



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05262/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7th December 2018

Decision & Reasons Promulgated
On 17th December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR. HRISHIKESH
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr J. Waithe, Counsel, instructed by Okafor and Co,
Solicitors

For the respondent: Ms Z. Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has been given permission to appeal the decision of First-tier Tribunal Judge Freer who, in a decision promulgated on 19th October 2018, dismissed his appeal against the respondent's decision to refuse to grant him leave to remain based upon his family and private life under Article 8.

2. The appellant is a national of Mauritius, born on 22 April 1992. He came to the United Kingdom as a visitor on 30 April 2005. At that stage he was 13 years of age. He was then granted various leaves as his mother's dependent, she being admitted as a student nurse. She was also joined by the appellant's father and younger brother. His last leave expired on 30th of April 2009 at which stage he was 17.
3. He then made a further application on 14 October 2010. This was rejected on 23 December 2010. On 26 September 2011 he made an Article 8 application. This was refused with no right of appeal on 31 January 2012. He then made a further application for leave to remain on 26 February 2013 which again was refused was the right of appeal on 26 April 2013.
4. He made the present application on 12 May 2017. At that stage he was 25 years of age.
5. That was refused on the 7th February 2018, this time with a right of appeal. It was considered under paragraph 276 ADE and did not succeed because he did not meet the 20 year requirement as someone aged over 25 years. The respondent did not see very significant obstacles to his integration back into life in Mauritius. The respondent did not see any circumstances which would justify the grant of leave outside the rules.

The First tier Tribunal

6. First-tier Tribunal Judge Freer was told that the appellant was unmarried and continued to live with his parents and younger brother. The judge did not find any credibility issues.
7. The judge referred to taking judicial notice of life in Mauritius, stating amongst other things that English and French are widely used and that the country has a strong tourist industry. The judge referred to his parents being able to downsize if the appellant left. The judge stated this was not a situation akin to that in the decision of Kugathas v SSHD [2003] EWCA Civ 31.
8. At paragraph 38 the judge refers to the rights which can be acquired through marriage to a British national and then refers to EU rights and Brexit. The judge alludes to the fact the appellant was not allowed to work and concluded that since 2011 he had a lot of free time to study and develop skills over the Internet. The judge said that the appellant could lawfully study at a university in Mauritius and work there in his spare time.

The Upper Tribunal

9. Permission to appeal was granted on the basis it was arguable that the judge erred in his assessment of family life and in carrying out the proportionality exercise under Article 8. The judge had not made any

clear findings as to whether or not there was family life within the meaning of Article 8 between the appellant and his parents. It was arguable that the judge had introduced factors not before the tribunal, such as the situation in Mauritius.

10. Mr Waithe pointed out that the appellant had lived all his life with his parents and brother and had never lived an independent life. He submitted that the judge failed to properly assess this.
11. Ms Kiss also expressed concern about the decision. The judge did not appear to have considered the matter outside the rules. Furthermore, she expressed concern at the judge apparently going off on tangents in the decision.

Consideration

12. There is a considerable amount of case law in relation to adult relationships and the existence of family life. Mr. Waithe has provided me with a copy of the decision of Kugathas v SSHD (2003) INLR 170. In that decision the Court of Appeal said that in order to establish family life, the normal emotional ties between a mother and an adult son would not, without more, be enough it is necessary to show family life. The decision envisaged a fact-sensitive approach. The subsequent case law is summarised in Ghising (family life - adults - Gurkha policy) [2012] UKUT 160 (IAC) and again I have been provided with a copy.
13. There was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 nor is there any requirement of exceptionality. It all depended on the facts. The love and affection between an adult and his parents or siblings would not of itself justify a finding of a family life. A young adult living with his parents or siblings would normally have a family life to be respected under Article 8. All of the people in the family unit must be considered. Notably, in the present decision there is no reference to the appellant's brother.
14. The refusal letter makes limited reference to the appellant's family life. In line with this the judge's decision focuses upon his private life and the question of his reintegration into life in Mauritius. The decision records that his parents have leave until 2020. However, it is anticipated they will be making an application for indefinite leave to remain.
15. The bulk of the judge's findings at paragraph 28 to 40 are directed towards the appellant's private life. In the subsequent section headed 'Human Rights' the judge continues to focus upon his private life. The judge at paragraph 37 simply stated this was not a Kugathas situation. There is no in-depth analysis and the assessment that is made consists of generalities. Throughout, the focus is upon his

integration into his home country rather than the relationship with his parents and brother.

16. The judge has introduced points which the parties do not appear to have raised and has expressed opinions. For instance, there is a reference to the consequences of marrying a British or European national. Comments are made about Mauritius which appear to be of the judge's own making. The judge refers to considering appendix K which is a shortage occupation list. However, there is nothing to indicate this was advanced by any party. The judge comments that the appellant has had a lot of free time with which he could study. In the assessment the judge has introduced the effect of marrying a British or European national. Again, this appears to have emanated from the judge. Then, at paragraph 46 there is a reference to the possibility the appellant could benefit from section 117 B6 at some future date. I cannot see how this can possibly be relevant.
17. I find the judge has not focused upon the relevant issues. There should be an evaluation as to whether family life exists within the meaning of Article 8 between the appellant and his parents and siblings. If there is a finding of family life there is then a need to assess the proportionality of the decision. There is also a need to assess the appellant's private life which can encompass his family and then an assessment of the proportionality of the decision. In this appeal the judge has not focused upon those key issues but has digressed into his own considerations and opinions. Consequently, the decision materially errs in law and is unsafe.

Decision

The decision of First-tier Tribunal Judge Freer materially errs in law and is set aside. The matter is remitted for a de novo hearing in the First-tier Tribunal.

Francis J Farrelly

Deputy Upper Tribunal Judge

Directions.

1. Relist for a de novo hearing in the First-tier Tribunal at Taylor House excluding First-tier Tribunal Judge Freer.
2. The hearing is expected to last around an hour.
3. The appellant's representatives are to prepare an up-to-date bundle and should consider whether family life in the circumstance exists within the meaning of Article 8. They should also provide information about his likely prospects in Mauritius.
4. The respondent should provide a chronology of the appellant's immigration history since 30 April 2009 and confirm whether at any stage the appellant overstayed. It will be helpful to know why the appellant had no right of appeal in respect of some of the earlier applications and the cause for any delay
5. There is no need for an interpreter unless the appellant's representatives advise to the contrary.
6. The hearing should last around an hour.

Francis J Farrelly

Deputy Upper Tribunal Judge