



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

Appeal Number: IA/01538/2016

THE IMMIGRATION ACTS

**Heard at HMCTS Employment Tribunals,
Liverpool
On 13th August 2018**

**Decision & Reasons
Promulgated
On 25th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**ARMAN [V]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Metzger QC (Counsel)

For the Respondent: Mr M Diwnycz (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Birrell, promulgated on 16th March 2018, following a hearing at Manchester on 5th March 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Armenia, and was born on 2nd February 1978. He appealed against the decision of the Respondent, dated 23rd March 2016, refusing his application for ILR as a spouse, with a British citizen by the name of [JB], which application had been refused by the Secretary of State on the basis of paragraph 287 of HC 395 and the failure of the Appellant to satisfy paragraph 322(1C), as well as the requirements of Appendix FM and paragraph 276ADE.

The Judge's Findings

3. Judge Birrell was faced with an appeal which had shifting scenarios unfolding before her. Initially the Appellant had claimed to be in a relationship with [JB]. This is how the appeal had been listed on 15th March 2017 before Judge Wedderspoon. At that hearing, the Appellant claimed no longer to be in a relationship with this lady but in a relationship with another lady by the name of [AA]. He claimed that she was not his partner at the time but he had exercised regular access to the children, who were also his children, and those of [AA]. At the appeal before Judge Birrell, the situation changed again in that the Appellant claimed that he was now living with [AA], as well as with his children, and doing so as a family unit, and had been doing that for about a month (paragraph 19). The judge heard several witnesses, most of whom she considered to be unreliable (see paragraphs 50 to 51).
4. In the background, there was also the matter of the Appellant's criminal convictions for fraud in Scotland in February 2012 where he had been sentenced to a term of eight months' imprisonment, for a first offence, which Judge Birrell observed could only have met with a custodial sentence because "this was a matter viewed as serious by the court" (paragraph 66).
5. Nevertheless, there were the children. They are twins and they are British citizens, having been born in the UK. The judge was clear that,

"The objective evidence now produced suggests that he has been involved in their life since they were born as he registered their birth and on a number of occasions has an address which is the same one given for them. I accept that he has produced photographic evidence showing that he is part of their lives although the extent of his involvement in their early years is less clear than it is now. The school is clearly familiar with him and friends and the church see him and his partner and the children as a family" (paragraph 55).
6. However, given that sufficient regard also had to be given to the Section 117B consideration in favour of immigration control, the judge ended the determination with the observation that,

“I am mindful of the fact that the children should not be punished for the actions of their parents, but I am satisfied that in this case the accumulative effect of the Appellant’s convictions taken together with the repeated dishonesty of the Appellant in his dealings with the Respondent in his various applications seriously undermined the integrity of the immigration system and thus are powerful factors that outweigh the best interests of the children” (paragraph 73).

Grounds of Application

7. In detailed and well crafted grounds of application, it was argued that the judge erred when assessing that it was not overwhelmingly in the best interests of the children to remain in the UK with both parents by failing to take into account and to give significant weight to the fact that they had lived for a continuous period of at least seven years in the UK.
8. On 29th June 2018, permission to appeal was granted on the basis that it was arguable that the judge may not have considered the best interests of the children who are British citizens and have been in the UK for seven years.

Submissions

9. At the hearing before me Mr Diwnycz, appearing as Senior Home Office Presenting Officer, on behalf of the Respondent Secretary of State, conceded that there was an error in the judge’s determination, as argued by Mr Metzger QC, Counsel for the Appellant, in that the existence of “qualifying” children meant that the Section 117B considerations could only be given priority if it was “reasonable” to do so.
10. Otherwise the children faced being separated from the Appellant, given that [AA], their mother, was a British citizen settled in the UK. Mr Metzger argued that in this case, if there was to be a concession, then it would be helpful if, on a remittal back to the Tribunal below, those matters, that had been found to be in favour of the Appellant, should be preserved intact, so that they are not to be re-visited again as a contentious set of issues, given how long this appeal had been in the system, with little resolution in sight.
11. Whilst I recognise the force of that argument, I have decided not to give a direction to this effect, because ultimately, in circumstances where the facts on the ground have been constantly changing, a decision as to whether it is proportionate or not for the Appellant to remain in the UK on the basis of his family ties with his children, must fall to be determined by a judge on a remittal.
12. Put another way, for this Tribunal to give a direction that “plays an active role in their lives” or that “the children are settled in schools, have friends and their grandparents in the UK”, this would likely have the effect of pre-

empting the decision on proportionality that is to be made by the judge following a remittal.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the judge has been clear in the finding that “the objective evidence now produced suggests that he has been involved in their life since they were born” and that there has been “photographic evidence showing that he is part of their lives” and that “the school is clearly familiar with him” (paragraph 55).
14. Second, the Respondent’s own policy, “Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b, family life (as a partner or parent) and private life: 10-year routes August 2015” (“the guidance”) is clear that “strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years” for a child in this country.
15. Third, the recent Upper Tribunal decision in **SF (guidance, post-2014 Act) Albania [2017] UKUT 120** confirmed (at paragraphs 10 to 12) interests of consistent decision making, when it noted that,

“Where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it”.

The failure of the judge below to proceed along these lines means that there has been an error of law.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I re-make the decision as follows. This matter is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Birrell, pursuant to Practice Statement 7.2(b). I give directions that this matter is to be listed for three hours at Manchester Piccadilly Hearing Centre with provision made for the hearing of four witnesses. No interpreters are required.
17. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

22nd September 2018