



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/16793/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

On April 30, 2018

**Decision &
Promulgated
On May 09, 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR AJAY KUMAR
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Howson Semega-Janneh, Counsel, instructed by
Knights Law

Solicitors

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction.
2. The appellant entered the United Kingdom as a Tier 4 student in July 2010. He met his wife the same year and they began a relationship. His Tier 4 leave was extended until March 30, 2013 whereupon he made an application to extend his stay further but this application was refused and an appeal against that decision was dismissed on February 12, 2014.

3. The appellant began cohabitating with his future-wife in September 2014 and on October 3, 2014 he again made an application to remain in the United Kingdom. The respondent refused this, with no right of appeal, on December 4, 2014. The appellant then lodged an application on March 5, 2015. This was refused on March 27, 2015 and the appellant appealed that decision but Judge of the First-tier Tribunal Davies dismissed that appeal in a decision promulgated on September 14, 2015.
4. On March 13, 2015 the appellant and his wife married and the appellant lodged a further application to remain on June 1, 2016. The respondent refused the application on June 23, 2016.
5. His application came before Judge of the First-tier Tribunal Rhys-Davies (hereinafter called "the Judge") and in a decision promulgated on July 20, 2017 the Judge dismissed his appeal under ECHR legislation.
6. On August 4, 2017 an application to appeal that decision was lodged and Judge of the First-tier Tribunal Scott-Baker granted permission to appeal on February 5, 2018 on the basis it was arguable the Judge's assessment of the children's best interests and the reasonableness of requiring them or the appellant to leave the United Kingdom was flawed.

SUBMISSIONS

7. Mr Semega-Janneh relied on the grounds of appeal and submitted that when considering reasonableness the Judge failed to give sufficient weight to all of the factors that were presented on behalf of the appellant's stepchildren.
8. The Judge had accepted that the appellant had a genuine and subsisting relationship with the children but attached too much weight to what was available in India and paid too little regard to the length of time they had been here, the fact that English was their spoken language, the stages they had both reached in their education with the eldest child being in the middle of his GCSE A-level course and the younger child in the middle of his GCSE O-level course, the fact that the appellant provided a father figure in their lives and had done so for a number of years against the background that they had no direct contact with their natural father due to the granting of a non-molestation order and any removal would decimate friendships, relationships, activities and other ties formed since they had been in the United Kingdom.
9. Mr Semega-Janneh further submitted that the Judge failed to give sufficient regard to the decisions of Azimi-Moyaed and others (decisions affecting children: onward appeals) [2013] UKUT 00197 and EV (Philippines) and others [2014] EWCA Civ 874 and most significantly failed to attach any weight to the fact that they had already accumulated almost 5 years discretionary leave in the United Kingdom and almost certainly would have that leave extended prior to October 2018 when their current leave expired.

10. Mr McVeety opposed the application and submitted that whilst the Judge's decision could be viewed as harsh nevertheless he submitted the Judge had considered all the evidence and had reached a decision that was open to him. He argued that the grant of permission to appeal was flawed and invited me to uphold the decision.

ERROR OF LAW ASSESSMENT

11. The appellant came to the United Kingdom as a student and in normal circumstances his immigration status would always be viewed as precarious unless his circumstances changed.
12. The appellant met his future wife shortly after he entered the United Kingdom and his relationship with her therefore commenced at a time when he was here lawfully and that relationship continues.
13. The Judge noted in his decision that when the appellant's status as a student came to an end he unsuccessfully tried to extend his stay. A previous appeal went before Judge of the First-tier Tribunal Davies although it seems the main thrust of that appeal centred around problems the appellant and his wife would face if they had to leave the United Kingdom. His wife had been married and that marriage ended in divorce and according to the documents his wife and her children had the benefit of a non-molestation order and the children's natural father had no direct contact to them.
14. The appellant's wife and stepchildren currently have leave until October 2018 and it was argued that the Judge should at the very least have granted this appellant leave alongside their leave but the Judge had no such power to what was being argued. The Judge had to either allow the appeal in which case the respondent would decide the length of leave or alternatively dismiss it.
15. I indicated during submissions that my main area of concern centred on the Judge's approach to the stepchildren's lives in the United Kingdom. His findings can be found from paragraph 62 onwards.
16. It is clear that the Judge noted that the children and their mother were, like the appellant, Indian nationals and able to travel to and from India without restriction. The Judge also noted that India has a "more than adequate education system". The Judge was sceptical about the claim the children spoke very little Punjabi on the basis that their mother spoke Punjabi as well as Urdu and English in the family home. The Judge concluded that even if they did not speak Punjabi they would be able to acquaint themselves with this language if they accompanied the appellant to India.
17. The Judge was not satisfied that the children's private life added any weight to the proportionality exercise but he attached considerable weight to the fact that their status remained precarious as their leave expired in October 2018. At paragraph 68 the Judge concluded that it was the appellant's wife's choice whether she returned to India with her children.

18. Lacking in this decision is any proper consideration of the stepchildren's personal circumstances in the United Kingdom. Insufficient weight was given to the fact the children had lived in the United Kingdom, lawfully, for 13 years. No weight was attached to the fact that these children were in the middle of their A-level and O-level courses respectively. The fact they had been here for such a substantial period of time would indicate that they would have established a strong private life with both children associating their lives in the United Kingdom as against their short lives in India.
19. The Judge had to consider whether the effect of dismissing the appellant's appeal would or would be likely to result in the children having to leave the United Kingdom.
20. The Judge did consider this but ultimately concluded it was a matter for the appellant's wife whether she accompanied the appellant back to India in the event that his appeal failed.
21. However, as it was accepted there was a genuine and subsisting parental relationship between the appellant and the children the Judge had to consider whether the appellant's removal would disrupt that relationship. The Judge had to consider whether, in the round, the appellant's removal was appropriate in light of all the circumstances of the case, taking into account the best interests of the children as a primary consideration and the impact on the children of the appellant's departure from the United Kingdom.
22. It is here that I find that the Judge erred.
23. The Judge's decision concentrated on what was available in India for the children and failed to give any real consideration to what they had been enjoying in the United Kingdom for the previous 13 years. Importantly the Judge attached insufficient weight to the role that this appellant played in their lives.
24. I raised with Mr McVeety whether he had any further submissions on this issue and he accepted that it was likely the children's leave would be further extended (although that was not something he could guarantee) and on further reflection he conceded that the Judge had not addressed the issues identified above.
25. I therefore find there was an error of law in this decision and that that error was material.
26. I see no need for any further evidence. I conclude that refusing the appellant's appeal would lead to unjustifiably harsh consequences for the appellant, the children and his wife.
27. There are exceptional circumstances meriting a ground of leave to remain outside the Immigration Rules and in doing so I have had regard to section 117B of the Nationality, Immigration and Asylum Act 2002.

DECISION

28. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.
29. I have remade the decision and I allow the appeal on human rights grounds.

Signed

Date 30/04/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award in this because the appeal was allowed following the service of evidence after the date of decision.

Signed

Date 30/04/2018



Deputy Upper Tribunal Judge Alis