



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

Appeal Number: IA/28870/2015

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Decision & Reasons Promulgated
Centre
On 24th April 2017**

On 19th May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR NARESH KUMAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Vencatachellum (Counsel)

For the Respondent: Mr D Mills (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Phull, promulgated on 5th September 2016, following a hearing at Birmingham, Sheldon Court on 2nd August 2016. In the determination, the

judge allowed the appeal of the Appellant, whereupon the Respondent 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 India, who was born on 9th September 1979. He appealed against the decision of the Respondent Secretary of State dated 5th August 2015 to refuse his application for leave to remain on the basis of his family and private life in the United Kingdom, such a claim being based upon his relationship with his partner, Neelam Chopra, who is present and settled in the United Kingdom.

The Appellant's Claim

3. The Appellant's claim is that Neelam has three children, two from a relationship with Mr Chopra, and a third one, Hamza Malik, a son, who was born from a relationship with a Mr Malik. The Appellant himself met Neelam Chopra in India because their fathers are friends. In India Neelam became very ill and the Appellant helped administer her medicine and helped with the oxygen tank for her breathing. After she had come to the UK they kept in touch and she asked him to visit. The Appellant entered the UK on a visitor's visa which was valid from 22nd December 2014 to 15th June 2015. He himself arrived in the UK on 22nd December 2014. Neelam herself became ill, bedridden, and had mobility problems, and the Appellant came to her assistance, making life as comfortable as possible for her, and a close relationship started amongst them. Neelam suffers from arthritis. Therefore, the Appellant helps to wash her, bathe her and administer medication to her. He prepares her breakfast, shops for her, and cleans the house. He also engages with the children, and in particular with Hamza, because the older children are independent. They cannot live together in India because Neelam is ill and needs medical treatment in the UK. He could not leave to apply for entry clearance because she could not survive without him. His claim is that they love each other dearly and he would like to stay here with her. These matters are set out in the determination of Judge Phull (see paragraphs 2 to 9).

The Judge's Findings

4. The judge heard the appeal in the absence of a Home Office Presenting Officer, such that the Appellant's evidence, and that of his sponsoring partner, Neelam, could not be tested under cross-examination. The judge went on to conclude that,

"The Appellant and Neelam are a couple, they entered a religious marriage ceremony. I accept that to all extents and purposes they consider themselves married. The Appellant lives with Neelam and her son, Hamza. I also find that in the time the Appellant has lived in the UK he has established some private life ties within the community he lives in. I therefore find on balance the Appellant enjoys a private

life and a family life with his partner and stepson sufficient to engage Article 8 ECHR” (see paragraph 30).

The judge then went on to decide that the decision of the Respondent Secretary of State was not in accordance with the law “because the Respondent’s decision fails to take account of the fact that the Appellant’s stepson is a British citizen” (paragraph 32). Consideration was given by the judge to Section 117B(6) of the Immigration Rules, and the judge concluded that “the public interest does not apply in this case because I find on balance and accept that Hamza is a British citizen and enjoys a genuine and subsisting relationship with the Appellant, and therefore the question of removal does not apply” (paragraph 34).

5. The judge went on to allow the appeal.

Grounds of Application

6. The grounds allege that the judge failed to consider the issues in dispute, failed to give adequate reasons, and failed to give reasons why compelling circumstances existed so as to make the decision of the Respondent unlawful.
7. On 9th January 2017 permission to appeal was granted by the Tribunal.

Submissions

8. At the hearing before me on 24th May 2017, Mr Mills, appearing as Senior Home Office Presenting Officer, relied upon the Grounds of Appeal. He submitted that it was unfortunate that at the hearing there was no Home Office Presenting Officer in attendance, but the refusal letter still required detailed consideration when it asserted that the relationships alleged were not accepted by the Respondent. Mr Mills directed my attention to page 10 of 2 of the refusal letter which states at the bottom of the page that,

“The nature of your claimed relationship with your partner has been considered. You have not provided any documentation to demonstrate that you are residing with Neelam Chopra. It is therefore not accepted that your relationship with your partner is genuine and subsisting”.
9. Mr Mills submitted that the basic criticism of the determination was that the judge simply reaches findings of fact without providing the reasoning process behind those findings. It is simply not possible to know how the judge concluded that the Appellant and the Sponsor were living together or that they were in a genuine and subsisting relationship. Indeed, the judge makes very little reference to the refusal letter. She does not engage with it.
10. Second, whereas it is accepted that if the child, Hamza, was a British citizen, then he would be a “qualifying child”, and whereas it is accepted that if as such, he were to have a genuine and subsisting relationship with

the Appellant, then the Home Secretary would not consider removing the Appellant back to India, all these matters needed proper determination and analysis before it could be so concluded. The judge provided no analysis and no reasoning for her decision.

11. Finally, the judge had given citations of the law which were antiquated. If one looks at paragraphs 26 to 27, there is a reference to case law that suggests that the Rules are not a complete code, but even by that stage the Court of Appeal had stated a number of times that, if one cannot fall within the Rules, then one has to show “compelling circumstances” before an appeal can be allowed. Thereafter, of course, the Supreme Court in **Agyarko [2017]** had affirmed precisely that, but even at the time of the decision of the judge, there were a whole list of Court of Appeal decisions which pointed in that direction. The failure of the judge to focus on the requirement of “compelling circumstances” suggested that she had misdirected herself.
12. For her part, Ms Vencatachellum on behalf of the Appellant, stated that if the Secretary of State was not represented by a Presenting Officer, then the Appellant should not be blamed for any shortcomings arising from the non-attendance of an advocate on behalf of the Respondent. Second, if that was the context in which Judge Phull had to make findings of fact, then that was the context, and within that context, Judge Phull had proceeded to hear the evidence of both the Appellant and the Sponsor. She did not just consider the witness statement evidence but she also herself asked a number of questions of both witnesses. This is clear at paragraphs 16 to 17 of the determination. At paragraph 16 she states, “in oral evidence Neelam said she has three children ...”. At paragraph 17 she states, “in answer to my questions, Neelam said that the Appellant takes Hamza to school ...”.
13. Before then, the judge makes it clear that, “I heard oral evidence from the Appellant and his wife ...” (paragraph 4). Having done all of this, the judge then concluded (at paragraph 18) that,

“Prior to a relationship with the Appellant she was receiving help and assistance from her daughter, Ganga. She did not receive any practical support from Social Services other than aids and adaptations such as a footstep, a chair, and a toilet seat. The Appellant does everything for her, wash and bathe her and prepares her food. She helps her to dress because she has a lot of pain in her shoulders. If she wets the bed he changes it ...” (paragraph 18).

Ms Vencatachellum submitted that these were very highly personal matters which the judge probed and heard evidence on and it demonstrates the closeness of relationships possible between two caring couple.

14. Third, insofar as consideration of Section 117B(6) is concerned, the judge did properly take this into account, and having addressed it, concluded

that “the public interest does not apply in this case because I find on balance and accept that Hamza is a British citizen and he enjoys a genuine and subsisting relationship with the Appellant” (paragraph 34).

15. Fourth, that left the question of whether the judge had misdirected herself by referring to antiquated case law. Insofar as this is concerned, if there is an error here, she submitted, it is not a material error of law because the result would have been no different, once the judge had made the findings of fact that she had. These findings were sustainable on the evidence that the judge herself had elicited from the witnesses before her.
16. In reply, Mr Mills submitted that it was of course the case, that if the judge had accepted oral evidence, then she need not rely upon any other documentary evidence or otherwise, but only provided that she gives her reason for that decision. Here the judge had simply made findings of fact without providing any reasons.

No Error of Law

17. I am satisfied that the making of the decision by the judge did not involve 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 and re-make the decision. My reasons are as follows. It is well established that the jurisdiction of this Upper Tribunal is supervisory. The words of LJ Brooke in **R (Iran) [2005] EWCA Civ 982** are instructive. Here his Lordship stated that, “it is well-known that ‘perversity’ represents a very high hurdle” (at paragraph 11). His Lordship went on to explain that, “far too often practitioners use the word ‘irrational’ or ‘perverse’ when these epithets are completely inappropriate” (at paragraph 12). I find the same to be the case here.
18. The judge in this matter was confronted with a situation where the Respondent was unrepresented. The best the judge could do in these circumstances was to raise issues with respect to the relationship and the alleged Article 8 claim directly with the witnesses. She questioned both the Appellant and the Sponsor (see paragraph 4). She found the evidence of the Appellant (set out at paragraphs 5 to 9) consistent with the evidence of the Sponsor (set out at paragraphs 10 to 18). After that she heard submissions from Ms Vencatachellum that the relationship was genuine and subsisting and one could not expect reasonably that the family would return to India because “the Sponsor and her children are British and settled in the UK, and the youngest child attends school here” (paragraph 19). The judge did not ignore the reasons set out in the refusal letter but expressly referred to them (at paragraphs 22).
19. It was then concluded, “the Appellant lives with Neelam and her son, Hamza” and that “the Appellant enjoys a private life and a family life with his partner and stepson sufficient to engage Article 8 ECHR” (paragraph 30). The judge also concluded that the decision by the Respondent was not in accordance with the law because it had failed to take into account the Appellant’s stepson as a British citizen (paragraph 32).

20. Consideration was then given to Section 117B(6) and it was held that public interest did not militate against the Appellant (paragraph 34). Mr Mills submitted that it is not clear from these conclusions if there is a parental relationship that the Appellant enjoys with his stepson. It is not clear if the Appellant is cohabiting with Neelam Chopra, as this was a contested matter in the refusal letter. All one can say is that it is plainly to be inferred from the determination taken as a whole, that the judge does find this to be the case, having heard the evidence from both parties, which was not cross-examined, before concluding that, “the Appellant lives with Neelam and her son, Hamza” (at paragraph 30).
21. That leaves the question of whether the judge had misdirected herself by stating the law in a manner which did not refer to the requirement of “compelling circumstances” before there could be a departure from the Immigration Rules. Whereas there may be substance in such a criticism, the error, such as it is, would not have led to a different result, and therefore the error cannot be a material one.
22. As Mr Mills himself accepted, once it is established that the Appellant enjoys a parental relationship with a qualifying British citizen child, namely, Hamza, the Respondent would not require the Appellant to leave the United Kingdom.

Notice of Decision

23. There is no material error of law in the original judge’s decision. The determination shall stand.
24. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

12th May 2017