



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16552/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2018

Decision & Reasons Promulgated
On 23 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A V V
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Vatish, Counsel, instructed by Susan Paul Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

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

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

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge R Hussain (the judge), promulgated on 15 March 2018, dismissing her appeal against the Respondent's refusal of her human rights claim, dated 20 June 2016.

2. The Appellant, a national of India, came to the United Kingdom in July 2015 as the spouse of her Sponsor, who has indefinite leave to remain in this country. Accompanying the Appellant was the couple's son, born in 2010. He too now has indefinite leave to remain. The human rights claim was made via an application on form FLR(O) on 9 April 2016. At pages 13 and 33 of that form it is expressly stated that leave to remain was being sought for purposes not covered by other forms or indeed the Rules themselves. It is accepted in the box at the bottom of page 13 of the form that the Appellant could not satisfy the financial and English language requirements of the Rules.

The judge's decision

3. The judge himself notes at [2] that the Appellant had sought leave to remain outside the context of the Rules. Having set out various aspects of the legal framework (not all of which were applicable to the appeal) the judge finds at [14] that the Appellant and Sponsor were in a genuine and subsisting relationship.
4. Although the first sentence at [15] appears to be unfinished, in view of the decision as a whole and the Respondent's refusal of the application, I would reasonably infer that the judge intended to confirm that the financial and English language requirements under Appendix FM could not be met.
5. The judge then considers paragraph EX.1(b) of Appendix FM (EX.1(a) did not apply because the couple's son was not a qualifying child). Having taken into account a number of factors including the couple's background, the time they had both spent living in India, their knowledge of the language and culture of that country, the relatively young age of their son, the fact that he had indefinite leave to remain and the good likelihood of the Sponsor being able to find employment in India, the judge concludes that there would be no insurmountable obstacles to family life being enjoyed overseas (in other words, in India).
6. The judge then set his attention to the child's best interests, citing the well-known authorities of ZH (Tanzania), EV (Philippines) and MA (Pakistan). At [20] the judge notes a number of relevant factors: the child's age; the fact that he was not a qualifying child; the fact of the indefinite leave to remain; the fact that the child has spent the majority of his own life in India and was able to speak what is described as the native language (presumably Hindi); and that he had siblings and extended family back in his country of origin. The judge concludes that it would be in the child's best interests to return to India.
7. At [21] the judge states that even if the best interests of the child lay in remaining in this country, in light of a number of factors (many of which had been stated previously, and additionally the fact that the Appellant could not speak English, the lack of financial independence, the child's fairly short period in the United Kingdom and the fact that he was not at a crucial stage of education), the judge concludes that it would not be unreasonable for the child to leave the United Kingdom together with the rest of his family.

8. At [22] the judge ultimately concludes that the decision under appeal was proportionate.
9. The appeal was duly dismissed.

The grounds of appeal and grant of permission

10. The grounds of appeal are handwritten but I am satisfied that they were settled by the Appellant's representatives. I will deal with them in due course.
11. Permission to appeal was granted by First-tier Tribunal Judge Murray on 3 May 2018. Judge Murray considered that it was arguable that the judge may not have taken account of the fact that the Sponsor and child both had indefinite leave to remain when conducting the proportionality exercise.

The hearing before me

12. At the outset Ms Vatish sought to suggest that the judge had got things wrong by failing to look at the nature of the Appellant's application properly. She indicated that the application should have been under paragraph 196 of the Rules. However, as was pointed out to her, the application form itself made it very clear that leave to remain had been sought outside the context of the Rules and it had been accepted throughout that she could not meet either the financial or English language requirements under Appendix FM.
13. Having acknowledged this, Ms Vatish submitted that the Sponsor and child had indefinite leave to remain, and this had not been properly considered. The judge had not conducted a balance of probabilities and had not applied a proportionality test.
14. Mr Kotas simply submitted that the all the findings and conclusions were open to the judge.
15. Ms Vatish did not make any substantive reply.

Decision on error of law

16. As I announced to the parties at the hearing, I conclude that there are no material errors of law in the judge's decision.
17. The judge quite clearly dealt with the appeal on the basis on which it had been put to him, namely on Article 8 with reference first to EX.1(b) under Appendix FM, and then to Article 8 outside the context of the Rules. The judge took full account of the evidence before him (and, having read that for myself, it was fairly scant). The judge correctly directed himself in law, first to the EX.1(b) issue and then to Article 8 outside the context of the Rules. The judge made more than sufficient findings on the circumstances both of the parents but also, importantly, the child.
18. All of the factors I have mentioned previously in my decision were appropriately considered. It is quite clear that the judge had well in mind that the Sponsor and child both had indefinite leave to remain. It was open to the judge to conclude that

the child's best interests in fact lay in returning to India with his parents. The judge was also fully entitled to reach an alternative conclusion that if the best interests in fact lay in the child remaining in the United Kingdom, other relevant factors in the case outweighed those best interests. In light of the child's time in this country, age, stage of education, and the absence of any particularly strong or other compelling circumstances, it was entirely open to the judge to conclude that it would be reasonable for the child to leave the United Kingdom and that, taking matters as a whole, the refusal of the human rights claim was proportionate.

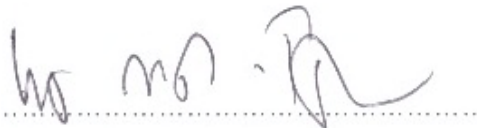
19. Referring to the grounds briefly, they are, in my view, wholly misconceived. The judge in fact made a favourable finding on the genuineness of the relationship between the Appellant and the Sponsor. The judge also accepted that they had cohabited. There is a reference in the grounds to the Sponsor working in Qatar, a reference that is simply inaccurate, as confirmed by Ms Vatish. The assertion that the judge failed to take the indefinite leave to remain into account is simply wrong.

Notice of Decision

The decision of the First-tier Tribunal does not contain errors of law.

That decision shall stand.

The Appellant's appeal to the Upper Tribunal is dismissed.

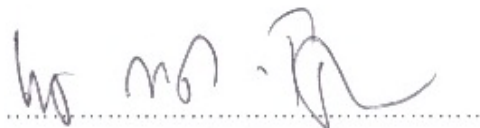


Signed

Date: 20 July 2018

Deputy Upper Tribunal Judge Norton-Taylor

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date: 20 July 2018

Deputy Upper Tribunal Judge Norton-Taylor