



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06725/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 September 2018

Decision & Reasons Promulgated  
On 11 September 2018

Before

UPPER TRIBUNAL JUDGE FINCH

Between

GEMUNU AUGUSTUS ALLES

**Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Respondent**

**Representation**

For the Appellant:

Mr. A. I. Corban, solicitor

For the Respondent:

Ms A. Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Appellant is a national of Sri Lanka. He entered the United Kingdom on 13 January 2007 as a student. He applied for indefinite leave to remain in the United Kingdom on 12 January 2017. His application was refused on 30 May 2017. He appealed against this decision and First-tier Tribunal Judge Lawrence dismissed his appeal in a decision promulgated on 31 May 2018. First-tier Tribunal Judge Pickup granted him permission to appeal on 17 July 2018.

## **ERROR OF LAW HEARING**

2. The solicitor acting for the Appellant relied upon the grounds of appeal and the observations made by First-tier Tribunal Judge Pickup when granting permission. When doing so he noted that First-tier Tribunal Judge Lawrence had not considered Appendix FM of the Immigration Rules and did not apply Appendix FM when considering suitability. In reply, the Home Office Presenting Officer submitted that the First-tier Tribunal Judge had made clear findings in relation to all relevant issues.

## **ERROR OF LAW DECISION**

3. The Appellant's solicitor submitted that the requirements relating to suitability within Appendix FM should have been applied and that these contained a discretion which had not been exercised. However, this was not a point which was contained within the grounds of appeal and the Appellant's representative had not applied for permission to rely on any further grounds.
4. In any event page 3 of 8 of the refusal decision makes it clear that the Respondent had relied on the general grounds for refusal contained in paragraph 322(5) of the Immigration Rules which was based on

“the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or association or the fact that he represents a threat to national security”).

5. In particular, it was said that, when the Appellant had applied for leave to remain as a Tier 1 (General) Migrant on 19 March 2014, he said that he had earned £86,879 in profit from self-employment between March 2013 and February 2014. However, when he made his tax return for 2013/2014 he declared a loss of £300.
6. It was the Appellant's case that he had bought suits from China and made a profit of £83,000 when selling them in the United Kingdom for £45 a suit when he had bought them for £20 and that this was the case when he applied for Tier 1 leave on 19 March 2014 but that he had made

a loss on his business of £300 by the time he submitted his tax return for 2013/2014. In paragraph 15 of his decision the First-tier Tribunal Judge found that the claim by the Appellant to be a self-employed trader was a fiction and the Appellant has not challenged this finding in his grounds of appeal.

7. Instead he relies on the fact that his wife and child have been granted indefinite leave to remain and submits that, if he is not also granted leave to remain, a breach of Article 8 will occur.
8. In paragraph 17 of his decision, First-tier Tribunal Judge Lawrence stated that their grants of leave were entirely based on the Appellant's status and commented that it was a mystery why the Appellant's wife and daughter were granted such status. He went on to assert that their applications should also have been refused.
9. However, at the date of the hearing the Appellant's wife and daughter did have indefinite leave to remain and it was on this basis that the First-tier Tribunal Judge had to decide the Appellant's appeal.
10. In addition, it is arguable that the First-tier Tribunal Judge should not have commented on the Appellant's wife and daughter's immigration status when they did not have appeals which were before him. The First-tier Tribunal Judge suggested that the Respondent may wish to revoke their leave under section 76 of the Nationality, Immigration and Asylum Act 2002 but it had not been suggested that they had obtained their leave by deception or that they were liable to deportation but cannot be deported for legal reasons.
11. The Appellant's solicitor submitted that First-tier Tribunal Judge Lawrence had also failed to consider the Appellant's application under Appendix FM as the partner of a person settled in the United Kingdom. It is clear from the substance of the decision, that no consideration had been given to Appendix FM and it is my view that, even he could not meet the suitability requirements, Appendix FM should have been considered as this formed the benchmark against which to consider whether leave to remain on family life grounds outside the Immigration Rules should be granted.
12. In paragraph 26 of the decision, First-tier Tribunal Judge Lawrence did accept that the Appellant enjoyed a family life with this wife and daughter but when he went on to consider

the application of Article 8 of the ECHR he took into account the circumstances of the Appellant's wife and daughter even though they were not subject of any appeal. For example, the fact that their previous immigration status was precarious was not material to a decision about the Appellant's entitlement to leave. This had the effect of undermining the findings he made in relation to proportionality for the purposes of Article 8(2) of the ECHR.

14. It is also the case that the First-tier Tribunal Judge did err in law when he said in paragraph 5 that "the Appellant bears the legal burden of proof from start to finish and the standard of proof is on balance of probability". In relation to any breach of Article 8(2) of the ECHR, the Respondent bears the burden of showing that any breach would be proportionate. The Home Office Presenting Officer submitted that, in the substance of his decision, the First-tier Tribunal Judge applied the correct burden of proof but it does not appear that this is the case as between paragraphs 26 to 31 he only addressed the Appellant's private life rights not his family life rights as he found that there would be no interference with his family life rights.
15. As a consequence, I find that First-tier Tribunal Judge Lawrence did make errors of law in his decision.

### **Decision**

- (1) The Appellant's appeal is allowed.
- (2) The decision of First-tier Tribunal Judge Lawrence is set aside.
- (3) The appeal is remitted to Hatton Cross for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Lawrence.

*Nadine Finch*

Signed

Date 3 September 2018

Upper Tribunal Judge Finch