



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

**Appeal Number: HU/06224/2017
HU/06221/2017**

THE IMMIGRATION ACTS

**Heard at Field House
On 16 November 2018**

**Decision & Reasons Promulgated
On 30 November 2018**

**Before
UPPER TRIBUNAL JUDGE FINCH**

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

Appellant

**and
DANIEL CORNICHE
MARIE MIMOSE CORNICHE**

Respondents

Representation:

For the Appellant: Mr. D. Clarke, Home Office Presenting Officer

For the Respondent: Mr. R. Megha, Campbell & Co Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondents are nationals of Mauritius. On 9 March 2017 they applied for leave to remain outside the Immigration Rules on human rights grounds. Their application was

refused on 4 May 2017 and they appealed. First-tier Tribunal Judge Herbert allowed their appeal under Article 8 of the European Convention on Human Rights in a decision promulgated on 11 May 2018. The Appellant sought permission to appeal and First-tier Tribunal Judge Lambert granted him permission to appeal on 19 September 2018.

ERROR OF LAW HEARING

2. The Home Office Presenting Officer and the Appellants' legal representative made oral submission and I have taken these into account when reaching my decision below. In particular, the Home Office Presenting Officer submitted that he was not relying on his second ground of appeal, as the Respondents lived with their children and there was no challenge to the level of their dependence. Therefore, it was not necessary to address the cases of *The Secretary of State for the Home Department v HK (Turkey)* [2010] EWCA Civ 583 and *AP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 89

ERROR OF LAW DECISION

3. Counsel for the Respondents relied upon the fact that First-tier Tribunal Judge Herbert was an experienced First-tier Tribunal Judge and submitted that he had taken into account all relevant factors.
4. He also submitted that the Respondents were entitled to leave to remain under paragraph 276ADE(1)(vi) of the Immigration Rules and that they had not conceded that this was not the case at the appeal hearing, as recorded in paragraph 14 of First-tier Tribunal Judge Herbert's decision. This had been referred to in their skeleton argument but they had not sought to cross-appeal on this basis.
5. The Respondents applied for leave to remain as adult dependent relatives or, in the alternative, on human rights grounds on 8 March 2017. Their application was refused on 4 May 2017 and it is not submitted on behalf of the Respondents that they could qualify for leave to remain under section EC-DR of Appendix FM to the Immigration Rules.
6. The core of their application was that they are dependent upon their children who are living in the United Kingdom and that they would not be able to access similar care if they were

removed to Mauritius. It is on this basis that they primarily submit that they are entitled to leave to remain outside the Immigration Rules. As submitted by the Home Office Presenting Officer, when considering whether they qualify for such leave, it is appropriate to consider the fact that provision for leave for adult dependents has been incorporated into the Immigration Rules in order to meet some of the obligations arising from Article 8 of the European Convention on Human Rights. In order to qualify for leave under this Rules they would have to show that they would be unable, even with the practical and financial help of their children, to obtain the required level of care in Mauritius because that care would not be available there or that there was nobody who could reasonably provide it or it is not affordable. Therefore, in order to qualify for leave to remain outside the Immigration Rules they need to identify other factors which would mean that refusing them leave would amount to a breach of Article 8 of the European Convention on Human Rights.

7. The Appellants' legal representative submitted that the witness statements in the Appellants' Bundle went some way to showing that this was the case and that, therefore, they were entitled to leave to remain outside the Immigration Rules. However, these statements go no further than asserting that there was no-one in Mauritius who would be able to provide them with such a high level of help and support. There was no objective or medical evidence to confirm that this was the case. It was also asserted that they would not be able to access the same quality of medical care in Mauritius but again there was no medical or objective evidence to confirm that this was the case. There was also no current diagnosis and prognosis relating to their current medical needs and no evidence that they would have to fly to India or a Gulf State or South Africa to obtain any necessary medical treatment. This was despite the Respondent asserting in his decision letter that they would be able to access appropriate medical treatment in Mauritius.
8. I was not able to base on findings on the facts contained in the Respondents' skeleton argument as this did not have the status of evidence.
9. It was not disputed that the Respondents had established a private and family life in the United Kingdom but, as the First-tier Tribunal Judge acknowledged, the issue was whether the decision to refuse them leave was proportionate for the purposes of Article 8(2) of the European Convention on Human Rights. When considering this, the First-tier Tribunal Judge

did remind himself of the contents of section 117B of the Nationality, Immigration and Asylum Act 2002.

10. In particular, in paragraph 46 of his decision, First-tier Tribunal Judge Herbert noted that little weight should be given to the private life of a person at a time when a person's immigration status is precarious. But in paragraph 47 he did not treat periods in which the Respondents had been here with limited leave to remain, as opposed to periods when he had been an overstayer, as periods in which his leave had been precarious. In paragraph 44 of *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, Lord Wilson found that "the answer to the primary question posed by the present appeal is therefore that everyone who, not being a UK citizen, is present in the UK and who has leave to remain here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5). Therefore, the First-tier Tribunal Judge erred in law in his approach to the issue of precariousness and this error also undermined the weight that he gave to the necessity of maintaining immigration control in paragraph 52 of his decision.
11. In addition, as noted by the Home Office Presenting Officer, in paragraph 44 of his decision First-tier Tribunal Judge Herbert treated the fact that the Respondents could speak English and were being financially supported by others, as a positive factor in their favour. But, as found by the Upper Tribunal in *AM (s 117B) Malawi* [2015] UKUT 0260 (IAC), these are at best neutral factors.
12. The First-tier Tribunal Judge was entitled to take into account the Respondent's past immigration history, including any applications where were or were not made by their solicitors. However, neither this nor any of the other factors relied upon met the test defined in *R (on the application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, where it was held that "exceptionality" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate".
13. First-tier Tribunal Judge Herbert did set out a number of factors, which he had taken into account for the purposes of his proportionality assessment, in paragraph 49 of his decision. However, these amounted to bare assertions and were not supported by objective evidence. The fact that the First-tier Tribunal Judge did not require the Respondents' witnesses from

giving evidence did not enhance the weight that should properly have been given to this evidence.

14. For all of these reasons I find that the decision made by First-tier Tribunal Judge Herbert contained errors of law and must be set aside.

Decision

- (1) The appeal by the Secretary of State is allowed.
- (2) The decision of First-tier Tribunal Judge Herbert is set aside.
- (3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Herbert or First-tier Tribunal Judge Lambert.

Nadine Finch

Signed

Date 16 November 2018

Upper Tribunal Judge Finch