



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03650/2020**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
On 26 January 2022

Decision & Reasons & Reasons
On 14 February 2022

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

LAMIN GIBBA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr J MacGregor QC, instructed by Drummond Miller,
Solicitors
For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge McLaren dismissed the appellant's appeal by a decision promulgated on 25 March 2021. That decision was set aside by my decision on error of law, with directions, issued on 17 August 2021, which should be read herewith.
2. The appellant provided updating statements from himself and his son, which were deemed to be adopted as their further evidence-in-chief. There was no cross-examination. The primary facts are no longer in any significant dispute.

3. It was common ground that the starting point is in the immigration rules, appendix FM, sections S-LTR and R-LTRP (as in the respondent's decision).
4. The respondent has withdrawn the refusal of the original application in terms of S-LTR. The timing and nature of the appellant's convictions does not support the proposition that he is "a persistent offender who shows a particular disregard for the law".
5. The rules:

Section E-LTRPT: Eligibility for limited leave to remain as a parent

E-LTRPT.1.1. To qualify for limited leave to remain as a parent all of the requirements of paragraphs E-LTRPT.2.2. to 5.2. must be met.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be-

- (a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
- (b) living in the UK; and
- (c) a British Citizen, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d); or
- (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

- (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d)), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or
- (b) the parent or carer with whom the child normally lives must be-
 - (i) a British Citizen in the UK, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d).;
 - (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
 - (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

- (a) The applicant must provide evidence that they have either-
 - (i) sole parental responsibility for the child, or that the child normally lives with them; or
 - (ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and
- (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Immigration status requirement

E-LTRPT.3.1. The applicant must not be in the UK-

- (a) as a visitor; or
- (b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings;

E-LTRPT.3.2. The applicant must not be in the UK –

- (a) on immigration bail, unless:
 - (i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and
 - (ii) paragraph EX.1. applies; or
- (b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.

Financial requirements

E-LTRPT.4.1. The applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependants in the UK without recourse to public funds, unless paragraph EX.1. applies.

E-LTRPT.4.2. The applicant must provide evidence that there will be adequate accommodation in the UK, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively, unless paragraph EX.1. applies: accommodation will not be regarded as adequate if-

- (a) it is, or will be, overcrowded; or
- (b) it contravenes public health regulations.

English language requirement

...

6. The appellant has produced DNA and other further evidence since the time of the respondent's decision. It is now accepted that the appellant is the father of Miro Elias Haikonen, who had not reached 18 years of age at the date of application (but did so 3 days thereafter). Contrary to the refusal decision, I indicated that I would have no difficulty in finding that the appellant has had parental responsibility for his son; that the child had lived in the UK for 7 years preceding the application (and throughout his life); and that after separation from the child's mother, the appellant had regular contact and continued to play an active role in the child's upbringing. Mr Diwyncz did not argue against any of those findings.
7. I therefore reach a contrary view to the refusal decision (at page 3 of 11) on whether the eligibility relationship requirements in 2.2. and 2.4. above were met.
8. The refusal decision does not deal with 2.3, but it appears that would be met by the appellant's son living with his mother, who is a Finnish citizen settled in the UK.
9. The rules require *all* of 2.2. to 5.2 to be met. The decision states that 3.1 to 3.2, eligibility immigration status requirements, are not met. The appellant does not dispute that.

10. The decision does not deal with the financial requirements in 4.1 to 4.2. The evidence about the appellant’s financial position is that he does not impose directly on public funds; there is some record of working when he was able to do so; and currently he depends on accommodation and financial assistance provided by friends.
11. This issue was not explored at the hearing, but there is little evidence to show that financial requirements are or were satisfied.
12. I have not set out the English language requirement. It may be taken as satisfied.
13. Mr MacGregor submitted that it could now be seen that the original application should have succeeded under the rules, and that this was “a weighty factor in an appeal based on human rights”; not determinative, but “a strong reason for allowing the appeal that must be weighed with the other facts in the case” - *Mostafa*, [2015] UKUT 00112.
14. The submission that the original application ought to have succeeded under the rules goes too far. It may now be considered positively in terms of suitability and of eligibility in terms of relationship, but it would not have passed the tests on immigration status and financial requirements.
15. Reference may next be made to paragraph EX.1., “Exceptions to certain eligibility requirements for leave to remain as a partner or parent”, the relevant parts of which state:

This paragraph applies if

 - (a)
 - (i) the applicant has a genuine and subsisting parental relationship with a child who-
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
 - (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; ...
16. In the respondent’s decision, the exception was found not to apply because there was no parental or genuine relationship.
17. On the evidence now, I have no difficulty in finding that the applicant had a genuine and subsisting parental relationship with his son throughout the years when his son was legally a child; his son was under the age of 18 years at the date of application, although not at the date of decision; his son was in the UK and has lived here for the 7 years to the date of application (and, in effect, throughout his life; his absence on military service in Finland may be disregarded for present purposes); and it would not be reasonable to expect his son to leave the UK. Again, the respondent does not now argue against such findings.

18. EX.1.1 is framed to cover a relationship with a child up to the age of 18. It provides no scope for extension to a decision involving a young adult.
19. I turn to GEN.3.2. of appendix FM:
- ... the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of ... leave ... to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant ... [or] a relevant child ... whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.
20. The appellant's son is not "a relevant child" within the meaning of this provision.
21. Mr MacGregor sought a finding that family life for article 8 purposes continues to exist between the appellant and his son since his son became legally an adult. As a generality, article 8 protects core relationships including those between parents and minor children, but not relationships between parents and legally adult children. I was referred to the leading authorities. There was no difference between the parties on the law. In the end, each case depends on its own circumstances.
22. Father and son have not lived together for some years, but they maintain regular contact. The appellant's son continues to live with his mother. He is a student and works part-time. He has not "flown the nest" or finally crossed the line into independent adult life. That is not a "bright line"; but Mr MacGregor accepted that it will be crossed sometime.
23. Mr MacGregor submitted that the appellant could still be seen as playing a part in his son's "upbringing", but I consider that in ordinary usage, on the evidence, that stage has passed. There is an aspect of keeping the appellant's son in touch with a distinct side of his cultural heritage. It is doubtful whether their interaction is any more than is common between a father and a recently adult child. On the now uncontested evidence, however, little has changed since the 18th birthday of the appellant's son.
24. I find that as at the date of the hearing before me the evidence tips (although only just) in favour of a finding that the relationship between father and son remains one of family life within the core meaning of article 8.
25. The continued existence of family life in the above sense does not have the effect that the appellant's son is to be treated as a child for purposes of the rules.
26. The tribunal must take account under section 117B of the 2002 Act of "public interest considerations applicable in all cases":
- (1) The maintenance of effective immigration controls is in the public interest.
 - (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and

- (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to—
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

27. Taking account accordingly:

The generality of sub-section (1) tends against the appellant because (a) he cannot bring himself within the terms of the rules and (b) his immigration history, while not of the worst, is adverse. He has remained without leave for almost 5 years prior to the application leading to these proceedings.

Sub-section (2), on ability to speak English, is neutral.

Sub-section (3) tends against the appellant. There is little to show that he is likely to become a financial net contributor. He has significant long-term issues with alcohol abuse and, to a lesser extent, with drug abuse, which tend to the contrary.

Applying sub-sections (4) and (5), the appellant's private life (as distinct from family life) carries little weight. It has not been argued that his case might succeed on any feature apart from his relationship with his son.

Sub-section (6) does not assist the appellant, because although he has an ongoing family relationship, his son is not "a qualifying child".

- 28. The limited extent to which the appellant's position might in the past have met the requirements of the rules has some relevance; but it was common ground that the decision of the UT had ultimately to be based on circumstances at the date of the hearing.
- 29. The scheme of statute and the rules is that consideration of family life between parent and child, and of the best interests of the child, ends with legal childhood.

30. No matter arises for consideration outside the rules which is not built into the rules, apart from family life between father and son not having ended abruptly on his son's 18th birthday appellant. That does not mean that the concepts of best interests and upbringing apply as if the appellant's son has in no way emerged socially from childhood. Although he still lives with his mother, he has been to Finland to perform military service, he is in tertiary education, he works part-time, and he contemplates finding his own accommodation. He is no more (and possibly less) child-like than the average young adult.
31. As Mr MacGregor emphasised, the article 8 rights of both father and son are in play. Essentially, this consists of the sincere and deeply felt wish of both to continue their contact as it has existed in recent years.
32. Most of that contact has taken place while they are physically apart. That is due not only to the pandemic, but to father and son respectively living in Edinburgh and in London. Such contact is not the equivalent of physical proximity, but the case law does not require it to be left entirely out of account that their remote communication - by telephone, text, video - may continue after the appellant leaves the UK. The respondent's decision does not interfere with those forms of their relationship.
33. The extent of the interference is that occasional direct contact will cease, at least for the near future. That change which will be keenly felt on both sides.
34. In the longer term, any application by the appellant to enter the UK again will be assessed on its own merits. His immigration history may be against him (although future compliance would be in his favour). His son may not at the moment have the means to visit him in Gambia, and thus to increase his familiarity with that aspect of his identity, but flights are frequent, at a cost which makes that a realistic future possibility.
35. The case for the appellant has been thoroughly and skilfully presented and has "moved the dial" quite a distance in his favour from findings of the FtT which were unjustifiably negative. However, I am unable to uphold the final submission that the decision of the respondent is "monstrously disproportionate" to the interference with the article 8 rights of the appellant and his son. The consequences are not significantly greater than in any case where the parent of a young adult has no ongoing right to remain in the UK. The interference does not amount to "exceptional circumstances" with "unjustifiably harsh" consequences. I find that the consequences are no more than proportionate.
36. The decision of the FtT has been set aside. The decision substituted is that the appeal, as originally brought to the FtT, is dismissed.
37. No anonymity direction has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

10 February 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is **“sent”** is that appearing on the covering letter or covering email.