



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12171/2015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)  
On 31 August 2017

Decision & Reasons Promulgated  
On 11 September 2017

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMUEL OSKAR LINDBLOM

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer  
For the Respondent: Mr H Dieu instructed by Magrath LLP

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellant is a citizen of the United States of America who was born on 26 April 1991. He is married to a British citizen, Stefani Lindblom who was born on 22 September 1976.
3. On 14 August 2015, the appellant made an application for leave to remain based upon his private and family life in the UK. On 12 November 2015, the Secretary of State refused his application under the Immigration Rules (HC 395 as amended) and under Art 8 of the ECHR.

4. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 19 October 2016, Judge Richards-Clarke allowed the appellant's appeal under Art 8 outside the Rules.
5. The Secretary of State sought permission to appeal. On 6 March 2017, the First-tier Tribunal (Acting R J Appleyard) granted the Secretary of State permission to appeal.
6. The appellant filed a rule 24 response seeking to uphold the judge's decision.

### **The Decision**

7. Before the judge, the appellant relied upon his relationship with his British citizen wife and the fact that his close family, including his mother and father and younger brother lived in the UK on a permanent basis.
8. In her decision, Judge Richards-Clarke first concluded that the appellant could not succeed under the 'partner' rule in Appendix FM as he could not meet the requirement in para EX.1. of Appendix FM as there were not "insurmountable obstacles" to their family life continuing in the USA despite the difficulties and obstacles they would face including in their careers (see para 23).
9. Having reached that finding, the judge then went on to consider whether the appellant's claim should succeed outside the Rules under Art 8. At para 27, the judge found that there was family life between the appellant and his wife and between the appellant and his close family in the UK in the following terms:

"I must firstly satisfy myself that on a balance of probabilities, whether the Appellant has established a private and/or family life in the United Kingdom. I find that she has because on the evidence before me:

- (a) The Appellant have been a relationship with Stephanie Lindblom, a British Citizen, for around 8 years and they married in June 2015.
- (b) The relationship between the Appellant and Stephanie Lindblom is genuine and subsisting and they live together.
- (c) The Appellant's father, mother and brother all live in the United Kingdom and have been granted indefinite leave to remain. The Appellant has a close relationship with his family, particularly his younger brother."

10. Then at paras 28-30, the judge considered whether any interference with that private and family life would be proportionate. She concluded it would not be proportionate. Her reasons were as follows:

"28. The decisions are in accordance with the law as they seek to maintain immigration control. The consequences are of sufficient gravity to engage Article 8 and the question for me to consider is one of proportionality. I find that the interference with family life is not necessary or proportionate. I say so because on the evidence before me I find that given the circumstances that I have set out above this to be a case that falls for consideration outside the rules. In addition to my finding above about his family life with his wife and his parents and brother:

- (a) The Appellant is now 25 years old, he was born in the United Kingdom, spent the first 2 years of his life here and has again lived in the United Kingdom as a teenager and a young adult from the age of 16.
  - (b) The Appellant's immediate family all live in the United Kingdom and have no intention to return to USA.
  - (c) The Appellant does not have family in the USA that would be able to provide him with the support that he is provided with in the United Kingdom.
  - (d) Where the Appellant is in the United Kingdom he and his wife are now able to meet the financial requirements if the Immigration Rules. If the Appellant were to return to the USA these would not be met by his wife and so the Appellant's removal from the United Kingdom would be permanent.
29. I have taken account of the Appellant's immigration history and the maintenance of effective immigration control in the public interest by the Respondent as is set out in *s 117A-117D Nationality Immigration & Asylum Act 2002*. I find that on the evidence before me the Appellant is able to speak English, is integrated into his local community and is not a burden the taxpayer and that his relationship with his wife was not formed when his leave in the United Kingdom was precarious or unlawful.
30. I have found that Article 8 is engaged and I find that the Respondent has not discharged the burden to show that any interference with an Appellant's rights under Article 8 is justified, necessary and proportionate. Having taken all these factors into account and carried out the balancing exercise and bearing in mind the exceptional circumstances of this case, I reach the conclusion that it would be justifiable and proportionate to allow this appeal under Article 8."

## The Grounds

11. The Secretary of State's challenge is set out in para 3(a)-(f) of the Grounds as follows:

"The SSHD asserts that these findings are wholly wrong in law for the following reasons:

- a. There is no finding at all as to why one element of the A's support from his family – the financial assistance from his father {§8(b) & §10(d)} – could not continue in the US (predicated upon the basis that the A still required such support of course);
- b. The Judge provides no further detail as to why this constituted a compelling feature where the A is an adult and does not live with his parents in the UK – especially where the Judge does not appear to find family life between the A and those family members [see {§27(c)}];
- c. The Judge's understanding of precariousness is flawed as a matter of law. The Judge gives no reason at all for finding that the A's immigration history was anything other than precarious. The SSHD quotes the relevant history as taken from the RFRL:

**'It is noted that you entered the UK on a Work Permit Dependant Visa valid from 10 September 2007 to 1 August 2012. On 1 August you were granted T2 SW Dependant Visa valid until 15 August 2015. On 14 August 2015 you applied for further leave to remain on the family/private life route.'**

- d. It must be plain from the extract above that the A was always dependent upon others for his original leave to remain and had no expectation (legitimate or otherwise) that he could be settled in the UK – the absence of any consideration of this issue is manifestly unlawful to the application of s. 117B;
  - e. The Judge also clearly erred in respect of the weight given to the A’s ability to ‘meet the Rules’ at the date of the hearing {§28(d)} – this is manifestly wrong in fact and law. As is plain from the rules the A was required to have the appropriate maintenance at the **date of the application** [see for instance FM-SE (2)(a)(i)] – to find otherwise is to completely miss the underlying point of the maintenance elements of FM-SE read with Appendix FM and means that the Judge has plainly not identified a compelling feature outside of the Rules;
  - f. Additionally the Judge’s speculation about the likelihood of an entry clearance application being successful (or not) at {§28(d)} was also materially inconsistent with the binding decision of the Court in SB (Bangladeshi) v Secretary of State for the Home Department [2007] EWCA Civ 28 at {§36}.”
12. In his oral submissions, Mr Richards who represented the Secretary of State accepted that the grounds as drafted were largely misconceived and that he was in some difficulty in establishing an error of law.
  13. First, Mr Richards accepted that, contrary to what was contended in ground 3(b), at para 27(c) of the judge’s decision she had not treated the relationship between the appellant and his parents in the UK as a “compelling feature”. Rather, he accepted that in para 27(c) the judge was making a factual finding that family life existed between the appellant and his close family in the UK. Mr Richards submitted that, nevertheless, given that the appellant is 25 years of age and did not live with his parents the weight to be attached to that family life should be commensurately reduced.
  14. Secondly, Mr Richards did not seek to rely upon the judge’s reference to the appellant’s family life as having been formed whilst his leave in the UK was “precarious”. He accepted that s.117B(4) of the Nationality, Immigration and Asylum Act 2002 (the “NIA Act 2002”) only applied to family life which had been established whilst an individual was “unlawfully” in the UK. He placed no reliance on ground 3(c).
  15. Thirdly, he placed no reliance upon ground 3(d). He was unable to put forward a positive case that the fact that the appellant had no expectation that he could settle in the UK was, as the ground claimed, “manifestly unlawful to the application of s.117B”.
  16. Fourthly, as regards ground 3(e), Mr Richards accepted that in para 28(d) the judge had not stated (erroneously) that the appellant met the requirements of the Immigration Rules. He acknowledged that the judge had merely stated that the appellant was “now able to meet the financial requirements” of the Rules.
  17. Fifthly, as regards ground 3 (f), Mr Richards did not seek to argue that in para 28(d) the judge was not entitled to take into account that, if the appellant returned to the USA to seek entry clearance, he would not be able to meet the requirements of the

Rules although, as Mr Richards pointed out, the judge's use of the word "permanent" was an "odd choice of words".

18. Mr Richards did, however, place reliance upon ground 3(a) of the ground and the contention that the judge had made no finding as to whether the appellant's father would continue to provide financial assistance to him if he lived in the USA.

### Discussion

19. The Secretary of State's grounds are carefully tailored in para 3(a)-(f). It is not contended that the judge's decision was irrational. The bulk of the grounds are no longer relied upon by the Secretary of State before me. Taking each of the grounds in turn:

- (1) 3(a): As Mr Dieu, who represented the appellant, pointed out in his submissions the appellant's father had given evidence, set out at para 10(d) of the judge's decision, that he would continue to provide financial support to the appellant. The judge accepted the evidence from the appellant and his witnesses at the hearing. It is clear, therefore, that although the judge made no specific reference to that aspect of the evidence, it must have been well in her mind when she reached her findings, in particular in para 28 of her decision.
- (2) 3(b): It is clear that the judge's reference to the relationship between himself and his parents in the UK in para 27(c) of the decision is not a statement of a "compelling" circumstance but rather a finding that the closeness of the relationship amounts to family life. That is a finding which is not challenged in the grounds. The effect of the appellant's removal upon his relationship with his parents was an aspect of the positive case put forward by him and nothing in the decision leads me to conclude that the judge placed undue weight upon those relationships when considering the impact as a whole on the appellant, his wife and his family.
- (3) 3(c): Mr Richards again placed no reliance upon the judge's reference to the appellant's relationship with his wife having not been formed whilst his leave in the UK was "precarious". I accept that submission in relation to the terms of s.117B(4) of the NIA Act 2002 which only applies to such a relationship formed whilst the individual is "unlawfully" in the UK. However, the precarious nature of his leave - meaning here that his leave was temporary - did however mean that "exceptional circumstances" were required to outweigh the public interest based upon that relationship (see Jeunesse v The Netherlands (2015) 60 EHRR 17 and R (Agyarko and another) v SSHD [2017] UKSC 11 at [49]-[53]). Nevertheless, in allowing the appeal, the judge (in paras 25 and 30) sought to identify "exceptional circumstances" to outweigh the public interest. That clearly in substance was commensurate with the requirement to establish "compelling" circumstances (see Agyarko at [54]-[60]).
- (4) 3(d): Mr Richards acknowledged this ground had no coherent substance with its reference to s.117B. To the extent the ground relies upon the appellant having no expectation of remaining in the UK, there is no suggestion in the

judge's reasoning that she was other than well aware that the appellant's current leave was temporary.

- (5) 3(e): Mr Richards acknowledged that the judge had not wrongly found that the appellant met the requirements of the Immigration Rules on the basis of evidence, not at the time of application but at the time of hearing. There is no doubt that in assessing whether the appellant's removal would be disproportionate under Art 8.2 outside the Rules it was relevant to look at the appellant's financial situation including that the funds currently available equated to the level of funding required under the Rules for a couple. Providing that the judge did not, as indeed Mr Richards acknowledged she did not, wrongly equate this with succeeding under the Rules a broader assessment of financial support than is permitted under the Rules was relevant in determining proportionality (see, e.g., R (MM (Lebanon) and others) v SSHD [2017] UKSC 10 at [93]-[101] dealing with "alternative sources of funding").
- (6) 3(f): Mr Richards also placed no reliance upon this ground recognising that the judge was entitled to take into account what affect the removal would have upon the appellant and his wife including the length of any separation to which the likely success on entry clearance application was relevant.

20. As I have already indicated, the grounds do not challenge the rationality of the judge's decision. It may well be that not every judge, in carrying out the balancing exercise in respect of proportionality, would have reached the same positive finding as did Judge Richards-Clarke. Even if an irrationality challenge had been made, and it was not, although generous this was not a decision which was out with the range of decisions which a reasonable judge could reach on the evidence.
21. For those reasons, the judge did not err in law in allowing the appellant's appeal under Art 8 outside the Rules.

### Decision

22. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of an error of law. That decision, therefore, stands.
23. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb  
Judge of the Upper Tribunal

Date 8 September 2017

**TO THE RESPONDENT**  
**FEE AWARD**

Judge Richards-Clarke made a full fee award having allowed the appeal. I see no basis to reach any other conclusion in upholding her decision and dismissing the Secretary of State's appeal.

Signed

A handwritten signature in black ink that reads "Andrew Grubb". The signature is written in a cursive style and is underlined.

A Grubb  
Judge of the Upper Tribunal

Date 8 September 2017