (paragraph 47) is inapplicable as it is concerned with the "*extension*" of long term visas. We give the word "*extension*" its ordinary and natural meaning. We do not overlook that in the outworkings of this discrete category the language used is "*grant*". However, this inconsistency simply highlights one of the significant difficulties posed by this documentary evidence. Furthermore, the sub-category of "PAK (*sic*) women married to Indian nationals and staying in India" would not apply to the mother of the family as she will be "*staying in*" Pakistan following the implementation of the Secretary of State's removal directions.

(v) The second discrete section entitled "Long Term Visa (Pakistan nationals)" (paragraph 48) is clearly of no application as it relates to Pakistan nationals "*staying in*" India on a long term visa and is designed to permit employment and the admission of their children to education.

22. We pose again the main question: what is likely to become of the Appellants in the event of the Secretary of State removing them from the United Kingdom in the manner proposed? The Secretary of State, on whom no legal burden of proof rests, has sought to persuade us that the effect of Indian immigration laws is that the family will, at some unspecified date, be reunited on Indian soil. In our estimation the evidence which has been adduced in support of this contention falls manifestly short of demonstrating that Indian law is to this effect. As our analysis above demonstrates, this evidence suffers from a series of flaws and raises more questions than it answers. It leaves us quite unable to conclude with any reasonable degree of confidence that family reunification will, ultimately, be achieved.

23. It follows that the cornerstone of the Secretary of State's case crumbles and collapses. The main pillar upon which the Secretary of State has sought to justify the impugned removal decisions has been shown to be devoid of foundation. The expectation on which the Secretary of State's decision was based is misconceived.

24. We apply the above analysis and conclusions to the legal framework in the following way. These are pure Article 8 ECHR claims. None of them satisfies the requirements of the Immigration Rules. Thus Article 8 must be viewed through a broader lens in this case. In conducting this exercise, some of the criteria identified in the Rules provide guidance:

(i) The first two Appellants are in a genuine marital relationship.

(ii) They have genuine and subsisting parental relationships with their children.

(iii) All three children of the family have lived their entire lives in the United Kingdom.

(iv) It would not be reasonable to expect any of the children to leave the United Kingdom given the fragmentation of the family unit which this will entail and the highly uncertain prospects of family reunification.

(v) There are obvious obstacles to family reunification. We have identified no evidence that these are surmountable.

25. Alert to our obligation to give effect to the applicable provisions at Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), we do so in the following way:

(i) We begin by acknowledging the public interest underpinning the maintenance of effective immigration controls: section 117B(1).

(ii) The Appellants demonstrated to us that they have an excellent command of the English language: section 117B(2); furthermore, this has never been a contentious issue.

(iii) There is no evidence that the Appellants are not financially independent and this too has never been a contentious issue: section 117B(3).

(iv) The "little weight" provisions of section 117B(4) and (5) are acknowledged and, succinctly, operate to the detriment of the Appellants in the overall proportionality balancing exercise.

(v) As regards section 117B(6), the oldest child of the family is a "qualifying child" by virtue of having lived in the United Kingdom for a continuous period exceeding seven years. For the reasons given above it would, plainly, not be reasonable to expose this child to all of the imponderables and adverse consequences above which her enforced removal from the United Kingdom would entail.

26. Finally, we turn our attention to section 55 of the 2009 Act. The best interests of the third, fourth and fifth Appellants rank as a primary consideration. Having regard to our analysis and conclusions above, the assessment that their best interests will not be promoted by the enforced removal of all five Appellants from the United Kingdom and ensuing family separation follows inexorably. There is an inextricable link between the best interests of these children and the perpetuation of the family unit. We have found that the implementation of the Secretary of State's removal decisions will give rise to fragmentation of the family unit with no identifiable prospect of re-establishment, or family reunification.

27. It follows inexorably from all of the above that this appeal succeeds. We remake the decision of the FtT accordingly.

Notice of Decision

These appeals are allowed under Article 8 ECHR and Section 55 of the 2009 Act.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Date: 19 April 2017