



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02273/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2018

Decision & Reasons Promulgated
On 22 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JINOY PANJIKARAN JOSE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr N Alam, Legal Representative, Bridgewater Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State from the decision of First-tier Tribunal Judge Abebrese promulgated on 30 November 2017. The applicant concerned is a citizen of India, born on 10 May 1986. He entered the United Kingdom on 8 October 2009 with a valid Tier 4 Student visa which expired on 22 April 2011. On 9 April 2011 he made a combined application for leave to remain as a Tier 4 (General) Student and for a biometric residence permit. His application was refused with a right of appeal on 15 May 2012.
2. An application for leave to remain as a partner of a person settled in the United Kingdom was submitted on 21 May 2012, and was refused with no right of appeal on

20 February 2013. An appeal was submitted to the First-tier Tribunal on 6 March 2013. This appeal was rejected as invalid on 12 March 2013. A reconsideration request was received on 20 March 2013. The request was rejected on 23 April 2013. On 2 May 2013 a pre-action protocol letter was submitted. On 2 October 2013 permission to proceed with judicial review was refused. On 9 January 2014 another application for permission to proceed with judicial review was rejected. On 5 March 2014 a reconsideration request was received. The applicant was served with an IS15A, IS75 and IS76 on 6 June 2014 as an over-stayer. He made an application under Article 8 on 16 June 2014 which was refused on 22 July 2014. He was subsequently removed from the United Kingdom at the state's expense on 17 April 2015.

3. The application with which I am concerned was made to the Entry Clearance Officer in India and refused. The sponsor is the appellant's partner, Kym Baldwin, who is a British citizen and resides in Walthamstow. The judge in the First-tier Tribunal was concluded that the application was properly refused under the Immigration Rules. The judge, relying on paragraph 320 of the Immigration Rules, further concluded that general grounds of refusal applied because the applicant had overstayed by some four years and was removed at the public expense. He had a poor immigration history which I have already related having made numerous applications to the respondent for leave and for judicial review, all of which were refused.
4. The applicant has a daughter (present in the Tribunal this morning) who was born in May 2015. He and the sponsor are not married but it is not disputed that they are in a long-term, committed relationship.
5. The judge set out and applied the principles in **Razgar**, concluding that it was not proportionate on the Secretary of State's behalf to refuse entry clearance, not least because although technically the Rule could not be met, the sponsor did satisfy the financial requirements, albeit her documentation was not in order.
6. The Secretary of State's appeal is straightforward and sound. The judge failed to have regard to his own finding under paragraph 320 applied and did not factor that into his proportionality analysis. Accordingly, I set aside that decision of the First-tier Tribunal on the basis of this error of law.
7. The decision therefore falls to be remade. I rejected the submission from Mr Alam that I should remit the matter to the First-tier Tribunal. The Presidential Guidance is clear that wherever possible decisions should be retained in the Upper Tribunal and be remade expeditiously.
8. I stood the matter out for a short period to allow documentation produced by Mr Alam to be considered by Mr Tufan, and by me. I then reconvened the hearing and heard submissions from both representatives as to the appropriate disposal of this matter now that I am remaking it.
9. Mr Tufan, very fairly, points to the decision in **MM (Lebanon)** and takes the realistic view that even though the documentation was inadequate at the time the matter was considered by the Entry Clearance Officer such deficiencies have to a large measure

been made good what has provided today by Mr Alam. Mr Tufan accepts that in reality this is a case where the financial requirements would probably have been met.

10. Mr Tufan takes me to the Home Office guidance concerning British children and their best interests and to two sections of the narrative which appear at pages 76 and 77 of that document. He notes that the best interests of a child are something which must take into account but where there is a poor immigration history that is a public interest consideration which may be sufficient to outweigh the best interests of the child concerned.
11. Mr Alam's submissions are that notwithstanding the paragraph 320 determination, this is not a case of a very bad immigration history. The reason the applicant had been reluctant to leave and ultimately was removed at public expense was the understandable paternal concern of wanting to be present for the birth of his child. Mr Alam has taken me to documentation which is strongly supportive of the suggestion that at his own expense, with the assistance of a friend, the applicant had acquired an airline ticket for a date after the expected birth of his child but it was the Home Office's insistence that he return earlier which led to the repatriation being at the public expense.
12. I am required when looking at Article 8 to have regard to all relevant factors when making a proportionality assessment. I start from the premise that there is a legitimate public interest in upholding immigration control. Equally, I take into account the private and family life of the applicant, and the sponsor, and of his daughter whom I understand he has not seen save through the medium of Skype and such like. I give due regard to the position of this British child and consider her best interests under section 55 of the Nationality, Immigration and Asylum Act 2002. Her best interests are unquestionably that she be with both her parents, particularly at her very young age.
13. I have regard to the applicant's immigration history. It is certainly not good but it is far from the worst that I have come across. Paragraph 320 is a weighty, but not determinative, consideration. The child's best interests must also be weighed in the balance. Having regard to all these considerations, including the fact that in reality the financial requirements under the Immigration Rules are met, I allow the applicant's appeal under Article 8 of the European Convention on Human Rights.

Notice of Decision

- (1) The decision of the First-tier Tribunal is set aside.
- (2) The decision is remade allowing the appeal.
- (3) No anonymity direction is made.

Signed *Mark Hill*

Date 20 June 2018

Deputy Upper Tribunal Judge Hill QC