



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25648/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18 February 2019

Decision & Reasons Promulgated
On 21 February 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MUHAMMAD [A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:

Mr G. Ó Ceallaigh instructed by Londonium Solicitors

For the respondent:

Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 09 November 2016 to refuse a human rights claim. The appellant did not meet the 'Eligibility' requirement for leave as a partner under Appendix FM because his wife was not a British citizen and was not settled in the UK. It would be reasonable to expect the appellant's wife and child to live with him in Pakistan or Bangladesh (her country of nationality).

Error of law

2. First-tier Tribunal Judge Davey (“the judge”) dismissed the appeal in a decision promulgated on 21 June 2018. It is not necessary to set out the decision in any detail given that the parties agree that the judge erred in law for the following broad reasons:
 - (i) The judge failed to consider the fact that the appellant’s wife had ILR at the date of the hearing. This changed the assessment of the requirements under the rules.
 - (ii) As a consequence, the judge failed to consider paragraph EX.1 of Appendix FM.
 - (iii) The judge failed to conduct a structured approach to his findings under the rules or outside the rules. The findings that were made were inadequate.
 - (iv) The Upper Tribunal observed that no findings were made in relation to section 117B of the Nationality, Immigration and Asylum Act 2002 (“the NIAA 2002”) and in particular to the test of ‘reasonableness’ under section 117B(6).
3. The Upper Tribunal agreed with the parties that the decision involved the making of an error of law and that the First-tier Tribunal decision should be set aside.

Remaking

4. Mr Jarvis accepted that the situation had moved on since the First-tier Tribunal hearing. The couple now have a second child, who is also a British citizen. Since the appellant’s partner is in the middle of her PhD studies he found that it was not right to pursue an argument that the family should be separated. He submitted that the appeal should be remade and allowed.
5. It is not necessary for me to go into the same detail as I would normally do in remaking the decision given the concession made on behalf of the respondent. There has never been any dispute that the appellant is in a genuine and subsisting relationship with his partner or the children. The couple were living together in a relationship akin to marriage for a period of at least two years before the date of the application. It is accepted that the appellant’s partner has now been granted Indefinite Leave to Remain and is therefore settled in the UK for the purpose of the ‘Relationship’ requirement contained in Appendix FM. That requirement is not limited to the date of the application. Because the appellant was an overstayer he does not meet the ‘Immigration Status’ requirement and can only rely on paragraph EX.1 of Appendix FM. Mr Jarvis submitted that this should include consideration of whether there are ‘insurmountable obstacles’ to the couple continuing their family life outside the UK and whether it is ‘reasonable’ to expect the two British children to leave the UK.
6. It is in the interests of the children to be brought up by both parents in the UK where they can benefit from the advantages of their citizenship. Separation from one or other parent is not in their interests. The interests of the children are a primary

consideration although not the only consideration. Significant weight should be given to the interests of British children or those who have been continuously resident in the UK for a period of at least seven years. Although the appellant has not had leave to remain since 30 November 2008, and there are some question marks surrounding his immigration history, the respondent accepts that any public interest considerations are outweighed by the individual circumstances of this case. I am satisfied that the interests of the two British children are such that it is not reasonable to expect them to leave to the UK to maintain their family life with both parents. The appellant meets the requirements of paragraph EX.1 of the immigration rules, which is said to reflect the respondent's position on where a fair balance is struck under Article 8 of the European Convention.

7. I conclude that the removal of the appellant would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The decision is remade and the appeal is **ALLOWED** on human rights grounds

Signed  Date 18 February 2019
Upper Tribunal Judge Canavan