



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09880/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 15th May 2019

Decision & Reasons Promulgated
On 16 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GURNAM SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs Z Young, Home Office Presenting Officer

For the Respondent: Mr L Singh, Moore Solicitors

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department and the respondent to this appeal is Mr Gurnam Singh. However for ease of reference, in the course of this determination I shall adopt the parties' status as it was before the FtT. Hereafter, I shall in this determination, refer to Mr Gurnam Singh as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of India. The appellant entered the United Kingdom on 4th November 2015 with a family visit visa valid from 4th September 2015 until 4th September 2017. When he first arrived in the United Kingdom, he was accompanied by his wife. Sadly, his wife passed away in May 2016, and it would appear that the appellant returned to India to deal with the funeral arrangements. As he had the benefit of an extant visit visa, the appellant returned to the UK on 29th June 2016, so that he could be looked after by his daughter and son-in-law, in the aftermath of his wife's death.
3. In January 2017, an application made by the appellant was received by the respondent. The application was accompanied by a letter from the appellant's solicitors, dated 29th December 2016. The covering letter describes the application as an application for leave to remain in the United Kingdom outside of the immigration rules on the basis of the appellant's exceptional circumstances that have led to his private and family life in the UK. The application was refused by the respondent for the reasons that set out in a decision dated 11th April 2018. That decision gave rise to an appeal before FfT Judge Place. The FfT Judge allowed the appeal on Article 8 grounds for the reasons set out in a decision promulgated on 26th September 2018. It is that decision that is the subject of the appeal before me.

The decision of the FfT Judge

4. The appeal was heard by FfT Judge Place on 10th September 2018. The appellant attended the hearing and was represented. There was no appearance on behalf of the respondent. The focus of the appeal was upon the appellant's relationship with his daughter, Mrs Kulwant Kaur, and his son-in-law, Mr Palwinder Singh.
5. At paragraphs [8] to [13] of the decision, the Judge records the evidence that was given by the appellant, his daughter, and his son-in-law. The Judge's findings of fact and conclusions are set out at paragraphs [14] to [28] of the decision.

6. The FfT Judge found that the appellant has been cared for by his daughter and family, since the death of his wife and his diagnosis with liver cancer. The Judge noted, at [15], the requirement under paragraph 276ADE(1)(vi) that the appellant must establish very significant obstacles to the appellant's integration into India. The Judge found that the appellant does not meet the requirements of paragraph 276ADE(1)(vi). The Judge went on to consider the Article 8 claim outside the immigration rules and found that the appellant does enjoy family life with his daughter for the reasons set out in paragraph [20] of the decision. The Judge noted that the question for him is that of proportionality. The Judge had regard to the public interest considerations set out in s117B of the 2002 Act, and noted that the appellant cannot speak English, and is not financially independent. At paragraphs [26] and [27], the Judge states:

"26. I have taken into account the state of the appellant's health relying on the letter of 23rd August 2018 from his GP. Though it has been suggested by the witnesses that the appellant is suffering from a terminal illness, that is not backed up by the GP's letter. I find that the appellant is currently free from liver cancer. His other health conditions appear to be kept under control by medication. He is frail and in need of support but that health care is available in India and the support he requires could be provided to an adequate standard, even if not to the standard of a devoted daughter which Mrs Kaur gives, by paid professionals.

27. I take into account the understandable reluctance that the appellant has to return to his former home in India which will be full of memories of his life with his wife. I do, though, find merit in the respondent's argument in the refusal letter that, though the appellant's circumstances are sad, grief and loss are a part of life and there is nothing particularly unusual or compelling about being left alone as a widower."

7. At paragraph [28], the Judge concluded that the question of proportionality is finely balanced and that there are factors that weigh both for and against the appellant. The Judge found that the fact that the family life between the appellant and his daughter was established while the appellant was in the UK legally, and in difficult circumstances that were beyond anybody's control, together with the absence of any family life in India, just tips the balance in the appellant's favour.

The appeal to the Upper Tribunal

8. The respondent claims that the Judge erred in his assessment of proportionality by failing to have proper regard to the public interest considerations set out in s117B of the 2002 Act. The respondent claims that the matters that the FfT Judge was bound to have regard to, in considering the public interest are matters that weigh against the appellant. His immigration status has always been precarious. He cannot speak English and he is not financially independent. Furthermore, the FfT Judge erred in concluding that there is no family support available to the appellant in India. There is no doubt that the former family home remains in India and would be available to the appellant. The FfT Judge also refers, at paragraph [10] of the decision, to a brother that remains in India. Although that brother may be unable to care for the appellant, given his own health, the Judge found, at [26], that the appellant is currently free from liver cancer and his other health conditions appear to be kept under control by medication. Any health needs are available in India, and could be provided to an adequate standard.
9. Permission to appeal was granted by FfT Judge Bird on 2nd November 2018. The matter comes before me to determine whether the decision of the FfT Judge contains a material error of law, and if so, to remake the decision.
10. Before me, on behalf of the respondent, Mrs Young submits that the Judge's conclusion that the question of proportionality is finely balanced, and the balance is just tipped in the appellant's favour, is irrational. It was open to the FfT Judge to find that the appellant has established a family life with his daughter, but having concluded that the appellant is unable to satisfy the requirements of the immigration rules, and that the public interest considerations at set out in s117B of the 2002 weigh against the appellant, the Judge fails to adequately explain why removal of the appellant to India, where he has a home and relatives, is disproportionate. Mrs Young submits that the Judge fails to consider whether the family life that existed between the appellant, his daughter and her family, could continue as it obviously had, for a number of years previously.

11. In reply, Mr Singh submits that the Judge had the opportunity of hearing the appellant and his witnesses give evidence, and forming a view of them. In light of the unexpected death of his wife, it is understandable that the appellant would wish to remain with his daughter, who has provided a significant amount of support to him. Mr Singh submits that on the evidence, it was open to the Judge to conclude that the balance is just tipped in the appellant's favour.

Discussion

12. I remind myself that it is now well established that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really cannot understand the original judge's thought process when the Judge was making material findings.
13. The FtT Judge found that the requirements of paragraph 276ADE(1)(vi) cannot be met by the appellant. The judgment of the Supreme Court in *Agyarko -v- SSHD* [2017] UKSC 11 confirms that the fact that the rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.
14. The Judge adopted the five-stage approach set out in *Razgar*. The Judge was satisfied that the appellant enjoys a family life with his daughter. The respondent does not challenge that finding. The FtT Judge also found that the decision to refuse leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8, and that the respondent has acted in accordance with the law. The ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test.

15. It is now well established that Appendix FM and paragraph 276ADE(1) of the immigration rules are said to reflect how the balance will be struck under Article 8 between the right to respect for private and family life, and the legitimate aims listed in article 8(2), so that if an applicant fails to meet the requirements of the Rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK, would breach Article 8.

16. Here, I am satisfied that the Judge's analysis of proportionality is irrational. The Judge refers to s117B of the 2002 Act, and noted that the maintenance of effective immigration controls is in the public interest. The Judge noted that the appellant cannot speak English and is not financially independent. The Judge found that the appellant is currently free from liver cancer, and his other health conditions appear to be kept under control by medication. The Judge noted that the appellant is frail and in need of support, but found that health care is available in India, and the support he requires, could be provided to an adequate standard by paid professionals. In reaching his conclusion that the question of proportionality is finely balanced, it is difficult to see what it is in the factual matrix, or in the evidence, that tips the balance in favour of the appellant. One has some sympathy, as the FfT Judge did, with the circumstances that the appellant found himself in following the unfortunate and unexpected death of his wife. It is entirely understandable that his daughter and son-in-law would wish to support him in the aftermath, particularly at a time when the appellant himself went through a period of ill-health. That sympathy is not sufficient to establish an Article 8 right to remain in the UK, when the requirements of the rules cannot be met, and factors relevant to the question of proportionality, weigh against the appellant.

17. In my judgement, in reaching the decision, the FfT Judge also failed to consider the support that would be available to the appellant in India. At paragraph [10] of the decision, the Judge refers to the family that the appellant has remaining in India. He has a brother who is said to have suffered a stroke and is under constant care. Although it may be correct that the appellants brother is unable to care for the

appellant, that is not to say that the appellant would be without any support whatsoever, and would be isolated.

18. It is difficult to identify any exceptional circumstances capable of establishing a breach of Article 8, where the Judge has found that the requirements of the rules cannot be met by the appellant, and the relevant public interest considerations set out in statute, weigh against the appellant. Reviewing the decision of FfT Judge Place as a whole, I have reached the conclusion that the Judge's finding that the decision to refuse leave to remain is disproportionate, was, for the reasons given by the Judge, irrational. It follows that in my judgment, the FfT Judge erred in law such that there is a material error of law in the decision and it must be set aside.
19. I remake the decision having regard to the findings made by the FfT Judge. It is uncontroversial that the appellant cannot satisfy the requirements of the immigration rules. The respondent does not challenge the finding that the appellant has established a family life with his daughter in the UK. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved.
20. The FfT Judge found that the appellant is currently free from liver cancer and his other health conditions appear to be kept under control by medication. The health care that he needs is available in India and the support he requires could be provided to an adequate standard. The maintenance of proper immigration control is in the public interest and the public interest considerations set out in s117B of the 2002 all weigh against the appellant. There is no evidence before me as to when the appellant's daughter married and came to the UK. There is no evidence before me as to when she was granted British citizenship, or indeed, as to the way in which the appellant maintained contact with his daughter, son-in-law and grandchildren, whilst he was living in India with his wife previously. There is no evidence before me to suggest that the family life enjoyed previously, could not continue. The FfT Judge accepted Mrs Kaur's evidence that she could not return to India with the appellant and care for him there, because she could not leave her children who are

settled in the UK. That is not to say that the appellant would be unable to maintain communications with his daughter, son-in-law, and his grandchildren, or that they cannot continue the relationship through visits to and from India. Only little weight can be attached to the private life that the appellant has established with the wider community whilst he has been in the UK. The visit visa granted to him permitted him to travel to the UK for a short period, and his immigration status has throughout, been precarious.

21. Having carefully considered the evidence, I am satisfied that the interference with family life in this case is proportionate, and it follows that the appeal is dismissed.

Notice of Decision

22. The appeal by the SSHD is allowed, and the decision of FfT Judge Place is set aside.
23. I remake the decision and dismiss the appellant's appeal on Article 8 grounds.

Signed

Date

15th May 2019

Deputy Upper Tribunal Judge Mandalia

I have dismissed the appeal and there can be no fee award.