



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/07470/2015

THE IMMIGRATION ACTS

Heard at Field House

On 19 April 2016

**Decision &
Promulgated**

On 28 April 2016

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**MUSTAFA ALTINISIK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Mr A Moksud, Legal Representative from First Global Immigration

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State (hereafter the Respondent, as she was at first instance) against the decision of First-tier Tribunal Judge D A Pears (the judge), promulgated on 29 September 2015, in which he allowed the appeal of Mr Altinisik (now once again the Appellant). The appeal to the First-tier Tribunal was against the Respondent's decision of

10 February 2015, refusing to grant him leave to remain on Article 8 grounds and to remove him from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

2. The basis of the Appellant's case before the First-tier Tribunal was that he had a genuine and subsisting relationship with his son H, a British citizen. The Appellant had been married to H's mother, also a British citizen. Unfortunately the relationship had broken down and the couple had divorced. The Appellant asserted that he had an ongoing relationship with H, was seeking to have further contact with him, and that this was sufficient to found a case under Article 8.

The judge's decision

3. At paragraph 3 of his decision the judge makes it clear that in his view the only issue in dispute in the context of the Respondent's refusal letter was the requirement under Appendix FM E-LTRPT.2.4(b). This particular provision stipulates that: "the applicant must provide evidence that they are taking and intend to continue to take an active role in a child's upbringing". Having set out the evidence provided by the Appellant at paragraphs 7 to 12, the judge goes on to find that the Appellant's evidence was credible. On the basis of that evidence, in particular Orders from the Wakefield County Court by District Judge Lynch, the judge concluded that the Appellant was entirely genuine about pursuing contact with his son H, and that ultimately he was taking and intended to take in the future an active role in his son's upbringing. Therefore E-LTRPT.2.4(b) was satisfied. Given this the judge goes on to allow the appeal under, as he put it, "Appendix FM of the Immigration Rules".

The grounds of appeal and grant of permission

4. The concise grounds of appeal assert that the judge erred by failing to consider the particular requirements of EX.1 of Appendix FM. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 17 March 2016.

The hearing before me

5. Ms Fijiwala relied on the grounds of appeal. She submitted that it was incumbent upon him to have done so notwithstanding his favourable finding on the eligibility requirement of Appendix FM mentioned previously. There had been no concession on the EX.1 point by the Presenting Officer at the First-tier Tribunal hearing.

6. For the Appellant Mr Moksud submitted that as the Presenting Officer had not raised any particular issues about the application of EX.1 at the hearing, the judge had been entitled to simply allow the appeal under the Immigration Rules without making express reference to EX.1.

Decision on error of law

7. I find that the judge made a material error of law in this case.
8. Whilst I have some sympathy with his approach to the appeal before him, given that the Presenting Officer does not seem to have made any, or any substantial, submissions on the requirements of EX.1, nonetheless these requirements fell to be decided by the judge on appeal. Having regard to the Respondent's refusal letter it is apparent that she had taken the view that because the Appellant did not satisfy E-LTRPT.2.4(b), EX.1 could not apply. Therefore the substance of EX.1 had not been considered at all by the Respondent. In light of the decision in Sabir (Appendix FM - EX.1 not freestanding) [2014] UKUT 63 (IAC) the Respondent had adopted a correct approach in this regard.
9. Once the judge found in the Appellant's favour on the eligibility requirement, he should, indeed was bound to, have gone on and considered all the requirements under EX.1. His failure to do so was clearly material given that those requirements must be met in order for an Appellant to succeed under the Rules.
10. In light of this material error of law I set aside the judge's decision.

Re-making the decision

11. Both representatives were agreed that I could and should re-make the decision on the evidence before me.
12. For her part Ms Fijiwala stated that she had no submissions to make on the application of EX.1 in the circumstances of this case.
13. Having considered the evidence as a whole, the findings of the judge, and Ms Fijiwala's position before me I find that the Appellant satisfies all of the relevant requirements under the parent route of Appendix FM.
14. There has never been any issue in respect of the suitability requirements. In terms of the eligibility requirements, the only live issue had been that referred to previously in my decision. The judge found in the Appellant's favour on this issue. That finding has not been challenged and is therefore preserved.
15. In respect of EX.1(a), on the unchallenged evidence as a whole (in particular pages 9-64 of the Appellant's bundle) I find that the Appellant has had and continues to have a genuine and subsisting parental

relationship with his son H. He has sought, been granted, and maintained contact with H, albeit limited by the constraints of the Contact Orders which appear in the Appellant's bundle (pages 9-11). He is exercising parental contact rights and his relationship with H in my view clearly falls within the ambit of a "parental relationship".

16. Moving on to the second requirement, H is a British citizen.
17. Finally, I address the question of whether it would be reasonable for H to leave the United Kingdom. H normally resides with his mother, the Appellant's now ex-wife. There has never been any suggestion that she would, or could reasonably be expected to move to Turkey. H is clearly not going to be separated from his mother. Given this state of affairs it would clearly be unreasonable (indeed, as matters stand in respect of residency, it would be unlawful) for H to leave the United Kingdom and go and live with the Appellant in Turkey. It seems to me as though there could be no other answer to this final question.
18. In light of the foregoing, all the requirements of Appendix FM having been satisfied, the Appellant succeeds under the Rules and the appeal is allowed on this basis.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal under the Immigration Rules.

No anonymity direction is made.

Signed

Date: 27 April 2016

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 27 April 2016

Deputy Upper Tribunal Judge Norton-Taylor