



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06878/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4th January 2019

Decision & Reasons Promulgated
On 28th January 2019

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR KEMAR DEXTER DAVIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Ferguson (instructed by Solomon Shepherd Solicitors)

For the Respondent: Mr N Bramble (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal with permission by the Appellant with permission granted by Judge Storey on 21st November 2018. It relates to a Decision of First-tier Tribunal Judge Mitchell promulgated on 26th June 2018 where he dismissed the Appellant's appeal, the Appellant being a citizen of Jamaica born in 1989. He had made an application for further leave to remain as the spouse of his British wife. His wife was born and raised in the United Kingdom although she is of Jamaican heritage.

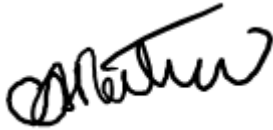
2. The Secretary of State had refused the application firstly on suitability grounds because the Appellant had failed to mention a conviction in his application and secondly on eligibility grounds on the basis that one piece of specified evidence was not included, in that the employer's letter did not state how long the Sponsor had been earning her current earnings.
3. The Secretary of State also found that the provisions of Ex.1 or Ex.2 did not apply. They do not apply where an applicant does not meet the suitability grounds.
4. The Judge considered first the suitability ground. He accepted the explanations given by both the Appellant and his wife that they did not realise a community penalty amounted to a "conviction". He found the matter to be finely balanced but gave the Appellant the benefit of the doubt and found the omission to be mistaken but not dishonest.
5. In considering the other issue the Judge accepted that the relationship was genuine. He accepted that the Appellant was credible, as was his wife. He accepted save for that one conviction that the Appellant has no criminal record. He found that the Appellant's wife's earnings, at £40,000, were well above the income threshold. The Judge nevertheless found it not a disproportionate breach of his right to private and family life to dismiss the appeal.
6. Ms Ferguson argued before me that in a case such as this where quite clearly the finances are there, inadequate weight was given to the fact that substantively they meet the Rules and that would make it disproportionate to dismiss the appeal.
7. I agree with her that the judge has erred in his consideration of Article 8 and proportionality in particular. In this case, on the Judge's findings, all the provisions of the Rules could be met, although they were not at the time of application because of the missing evidence. In terms of s.117B the Appellant speaks English, he is not a burden on society and the couple are financially independent. The Appellant had previous leave to remain as a spouse. Although there are no insurmountable obstacles, there are potential difficulties for the wife to relocate to Jamaica.

Decision

8. I therefore set aside the Decision.
9. I also note that the judge has strayed beyond his remit in suggesting that the Secretary of State should allow him to make a further application for leave to remain from within the United Kingdom even though his leave has lapsed. If the judge felt that to be appropriate, then that would have been a reason to allow the appeal.
10. Because the judge's reasoning is flawed in respect of his consideration of Article 8 I cannot find that it is not flawed in his consideration of the suitability point either.
11. I therefore set aside the Decision in its entirety because all matters need to be redecided. It was agreed by both representatives that the appropriate way forward is

for the case to be remitted to the First-tier Tribunal for a full rehearing of all matters before a judge other than Judge Mitchell. The appropriate hearing centre is Taylor House.

No anonymity direction is made.

A handwritten signature in black ink, appearing to read 'Martin', written in a cursive style.

Signed

Date 18th January 2019

Upper Tribunal Judge Martin