



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/02213/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 31 July 2018

On 23 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MANINDER SINGH

(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer

For the Respondent: Miss F Allen, Counsel, instructed by Talat Naveed Solicitors

**DECISION AND REASONS**

1. Although this is the Secretary of State's appeal I refer to the parties as they were before the First-tier Tribunal where Mr Singh was the appellant.
2. Mr Singh is a citizen of India born on 29 April 1980. He appealed to the First-tier Tribunal against the decision of the respondent dated 18 January 2017 to refuse his application for leave to remain in the UK under the Immigration Rules or alternatively under Article 8 outside the Immigration Rules, Appendix FM. In a decision promulgated on 23 April 2018 Judge of the First-tier Tribunal Sweet allowed the appellant's appeal.

3. The Secretary of State appeals with permission on the grounds that the First-tier Tribunal made material misdirections in the following ways:

#### **Ground 1**

The judge erred in finding that the respondent should not have refused the appellant and it was asserted that the judge erred in exercising the discretion himself whereas it was a matter for the Secretary of State whether he exercised his residual discretion (**Abdi [1996] Imm AR 148**).

#### **Ground 2**

The First-tier Tribunal treated the appellant's relationship with his stepchildren and their best interests as a 'trump card' and elevated consideration of their best interests from a primary consideration to the primary consideration; the balancing exercise was therefore flawed.

#### **Ground 3**

The judge's approach to Section 117B was flawed in that the consideration of whether it was reasonable to remove a parent must encompass all the relevant public interest factors. The consideration of the public interest test was further flawed in that the judge failed to adequately consider the appellant's integration into the UK and whether it was sufficient and outweighed the public interest. There was also no evidence before the judge to warrant his conclusion that the children's biological father was absent from their lives.

#### **Ground 4**

The judge failed to have regard to the fact that the appellant's relationship had been developed with his partner at a time when he had no legal right to be in the UK and that his wife would have been aware of this. It was reasonable to expect the appellant to return to make an entry clearance application.

#### **The Hearing**

4. Mr Tan relied on the grounds for permission to appeal and maintained in relation to ground 1 that it was not for the Tribunal to make a decision in relation to the exercise of discretion required under S-LTR4.2. He further submitted that the appellant did not volunteer the information about his deception in relation to his previous relationship no longer being subsisting and it was only when challenged in interview that he revealed this was the case.
5. In respect of ground 2 Mr Tan submitted that the best interests consideration had been conflated with the reasonableness test under Section 117B(6). In respect of grounds 3 and 4 Mr Tan submitted that he relied on the decision letter and that it was reasonable and proportionate to require the appellant to leave the UK taking into account all the factors, including the public interest in his removal, his deception and his immigration history and lack of leave, Mr Tan noting that the appellant had removal papers served on him in October 2013 which the judge noted at [12].

6. Miss Allen submitted that the second, third and fourth grounds essentially disputed the judge's decision on Article 8 outside of the Rules, which was set out at paragraph [26]. However that was to ignore the fact that the judge had allowed the decision under the Immigration Rules and that there was no reason for the judge to go on and consider the appeal outside of the Rules but that he had done so for the sake of completeness. The reference in the grounds of appeal to the exercise of discretion referred to in the respondent's residual discretion as discussed in Abdi, whereas this was a discretion set out on the face of the Rules and therefore it was open to the Tribunal to exercise that discretion.
7. Miss Allen further submitted that it was not a case, as argued by the respondent, that the judge had exercised the discretion in the appellant's favour because he had been apologetic about the deception. Rather the judge had taken into consideration all the factors. At [19] the judge looked at the appellant's immigration history and went on at [21] to look at his family history, including that that he is now in a relationship with his current wife who has two children by her previous marriage.
8. The judge accepted that they did not have any contact with their father and that they have a close relationship with the appellant "who exercised a father figure role in their upbringing." It was also accepted that the older child of the appellant's wife has autism and mental health difficulties, whilst the younger child suffers from a kidney condition, all of which the judge noted had been detailed in the medical documents contained in the bundle.
9. Miss Allen submitted that the judge was aware that there had been more than one deception and that he had this in mind. He looked at what the appellant had said at interview as to why he had practised this deception. It was submitted the judge had indicated at [24] that he had taken into account all the factors in reaching the decision that the appeal should be allowed. The judge noted, at [24], that respondent in the refusal letter had accepted that the appellant met the relationship requirements under EX.1 of Appendix FM.
10. In deciding that the respondent's discretion should be exercised differently the judge took into account specifically, at [25], the Home Office guidance in relation to Appendix FM and that:

"The decision maker should look at the nature of the suitability issues under consideration and in the context of the application as a whole and decide whether those issues are sufficiently serious to refuse on the basis of suitability (bearing in mind anything which comes within this criteria should normally or may be refused) or whether there are compelling reasons to decide that the appellant meets the suitability criteria. This will be a case specific consideration".
11. Miss Allen further submitted that having reached the decision that the appeal succeeded under the Immigration Rules, it already having been agreed as noted at [10] that the only issue in relation to the Rules was SLTR4.2. Such was not disputed in the grounds for permission to appeal or by Mr Tan before me. The judge's subsequent findings on Article 8, which he need not have made, had to be considered in light of his foregoing findings under the Immigration Rules, including the acceptance that EX.1 was met and therefore that it was not in the public interest for the appellant to be removed and the findings in respect of the children. It was her submission that the judge clearly had in his mind the reasonableness factors that had to be considered. He had in effect conducted this exercise in considering whether the discretion should be exercised differently.

## Error of Law Discussion and Conclusions

### Ground 1

12. The respondent's challenge to the judge's findings in relation to the discretion exercisable under S-LTR4.1 to 4.2 of Appendix FM is misconceived relying, as it does, on Abdi and the residual discretion, whereas SLTR4.2 relates to a discretion contained on the face of Appendix FM.
13. The correct approach where statute confers a right of appeal against a decision, as it does in this case, in the absence of express wording limiting the nature of that appeal, it must be treated as requiring the appellate body to "exercise afresh" any judgment or discretion employed in reaching the decision against which the appeal is brought (as discussed, including in Deliallisi (British citizen: deprivation appeal; Scope) [2013] UKUT 439 (IAC)) in relation specifically to the scope of appeals more generally (at paragraphs 30 to 37 of Deliallisi).
14. That being the case, much of the respondent's challenge to ground 1 must fall away, as there was no material misdirection in law, which was the foundation of the challenge. However I have gone on to consider the reasons given by the First-tier Tribunal Judge for the decision he made in relation to the exercise of that discretion. I do not agree with the respondent's analysis that it amounted merely to a consideration that the appellant was apologetic. Rather, it encompassed a full consideration of all the factors, including the appellant's deception which the judge did not minimise but took into consideration, as well as considering the position of the appellant's British citizen stepchildren.
15. Although the reasons for refusal did not accept that the appellant had parental responsibility, the judge accepted, including at [26], that the appellant had a "genuine and subsisting parental relationship with the children". The judge took into consideration that the respondent nevertheless accepted that the relationship requirements under EX.1 of Appendix FM were met and further took into consideration that the appellant's stepchildren were British citizen children, both of whom suffered from significant medical difficulties.
16. The First-tier Tribunal went on to consider the respondent's guidance in relation to Appendix FM and family life, as noted above, including that it must be considered whether there are "compelling reasons to decide that the appellant meets the suitability criteria" and that such consideration is case specific. A fair reading of the First-tier Tribunal's decision discloses that the judge was satisfied that there were compelling reasons in this case taking into account all the factors, including that the respondent accepted that the appellant met the relationship requirements under EX.1, the deception, the appellant's candid admission of the deception and the medical conditions suffered by the British citizen children (whom it was submitted had a close relationship with their stepfather).
17. The decision of the First-tier Tribunal in relation to the Immigration Rules discloses no error. In reaching this finding I take into consideration the respondent's submission, albeit at ground 3 in relation to the decision outside the Immigration Rules, that there was no evidence to warrant the conclusion that the children's biological father was absent from their lives. That is incorrect; the judge had before him the written and oral evidence of the appellant and the sponsor, as well as question 26 at page B6 of the Home Office bundle. At question 26 both the

appellant and the sponsor stated that there was no contact between the appellant's wife's children and his father or his father's family. The respondent did not dispute, either in the grounds or before me, that there had been no challenge to the factual matrix of the appeal. The judge's findings were available to him.

**Grounds 2, 3 and 4**

18. As the First-tier Tribunal's decision allowing the appeal under the Immigration Rules must stand, the challenges under grounds 2 to 4, which relate to the judge's findings under Article 8 outside the Immigration Rules, fall away. Even if I am wrong, read in its entirety the judge's decision under Article 8 is one that was open to him having regard to all the factors. Although he did not specifically set out the reasonableness exercise to be carried out under Section 117B(6), taking into account what the First-tier Tribunal said in relation to the children and the exercise of discretion under the Immigration Rules it is evident that he had in mind the relevant tests, but was satisfied that it was not reasonable to require the children to leave the UK, including because of the role that the judge accepted that the appellant played in the stepchildren's upbringing and that he accepted that there was no contact with their biological father. The children's best interests were not a 'trump card'. In reaching that decision the judge had quite properly taken into account the appellant's deception.
19. It is also relevant in the consideration of the judge's findings in respect of Article 8 that the sole reason for refusal, accepted by both parties before the First-tier Tribunal, was suitability which is not a requirement which applies to entry clearance applications. It is therefore questionable what public interest would be served by requiring the respondent to leave the UK simply to return having made an application (paragraph 51, **R (on the application of Agyarko and Ikuga) (Appellants) v the Secretary of State for the Home Department [2017] UKSC 11**).
20. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

No anonymity direction was sought or is made in this case. Although the appellant's stepchildren are minors there are no identifying features.

Signed

Date: 10 August 2018

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT**

**FEE AWARD**

No fee award application was sought or is made.

Signed

Date: 10 August 2018

Deputy Upper Tribunal Judge Hutchinson