



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

HU/25228/2016

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 29 November 2018**

**Determination & Reasons  
Promulgated  
On 12 December 2018**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**ALI BOUDALI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr J Bryce, Advocate, instructed by Maguire, Solicitors,  
Glasgow  
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant has permission to appeal to the UT against the decision of FtT Judge McGavin, promulgated on 17 May 2018, dismissing his appeal on human rights grounds.
2. The appellant's case to the UT is stated in the note of argument and motion to amend the grounds of appeal prepared by counsel, dated 27 November 2018. He contends that on a full analysis of his communications with the respondent he had placed all required material

before the decision-maker by the date the decision was made. Accordingly, the decision-maker should not have held that, for lack of evidence, he failed to meet the suitability and eligibility requirements of the immigration rules, and the judge erred at [21], where she found that the application fell to be refused “under the mandatory provisions of S-LTR.1.7” of appendix FM, and therefore did not “proceed to consider the substance of that application”.

3. At [24], the judge said that she had not required to make any findings under appendix FM as to the “genuineness and subsistence” of family relationships, but did “assume” for further purposes that there was family life.
4. There is error here, although not quite on the lines contended.
5. The FtT had before it an appeal on human rights grounds only.
6. Appendix FM provides at paragraph EX.1 and EX.2 as follows:

This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who -

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

7. Mr Bryce accepted that if the appellant’s application had been found to qualify for consideration in terms of the rules, it would not have met the financial requirements, and would fall for decision in terms of paragraph

EX.1. He also accepted that the case has no feature which is not reflected in EX.1 but which would be relevant to a consideration outside the rules, and that EX.1 is the measure of such a case, even if that stage is not reached from within the rules.

8. In other words, whether approached from within the rules or from outside, the case was the same.
9. The real question is not whether the appellant complied with the rules, to reach EX.1 from within, but whether the FtT adequately resolved the appeal on human rights grounds.
10. The relevant issues as defined in EX.1 and EX.2 are touched on in the discussion from [21] onwards, but it is unsatisfactory that there was no decision on whether the evidence established family life among the appellant, his wife, their son, and his wife's two older children. The respondent did not accept that there was. The decision proceeds by assuming family life, but as its existence, quality and extent were crucial to assessing proportionality, the judge should have made findings.
11. The decision at [22] - [29] is oddly framed as resolving the case under the heading "*paragraph 276ADE (1) private life*". The discussion is much more about family life than about private life, and error should not be found on points of form alone, but this also shows error of legal approach.
12. There was some criticism of the judge's finding at [25] that there was "not very much contact" among the two older children, the appellant, and his wife, as not reflecting the evidence. However, it was for the appellant to bring the materials on which the case was to be decided, and the finding was justified on taking that evidence, such as it was, at its highest. Any shortcomings here are the responsibility of the appellant not the judge. However, in view of the outcome, he will have a further opportunity to show whether there is family life involving the older children to such meaningful extent as might help to make his case.
13. There was also error in failing to refer to Part VA of the 2002 Act, "Article 8 of the ECHR; Public Interest Considerations", and to section 117B in particular. Again, that might be only a defect of form, if all relevant matters of substance were resolved, but express reference would have brought out the need to proceed on findings, not assumptions.
14. The decision cannot safely stand as a resolution of the appeal on human rights grounds. It is set aside, and stands only as a record of what was said at the hearing. The nature of the case is such that it is appropriate under section 12 of the 2007 Act, and under Practice Statement 7.2, to remit to the FtT for an entirely fresh hearing.
15. The member(s) of the FtT chosen to consider the case are not to include Judge McGavin.

16. Parties should frame their cases at the next hearing, to assist the judge, according to the issues in terms of EX.1, EX.2, and section 117B.
17. No anonymity direction has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

6 December 2018  
Upper Tribunal Judge Macleman