



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

Appeal Number: IA/28644/2014

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

**Decision given immediately following
hearing
On 10 June 2016**

On 12 July 2016

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SARFAZ ABDUL UGHTRATDAR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant (Secretary of State): Mr T Wilding, Home Office Presenting Officer

For the Respondent (Mr Ughratdar): Mr A Miah, Counsel, instructed by M A Consultants (Blackburn)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the determination of First-tier Tribunal Judge Dickinson whereby he allowed Mr Ughratdar's appeal against the Secretary of State's decision made on 23 June 2014 refusing him leave to remain in the United Kingdom as a spouse. For ease of convenience, I shall throughout this determination refer to Mr Ughratdar who was the original appellant as "the claimant" and to the Secretary of State, who was the original respondent, as "the Secretary of State".
2. The background can be summarised briefly. The Claimant has been in this country unlawfully but on 11 January 2014 he was married to a British citizen who is of Indian origin. Although as at the date of the decision of the First-tier Tribunal being appealed against the couple had no children subsequently a child, a girl, was born on 15 September 2014. Because the child was born to a British citizen mother the child is herself a British citizen.
3. The grounds of refusal were made on two bases (as I have indicated at a time when there was no child). The first was that under the Rules the claimant (who I note in passing speaks excellent English) had exercised deception in obtaining his English language certificate and therefore failed under suitability requirements. The second was that it would not be unreasonable to require the child to go to India with his father who is an Indian citizen and mother who is of Indian origin.
4. As already noted, the appellant's appeal was allowed by Judge Dickinson outside the Rules on Article 8 grounds. It should be noted that in the course of her decision she indicated that the Secretary of State had failed to demonstrate that the original decision was justified on the basis that the appellant had been guilty of deception in respect of his English language test certificate because there was no evidence to this effect before him as at the date of hearing. It is accepted by Mr Wilding that the Secretary of State had failed to demonstrate that the original decision was justified on the basis that the appellant had been guilty of deception in respect of his English language test certificate because there had been no evidence to this effect before the judge. As at today's date it is accepted by Mr Wilding that the Secretary of State would still be unable to establish this aspect of the refusal and so this appeal must be considered on the basis that the Secretary of State no longer maintains this ground.
5. This appeal came before Deputy Upper Tribunal Judge Baird sitting at Manchester on 21 April 2016 and in a Decision and Reasons dated 2 May 2016 and probably promulgated on 9 May 2016 (although on the decision itself it is said to have been promulgated on 9 April 2016 which obviously cannot be correct) she found that there was a material error of law in Judge Dickinson's decision which she accordingly set aside. In the course of this decision she stated that none of the findings of fact would be retained and so the decision has to be made afresh.
6. In the ordinary course of events Judge Baird would have gone on to reconsider the matter herself but for logistical reasons this has not been

possible and a transfer order has been made in consequence of which the appeal is now before me for reconsideration, an error of law having been found.

7. The circumstances have changed as I have indicated above in that the appellant and his British citizen wife now have a daughter who is also a British citizen. As it is accepted that the respondent is not in a position to maintain any suitability objections I have to consider the appeal first of all on the basis that the appellant is entitled to remain under the Rules having regard to what is set out in EX.1 of Appendix FM. It is accepted on behalf of the Secretary of State that in order to succeed in the circumstances of this case under EX.1 the appellant would have to establish one of two sets of circumstances.
8. The first is that he has a qualifying relationship with a qualified partner, which he does, but in order to succeed on this ground he would have also have to establish that there were insurmountable obstacles to his family life continuing outside the UK.
9. The second basis upon which he can succeed under EX.1 is if he has a genuine and subsisting parental relationship with a qualifying child which it is accepted this child is (because she is a British citizen) and it would not be reasonable for that child to leave the UK.
10. Having considered the Home Office Guidance set out in the IDIs Mr Wilding concedes that he cannot advance a case that it would be reasonable for a British citizen child to leave the UK. The position might have been different had he been able to argue because suitability requirements were not met that the appellant could be required to leave the country without his child, but that is not the case here and the IDIs make it clear that an advocate appearing on behalf of the Secretary of State should not argue that it would be reasonable for a British citizen, in this case the child, to leave the UK.
11. In these circumstances and Mr Wilding accepts this must be correct, it is apparent that this claimant meets the requirements of Appendix FM with regard to EX.1 and accordingly I have no alternative but to allow the appeal on this basis, which I now do.

Decision

The decision of the First-tier Tribunal having been set aside as containing a material error of law I now remake the decision as follows:

The claimant's appeal is allowed, under the Immigration Rules.

Signed:

A handwritten signature in black ink, reading "Ken Craig", on a light blue background.

Upper Tribunal Judge Craig
2016

Date: 29 June

Fee Award

This appeal has been allowed because the appellant had a child who is a British citizen after the date of the decision which was appealed against. In these circumstances it cannot be said that there was any error in the Secretary of State's decision at the date it was made or indeed at the time in which this appeal was launched. In these circumstances I do not consider it appropriate to make a fee award.

Signed:

A handwritten signature in black ink, reading "Ken Craig", on a light blue background.

Upper Tribunal Judge Craig

Date: 29 June 2016