



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

Appeal Number: HU/10037/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 10 October 2017**

**Decision & Reasons  
Promulgated**

**On 06 November 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**RAUL ANDRES LUNA ZAMBRANO  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Fouladvand of MAAS

For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Greasley promulgated on 29 December 2016.
2. The Appellant is a citizen of Colombia born on 15 November 1976. He was issued with a student visitor entry clearance on 1 September 2014, pursuant to which he entered the UK on 10 September 2014. On 26 July 2015 he made a human rights application for leave to remain. The application was refused on 21 October 2015 for reasons set out in a

'reasons for refusal' letter ('RFRL') of that date. The Appellant appealed to the IAC against the decision.

3. Prior to his entry to the United Kingdom the Appellant had developed a relationship with Ms Yude Portilla Mideros, a British citizen of Colombian origin, born on 25 April 1976. Although Ms Mideros had been living in the UK for some years the relationship developed, I am told, during visits to Colombia; it commenced in July 2011.
4. Also prior to the Appellant's entry to the UK, Ms Mideros became pregnant with the Appellant's child. The child was delivered in the UK on 27 October 2014 - just under two months after the Appellant's own entry to the UK. The child is a British citizen presently approaching her third birthday. Ms Mideros has another child from a previous relationship, a son born on 8 January 2010 who is also a British citizen. I was told that there is no contact between Ms Mideros' firstborn child and his natural father.
5. The Appellant's application was made by way of application form FLR(FP), signed by the Appellant on 24 July 2015 and submitted with a covering letter from his advisers. The application sought leave to remain through the so-called '10 year partner route': in this context it may be noted that the financial circumstances of the family were indicated to be that there was no income from employment but that the family was reliant upon benefits - maternity allowance, housing benefit, child benefit, council tax benefit, and child tax credit were all listed by way of sources of income, with no other source of income being declared (section 5 of the application form).
6. The Respondent refused the Appellant's application primarily on the basis that she was not satisfied that the claimed marital relationship was genuine and subsisting.
7. Further and in any event, the Respondent was not satisfied in respect of the eligibility requirements of paragraph E-LTRP.2.1 of Appendix FM of the Immigration Rules because the Appellant was present in the UK as a visitor.
8. In this latter context, whilst I note that according to the Rules a period of six months' leave is ordinarily to be granted to a student visitor, the Respondent's decision-maker herein appears to have proceeded on the premise that at the date of the Appellant's application he still had valid leave as a student visitor conferred by way of the entry clearance document that was valid until 1 August 2015. Indeed before me it was

common ground that the Appellant had leave as a student visitor at the date of his human rights application on 26 July 2015. In those circumstances paragraph E-LTRP.2.1 was appropriately invoked by the Respondent's decision-maker - and, as I have noted, no issue has been taken by the Appellant in this regard before the First-tier Tribunal or before me.

9. The Respondent also gave consideration to paragraph EX.1 of Appendix FM, but decided that the Appellant did not meet its requirements whether by reference to his relationship with Ms Mideros or in respect of his relationship with either child.
10. The Appellant appealed to the IAC. The appeal was dismissed for reasons set out in the decision of Judge Greasley.
11. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Boyes on 25 July 2017.
12. It seems to me that there is a fundamental error on the face of the decision of First-tier Tribunal Judge Greasley with regard to the ambit of the appeal. The Respondent's decision gave rise to a right of appeal limited - by reason of the amendments to the Nationality, Immigration and Asylum Act 2002 introduced by the Immigration Act 2014 - to the ground that the decision was unlawful under section 6 of the Human Rights Act 1998. The Judge appears not to have recognised this and proceeded to determine the appeal only by reference to the Immigration Rules. This may be seen in the first instance at paragraph 23 where the Judge states in terms that having considered the oral and documentary evidence "*I find that the appeal must be refused under the UK Immigration Rules*". At paragraph 30 the Judge goes on to state that he does not consider it necessary or appropriate to embark upon a consideration of the family circumstances in relation to "*classic **Razgar** principles*". The decision is concluded under the head Notice of Decision with the words "*I dismiss the appeal under the Immigration Rules*".
13. It seems to me clear that the Judge fundamentally misunderstood his jurisdiction and to that extent has failed to engage with the appeal on a proper basis. Such circumstances in themselves, it seems to me, would be enough to justify setting aside the decision of the First-tier Tribunal.
14. Notwithstanding that the Judge reached an adverse conclusion in respect of the Appellant's case under the Immigration Rules, he did make some favourable findings of fact that essentially overturned the approach of the

Respondent in the RFRL. At paragraph 23 the Judge found that the Appellant and Ms Mideros are in a genuine and subsisting marital relationship, and he also accepted that there was unchallenged DNA evidence to establish that the Appellant was the biological father of the daughter born to his partner on 27 October 2014. The Judge also accepted that the Appellant was a stepfather to his partner's son from a previous relationship. At paragraph 24 the Judge accepted that the Appellant was participating in the upbringing and development of both children, and that all four individuals lived as a family unit in the UK. At paragraph 26 the Judge accepted that both the Appellant and his wife had joint shared parental responsibility in relation to the children.

15. However, the Judge also made an adverse assessment in respect of the Appellant's immigration history. At paragraph 25 of the decision the Judge stated that "*the Appellant has an adverse immigration history in the United Kingdom*" and found "*that he has demonstrated a blatant disregard and a complete cavalier attitude to proper immigration control in the United Kingdom*". The Judge's reasons for this conclusion appeared to be those stated in the following sentence: "*He entered the United Kingdom on a visit visa as a student in September 2014 and simply overstayed.*"
16. As I have indicated above, it has seemingly been common ground throughout these proceedings that the Appellant was not an overstayer at the time that he made his application. Indeed, had he been an overstayer it would not have been open to the Respondent's decision-maker to invoke paragraph E-LTRP.2.1 of Appendix FM. The Judge appears to have disregarded the invocation of paragraph E-LTRP.2.1, and not otherwise to have engaged in the apparently agreed circumstance of the Appellant having had valid leave at the time of his application.
17. That said, it may nonetheless be the case that there is a significant issue to be explored in respect of the Appellant's immigration history by reference to his intentions when securing entry clearance and at the time of entry. It is to be recalled that he entered the United Kingdom just some two months prior to the birth of his daughter. It is not clear - and hitherto does not appear to have been the matter of any consideration or exploration - exactly what his intentions were at this time. In circumstances where his partner was seemingly entirely dependent upon benefits and there was no obvious prospect of satisfying the stringent financial requirements of the Immigration Rules, it may not be a difficult inference to draw that there must at the very least be some concern and doubt as to the *bona fides* of the Appellant's intentions in entering the UK as a student, and whether or not he intended simply to use that as a device to enter and thereafter make an application to remain notwithstanding the prohibition on switching contained in paragraph E-LTRP.2.1. As I say, this matter has not been explored and I express no

decided view on it one way or the other: suffice to say it does seem to me a matter that may in due course need some further and close scrutiny.

18. Be that as it may, on the face of it the First-tier Tribunal Judge was, in my judgment, plainly in error in characterising the Appellant as an overstayer.
19. It is equally clear that the Judge placed quite considerable reliance upon this in his overall consideration of the Appellant's case. The language of paragraph 25 is robust in its characterisation of the Appellant as somebody with "*a blatant disregard and a complete cavalier attitude*". Accordingly I find a material error of law in this regard too.
20. In my judgment there is further error in the First-tier Tribunal Judge's approach to the issue of insurmountable obstacles under paragraph EX.1.
21. So far as is material paragraph EX.1 as it relates to the circumstances of a partner is in the following terms at subparagraph (b):

*"the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen... and there are insurmountable obstacles to family life with that partner continuing outside the UK."*

The focus of that paragraph is very clearly an exploration of the ability or otherwise of an applicant to establish family life with his partner in another country.

22. However, the Judge's approach - at paragraphs 27 and 28 of the Decision - is not to consider the ability or otherwise of establishing family life together in Colombia or some third country, but rather to consider the extent of disruption to family life if the Appellant were to pursue an application for entry clearance from abroad. In my judgment that displays a misunderstanding of the meaning of paragraph EX.1.
23. For completeness, I note that complaint is also made that the Judge has not given full or close consideration to the best interests of either child with reference to the case of **ZH (Tanzania)**, and moreover that the Judge has not given any close or proper consideration to the case of **Chikwamba**. However, in the circumstances where I have already concluded that there are fundamental errors of law in the decision of the First-tier Tribunal I do not propose to explore those particular challenges.

24. In my judgment the errors are such that the decision of the First-tier Tribunal Judge must be set aside; the decision in the appeal requires to be remade. I take the view that this decision should properly be remade before the First-tier Tribunal because there are significant factual aspects of this case that have not been adequately explored. Be that as it may, it is also my judgment that the findings to which I have referred from paragraphs 23, 24 and 26 of the First-tier Tribunal in respect of the genuineness of the marital relationship and the family unit are all matters that should be preserved.
25. However, on remaking the decision the parties and the Tribunal may wish to give some further consideration to my observations in respect of the circumstances surrounding the Appellant's entry to the United Kingdom, and also to give some further consideration to the circumstances of the two children - in particular perhaps the circumstances of the older child, who has exceeded his 7<sup>th</sup> birthday, having, as I understand it, lived his entire life in the UK. However, even in this regard it may be necessary to explore something of the frequency of the Appellant's partner's visits to Colombia in the period between July 2011 and September 2014 which do not appear to have been the subject of any consideration hitherto.
26. All of these matters require careful consideration and possibly further findings of fact - and all of them must be considered within the framework of Article 8 rather than being confined, as per the First-tier Tribunal Judge, to the framework of the Immigration Rules.

### **Notice of Decision**

27. The decision of the First-tier Tribunal contained errors of law and is set aside.
28. The decision in the appeal is to be remade in the First-tier Tribunal before any Judge other than First-tier Tribunal Greasley. However, the favourable findings at paragraphs 23, 24, and 26 of the decision of Judge Greasley (referred to above) are to be preserved.
29. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: 5 November 2017

**Deputy Upper Tribunal Judge I A Lewis**