



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

Appeal Numbers: HU/15116/2016
HU/15117/2016

THE IMMIGRATION ACTS

Heard at Field House

On 19th March 2018

**Decision & Reasons
Promulgated**

On 27th March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**PALWINDER SINGH (FIRST APPELLANT)
MANDEEP KAUR (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellants: Mr Z Raza of Counsel instructed by Harbans Singh,
Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appealed against a decision of Judge Widdup (the judge) of the First-tier Tribunal (the FTT) promulgated on 27th July 2017. The Appellants are Indian citizens. The first Appellant is the brother of the second Appellant. They were born on 27 August 1999 and 1 July 1998 respectively.

2. Both Appellants were minors when they applied for entry clearance seeking leave to enter and settle in the UK with their father Sital Singh, and stepmother Kiranjeet Kaur. The Appellants resided in India with relatives. Their father had resided in the UK since January 2001. Their mother died in India in January 2007. Their father remarried Kiranjeet Kaur in September 2010.
3. The applications were refused on 25th May 2016. The Respondent in the refusal decisions made reference to paragraph 297 of the Immigration Rules, and section EC-C of Appendix FM which sets out the requirements for entry clearance as a child.
4. The Respondent did not dispute that Kiranjeet Kaur had settled status in the UK, and the Appellants' mother died in India in 2007. The Respondent was not satisfied that the Appellants' father had been issued with leave to enter or remain under Appendix FM. It was not accepted that the father had taken sole responsibility for the Appellants' care or made any regular contact with them until recently. The Respondent was not satisfied that there were any serious and compelling family or other considerations which made exclusion of the Appellants undesirable. The applications were therefore refused with reference to section EC-C, in particular it was not accepted that the Appellants satisfied E-ECC.1.6.
5. The Respondent also considered paragraph 297(i)(f) of the Immigration Rules and refused the application as it was not accepted that there were serious and compelling family or other considerations which made exclusion of the Appellants undesirable.
6. The refusal decision was upheld on review by the Entry Clearance Manager.
7. The appeals were heard by the FTT on 20th July 2017, the Appellants' father and stepmother gave evidence. The FTT did not find the Appellants' father to be a credible witness, finding that he had deliberately omitted to disclose that the Appellants had an older sister who lived with them and other family members in India. The FTT found that the father had not exercised sole responsibility for their upbringing, and there were no serious and compelling factors making their exclusion from the UK undesirable. The FTT found as a fact that responsibility for the Appellants had been shared by the family members in India. The appeals were therefore dismissed.
8. The Appellants applied for permission to appeal to the Upper Tribunal. The grounds which were prepared by their solicitors contend that the FTT erred in law by failing to consider paragraph 297(i)(d) which requires that one parent is present and settled in the UK or being admitted on the same occasion for settlement, and the other parent is dead. It was contended that the FTT had erred by not considering the relevant test, and had wrongly considered sole responsibility rather than paragraph 297(i)(d).
9. Permission to appeal was granted by Judge Hollingworth on 27th October 2017.

Error of Law

10. On 9th January 2018 I heard submissions from both parties in relation to error of law. The Respondent contended there was no material error. I found that there was a material error of law and set aside the decision of the FTT. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my error of law decision dated 11th January 2018. I set out below paragraphs 17 - 26 which contain my conclusions and reasons for setting aside the FTT decision;

“17. I am persuaded that the FTT erred in law for the following reasons.

18. Although these appeals were brought on human rights grounds, it is necessary to consider whether the relevant Immigration Rules were met, as this is relevant to the public interest, and proportionality, when carrying out the necessary balancing exercise.

19. It must be decided which Immigration Rules are relevant. The Respondent referred both to paragraph 297 which sets out the requirements to be met by a person seeking indefinite leave to enter the UK as the child of a parent or relative who is present and settled in the UK or being admitted for settlement, and section EC-C of Appendix FM which sets out the requirements to be met for entry clearance as a child, when one of the parents is in the UK with limited leave to enter or remain.

20. In this case, the Appellants' father had limited leave to remain, that being 30 months' leave granted on 1st October 2015. It was however accepted that the father had remarried and his wife, who is the stepmother of the Appellants had indefinite leave to remain in the UK.

21. There is no specific reference in the FTT decision to paragraph 297. The FTT did consider the issues of whether the father had sole responsibility, and whether there were any serious and compelling considerations which would make exclusion of the Appellants undesirable. These issues are contained within paragraph 297(i)(e) and (f) and section EC-C. The FTT found against the Appellants on those issues, and there has been no challenge to those findings.

22. The FTT did not consider paragraph 297(i)(d). At the hearing I made the point to Ms Fletcher that in order to succeed under paragraph 297(i)(d) one parent must be settled in the UK, and in this case the father of the Appellants was not settled. However, on reflection, it is relevant to consider paragraph 6 of the Immigration Rules which provides interpretations and definitions. A parent includes the stepmother of a child whose mother is dead. Therefore the father's wife Kiranjeet Kaur is a parent to the Appellants, and she has settled status in the UK. The relevance of this is that it is not the case that the Appellants could not succeed under paragraph 297(i)(d), as they do in fact have a parent who is present and settled in the UK, that being their stepmother.

23. I accept that there is no specific reference to paragraph 297(i)(d) in the Grounds of Appeal which were settled by the Appellants' solicitors. There is however a reference in paragraph 8 of the grounds to the father having remarried in the UK and the Appellants treating their stepmother as their mother. The Appellants were legally represented at the hearing before the FTT, and it is not clear if there was any reference by their representative to paragraph 297(i)(d), but in view of the fact that it was accepted by all parties that the Appellants' mother had died in India, and their father had remarried an individual with settled status in the UK, I find that the FTT erred in law by not giving any consideration to paragraph 297(i)(d).
24. I find the error to be material, as if paragraph 297(i)(d) was satisfied, then this would be relevant in considering proportionality and the public interest. Therefore the decision of the FTT is set aside.
25. The decision must be re-made. I do not find it appropriate, having considered the Senior President's Practice Statements, at paragraph 7, to remit these appeals to the FTT.
26. There will be a further hearing before the Upper Tribunal. There has been no challenge to the findings made by the FTT that the Appellants' father did not exercise sole responsibility for their upbringing and that responsibility for the Appellants has been shared by the family members in India. Those findings are therefore preserved."

Re-Making the Decision

11. At the commencement of the hearing I ascertained that the Tribunal had received all documentation to be relied upon, and each party had served the other with any documentation upon which reliance was to be placed.
12. The Tribunal had the Appellants' bundle comprising 424 pages which had been before the FTT, together with witness statements made by the Appellants' father and stepmother dated 14th July 2017. In addition a supplementary bundle comprising ten pages had been lodged with the Tribunal on behalf of the Appellants. Mr Raza indicated that no skeleton argument had been prepared. The representatives indicated that they were ready to proceed and there was no application for an adjournment.

The Oral Submissions

13. Mr Raza placed reliance upon section EC-C rather than paragraph 297, and submitted that it was relevant, that it had been found at the error of law hearing, that the Appellants' stepmother satisfies the definition of a parent as contained in paragraph 6 of the Immigration Rules. Mr Raza stated that the Appellants' father had been granted limited leave to remain under Appendix FM. He therefore submitted that the relationship requirement set out at E-ECC.1.6.(a) was satisfied.
14. Mr Raza submitted that this was significant when considering proportionality and the public interest. I was asked to note that both parents of the Appellants are in the UK. It is in the best interests of the

Appellants to be brought up by their parents. Therefore refusal of entry clearance was disproportionate and a breach of Article 8. On that basis the appeals should be allowed.

15. Mr Kotas accepted that the requirements of E-ECC.1.6. were satisfied, and on that basis it would be disproportionate to refuse entry clearance.
16. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

17. Refusal of entry clearance is treated as refusal of a human rights claim and therefore the Appellants have a right of appeal pursuant to section 82(b) of the Nationality, Immigration and Asylum Act 2002. The Ground of Appeal is contained in section 84(2) on the basis that the decision is unlawful under section 6 of the Human Rights Act 1998.
18. The Appellants rely upon Article 8 of the 1950 European Convention on Human Rights. I find that Article 8 is engaged on the basis of the family life which the Appellants have with their parents.
19. In considering Article 8 I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53. It is accepted that the Appellants' father has limited leave to remain in the UK and this was granted under Appendix FM. I accept the evidence contained within the Appellants' father's witness statement that he was granted this status in 2013 on the basis of his marriage, and not October 2015 which was the date referred to at the error of law hearing.
20. I set out below E-ECC.1.6;

“One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being applying, or have applied, for entry clearance, as a partner or a parent under this Appendix (referred to in this section as the 'applicant's parent'), and

(a) the applicant's parent's partner under Appendix FM is also a parent of the applicant;”
21. As it is accepted that the Appellants' father has limited leave to remain granted under Appendix FM, and his wife, the Appellants' stepmother, is a parent of the Appellants, pursuant to the definition in paragraph 6 of the Immigration Rules, I find, as was conceded at the hearing, that E-ECC.1.6. is satisfied.
22. This is significant when one considers section GEN which sets out the general purpose of Appendix FM. I set out below, in part, GEN.1.1;

“It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the

Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK, the prevention of disorder and crime, the protection of health or morals, and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002). It also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009."

23. I must consider the circumstances appertaining at the date of hearing. The Appellants are now adults, and therefore it is not appropriate to consider the best interests of children.
24. I have regard to the considerations set out in section 117B of the 2002 Act. The maintenance of effective immigration control is in the public interest. It is therefore extremely significant, that the Appellants can satisfy the requirements of Appendix FM.
25. There is a requirement that persons seeking leave to enter can speak English as this aids integration. However, that is not a requirement either in paragraph 297, or section EC-C.
26. There is a requirement that persons seeking leave to enter the UK are financially independent. The Appellants are not financially independent, but their applications were not refused on financial grounds, therefore it must have been accepted by the Respondent that they could be adequately maintained and accommodated by their parents.
27. I do not find that sub-sections (4) - (6) of section 117B have any application to these appeals.
28. This is not a case where it is suggested that either the Appellants or their parents have a poor immigration history. I find that significant weight must be attached to the fact that the requirements of Appendix FM are satisfied. I do attach weight to the public interest in maintaining effective immigration control, and in view of the fact that the Immigration Rules are satisfied, I do not find that there is any public interest in refusing entry clearance to the Appellants. I conclude that the Respondent's decision is disproportionate and breaches Article 8, and therefore the appeals are allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The appeals are allowed on human rights grounds with reference to Article 8.

Anonymity

The Appellants were minors when they made their applications for entry clearance but are now adults. There has been no request for anonymity and I see no need to make an anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

19th March 2018

**TO THE RESPONDENT
FEE AWARD**

Because the appeals have been allowed I have considered whether to make a fee award. I make no fee award. The appeals have been allowed because of evidence adduced before the Tribunal, which was not before the original decision maker.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

19th March 2018