



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01092/2019

THE IMMIGRATION ACTS

Heard at Glasgow
On 7 June 2019

Decision & Reasons Promulgated
On 18 June 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

GURPAL [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal of Muzaffar Associates Ltd

For the Respondent: Mr A Govan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, where he was born in 1990. He has been granted permission to appeal the decision of First-tier Tribunal Judge Kempton, who for reasons given in her decision dated 21 February 2019, dismissed the appellant's appeal against the Secretary of State's decision refusing his human rights claim for leave to remain in the United Kingdom on the basis of his family life with his partner [CM] and her daughter.

2. As to his immigration history, the appellant entered the United Kingdom on 15 May 2012 on a six month family visit visa. He overstayed. In February 2014 he claims to have met Ms [M] in a nightclub. He was detained at Dungavel Immigration Centre after being encountered by police in Scotland in February 2015. A human rights claim based on Article 8 was refused and certified under Section 94 of the Nationality, Immigration and Asylum Act 2002 with an out-of-country right of appeal. This led to judicial review proceedings. The appellant attended a marriage interview in November 2016 but did not comply with a request to bring valid identification documentation. In June 2017 the couple were married. In July 2018 judicial review proceedings were settled on the basis that there would be a reconsideration of the decision. The appellant submitted further evidence in September 2018. On 10 October 2018 the Home Office requested further evidence in relation to claims regarding his family life with Ms [M]'s daughter and no response had been received by the time of the refusal for which reasons were given in a decision by the respondent dated 2 January 2019.
3. The challenge before Judge Kempton was that the respondent had erred in finding the appellant was not in a genuine relationship with his wife and that it was subsisting. The judge found that the couple were living together in the same house and have been doing so since 27 March 2015. She found their marriage to be genuine and subsisting. She also accepted that the judge was involved "... to a considerable extent in the care and wellbeing of his wife's daughter ...".
4. The judge considered the case under the Immigration Rules and in particular EX.1. Having previously concluded the appellant could not be regarded as a parent or a person with a parental relationship with Ms [M]'s daughter, she concluded at [28]:

"28. It would appear that the position of the respondent is correct and that the appellant is not within the definition of the Rules, and so does not have a parental relationship with [K], as he is not her guardian, adoptive father or a person who has sought parental rights in the civil court in relation to [K]. Accordingly, his relationship with her, for the purposes of the Immigration Rules cannot be considered."
5. The judge then went on to consider the issue of exceptional circumstances in terms of GEN.3.2. and set out her conclusions at [30] to [34]:

"30. The facts are that the appellant has overstayed for a number of years since the summer of 2012. He then simply did not return home. He had been working for about four years in India before he came to the UK. He knows some English from having been at school to senior school level. He has not been convicted of any criminal offences in the UK. However, he has been detained twice on immigration bail and has been found to have been working without permission. He has also carried out charitable work in the UK. He entered into his relationship, and married, knowing that he had no right to be in the UK, as did his wife. She has been fully supportive of him. His wife would not go to live in India as all her family, her friends and her life are here. She has a large and close family. She works extra hours to support her husband. However, she could not earn enough to sponsor him to come to the UK to be her husband by way of a spouse

application if he returned to India. Her daughter has family, schooling and life in the UK. She was born in the UK and lived here all her life. She is aged eleven years. [K] has a good relationship with the appellant.

31. If the appellant were to return to India. He would be so alone. He could find work there as he previously worked in India for four years after school before coming to the UK. He has work experience, albeit without permission in the UK. He has learned to speak and read English quite well in the UK (although he did use the Punjabi interpreter, as is his right, at the hearing before me). The appellant's wife does not consider that she would ever be in a position to earn £22,400 as required to sponsor her husband from India to come and live with her and her daughter in the UK. However, it is not clear what steps she has taken to find out what higher paid employment she could take on. In any event, her daughter is getting older and will soon be in senior school, leaving Mrs [M] in a position to work a full-time position through the week. [K] is old enough to go to school herself, or by bus, and to return home. She also has an older sister who can help out, when she is not working, as well as her oldest sister and her grandmother who seems now to be well and with no obvious difficulty in looking after an eleven-year old child when she is not at school.
32. It seems to me that there are no obvious exceptional circumstances here. The only issue is that the appellant and his wife have a genuine and subsisting relationship and want to be together. In such circumstances, hard decisions have to be made. Either the appellant returns to India and takes his wife and her daughter with him or he returns alone and seeks to maintain contact by way of visits each way. His wife can try to find better paid employment to sponsor him.
33. In the meantime, the appellant and his wife might want to consider taking advice in relation to acquiring a parental relationship over [K] if he wishes to revisit this matter by way of the Immigration Rules.
34. In relation to Article 8 of ECHR, I have taken into account the issue of section 55 and the best interests of the child. The child is best to be with her parents. In this case, the one whom she lives with, her mother. The appellant has not applied for parental rights in relation to [K] and so he cannot be prepared as a parent for the purpose of this appeal. The interference in family life of the appellant is proportionate to the need for proper immigration control."

6. The grounds of challenge argue:

- (i) The judge had erred in not considering the appellant as a parent in accordance with the definition in the Rules with reference to R-LTRP.1.1(a), (b) and (d).
- (ii) The judge had failed to consider the case with reference to EX.2. of Appendix FM regarding insurmountable obstacles, being the very significant difficulties to be faced by the appellant and his partner continuing their family life outside the UK.
- (iii) The judge had failed to give "due diligence" to the appellant's case. There had been a failure to consider the case in accordance with *Chikwamba v SSHD* [2008] UKHL 40.

7. In granting permission to appeal, First-tier Tribunal Judge Loke observed:
 - “2. While the Judge correctly found that the appellant could not fall within the Immigration Rules, it is arguable that the Judge failed to consider whether the appellant had a parental and subsisting relationship with his step-daughter outside of the rules, and the interests of the appellant’s step-daughter in the context of s117B(6).”
8. At the outset of the hearing Mr Govan explained that he agreed that the FtT had erred on the basis of the grounds of challenge with reference to the judge’s approach to the case under Appendix FM. In particular the judge had misdirected himself as to what is meant by parental responsibility. In my view Mr Govan was correct to take this approach; the judge had unlawfully restricted the class of those who could be considered to have parental responsibility.
9. This led to the decision being set aside. As to its remaking, Mr Govan accepted that there were “probably” insurmountable obstacles to the appellant’s partner joining him in India and conceded the appeal. He referred to the decisions of the Court of Appeal in *SSHD v AB (Jamaica)* [2019] EWCA Civ 661 and of the Upper Tribunal in *JG (s 117B(6): reasonable to leave)* UK Turkey [2019] UKUT 72 (IAC) Rev 1. In my judgment it was correct for Mr Govan to not only accept that the judge had erred but also that, based on the factual findings that had not been challenged, the appeal should be conceded. Legislation had fixed the public interest irrespective of the appellant’s immigration history.

DECISION

10. The determination of the FtT is set aside. I re-make the decision and allow the appeal against the Secretary of State’s decision.

Signed

Date 14 June 2019

UTJ Dawson

Upper Tribunal Judge Dawson