



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

Appeal Number: HU/06296/2016

THE IMMIGRATION ACTS

Heard at Manchester

On 3 July 2017

**Decision &
Promulgated
On 10 July 2017**

Reasons

Before

Deputy Upper Tribunal Judge Pickup

Between

**Fayyaz Muhammad
[No anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr M Moksud, instructed by IAS

For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Gladstone promulgated 1.12.16, dismissing his appeal against the decision of the Secretary of State, dated 18.2.16, to refuse his application for LTR on family and private life grounds. The Judge heard the appeal on 18.11.16.

2. First-tier Tribunal Judge Nightingale granted permission to appeal on 11.5.17.
3. Thus the matter came before me on 3.7.17 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons summarised below I found such error of law in the making of the decision of the First-tier Tribunal such that the decision of the First-tier Tribunal should be set aside.
5. The grounds argue that the judge's finding that there was no family life between the appellant and his partner, with whom he had undergone an Islamic marriage, and his step-children is unsustainable on the evidence. It is also submitted that the judge erred in finding it was reasonable to expect a British citizen child to leave the UK, following SF & Ors.
6. It is clear from [77] of the decision that the judge accepted that the appellant is part of the household and assists in the running of the household in the various ways described in the evidence. As set out in the judge's summary of the evidence between [57] and [60] of the decision, it was asserted that the appellant took the children to activities, attended parents' evenings, and attended to the household chores whilst his partner was out at work.
7. It was clear that the appellant could not meet the requirements of the Rules and relied only on article 8 ECHR at the appeal hearing. The appellant was in a relationship with RR. They were not married and had not cohabited for a period of two years. In any event, RR did not have settled status in the UK, but had a pending application for LTR as a parent of a British citizen child.
8. In considering [74], [79] and [83] of the decision, the judge appears to have been of the view that because the period of cohabitation and involvement in the lives of the children was less than one year, it cannot amount to family life, within or without the Rules.
9. Whilst it would be a period too short to meet the two-year minimum cohabitation requirement of Appendix FM, it is not the case that there can be no family life in a relationship of less than 12 months. That is an error of law, one fatal to the sustainability of the other findings. On the evidence accepted by the judge there must be family life, but account must be taken as to the duration of that family life in any assessment.
10. The decision is also flawed in consideration of s117B(6) of the 2002 Act. The judge may have been hampered by inadequate evidence in relation to the children and was unable to resolve whether the child not a British citizen was nevertheless a qualifying child. However, the judge doubted whether the appellant had a genuine and subsisting relationship with the

children, but referenced her earlier findings in justification, including that he has only been a member of the household for less than a year. Once again, that is an error of law. There is no reason why a period of less than 12 months disqualifies a person from having a genuine and subsisting relationship with the children, at least one of whom was a qualifying child.

11. Complaint is also made that the judge erred in finding at [87] that it would be reasonable to expect the children, including a British citizen child, to leave the UK. The Secretary of State's extant policy from 2015 is that it is not reasonable to expect a British citizen child to leave the UK and consideration has to be given to whether removal of a parent would force that child to also leave the UK. The policy additionally provides that without cogent grounds, such as a very poor immigration history, it will not require the separation of parents of a British citizen child.
12. The issue of reasonableness of expecting a qualifying child to leave the UK has also been overtaken by the Court of Appeal's decision in MA (Pakistan) [2016] EWCA Civ 705, promulgated in July 2016, in which it was held that resolving this issue required account to be taken of the conduct of the appellant and any other matters relevant to the public interest. The Court rejected the argument that the best interests of the child resolves the reasonableness issue, and stated that there was "nothing intrinsically illogical in the notion that whilst the child's best interests are for him or her to stay, it is not unreasonable to expect him or her to go. That is so even if the reasonableness test should be applied so as to exclude public interest considerations bearing upon the parents."
13. If the judge felt that she lacked the necessary information to make a best interests or reasonableness assessment, because of insufficient information about the children, it was open to the Tribunal to adjourn to enable such evidence to be submitted or adduced before making the decision, an approach endorsed in MA (Pakistan), but acknowledged as likely to be only exceptionally an error of law to fail to do so, and only if it resulted in unfairness.
14. I find that whilst an assessment of reasonableness 117B(6) in the appellant's case may not, ultimately, have been of assistance to his application for LTR, the assessment of the First-tier Tribunal was flawed and tainted by the judge's reliance on the view that a relationship of less than 12 months cannot amount to family life or a genuine and subsisting relationship with the children of the family. In the circumstances, the decision cannot stand and must be set aside to be remade.

Remittal

15. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the

heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

16. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Deputy Upper Tribunal Judge Pickup

Consequential Directions

18. The appeal is remitted to the First-tier Tribunal sitting at Manchester;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

A handwritten signature in black ink, appearing to read 'Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated