



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

Appeal Numbers: IA/37916/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 June 2016**

**Decision & Reasons Promulgated
On 12 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K J

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Mr Saini, counsel
For the Appellant: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

1. For ease of reference, I maintain the descriptions of the parties as they were in the First-tier Tribunal; thus the Secretary of State is described as the respondent.

Background

2. The appellant was served with notice of liability to detention and removal. He made a human rights claim and this was refused by the respondent on 10 September 2014 who also decided to remove the appellant.

3. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Beg (the FTTJ) on 21 October 2015. She allowed his appeal in a decision promulgated on 6 November 2015.
4. The respondent sought permission to appeal on the ground that the FTTJ had made a material misdirection in law and had failed to give adequate reasons. Permission was granted in the following terms:

“... It is arguable that where the parties were in agreement that the new Immigration Rules applied in this matter (see [19]), the First-tier Tribunal did not apply them correctly as regards the earnings of the applicant’s spouse at the date of application rather than at the date of hearing and also took an incorrect approach to the applicant’s relationship with his biological British child with whom he has no direct access.”
5. Thus the appeal came before me.

Submissions

6. Mr Saini, for the appellant, accepted that it had been appropriate for the FTTJ to decide the appeal in accordance with the Immigration Rules, insofar as Article 8 was concerned.
7. For the respondent, Mr Avery submitted that the FTTJ should have considered the financial evidence with regard to the appellant’s position at the date of application. The evidence was that the appellant’s wife could not meet the requirements at the time. The FTTJ should have made that finding and moved on to address EX.1. With regard to the appellant’s contact with his British child, he did not have face-to-face contact with that child. He accepted there was no reference in the Rules to any requirement for “direct access” but the evidence did not support a finding that the appellant was actively involved in his son’s upbringing.
8. Mr Saini submitted that the principal focus of the reasons for refusal was the respondent’s contention that there was no genuine and subsisting relationship between the parties. There was no challenge by the respondent to the FTTJ’s positive finding in that regard. The respondent had raised no concerns in the reasons for refusal letter with regard to the ability of the appellant to fulfil the financial requirements in the Rules. The FTTJ had taken it upon herself to consider those requirements and it was not clear why she had done so because it had not been raised as an issue at the appeal. Any error with regard to that assessment was immaterial because it was not a matter of concern to the refusal author.
9. With regard to the appellant’s relationship with his child, the phrase “direct contact” did not exist in the Rules; nor was it used in the reasons for refusal. The appellant had access rights as evidenced by the order of Dartford County court. Oral evidence had been given as regards the appellant’s involvement with his child’s upbringing. This had not, it was accepted, been the main focus of the appeal, which was the nature of the couple’s relationship. Nonetheless it had been addressed in evidence-in-chief. This was not a perversity challenge, but a reasons challenge. It was merely a disagreement with the outcome.
10. In reply, Mr Avery accepted there was no requirement in the Immigration Rules for the appellant to have direct access/contact with his British child. He submitted that “context is the key thing”. It was also accepted that there was no challenge to the FTTJ’s finding that the appellant takes an active role in the child’s upbringing. Mr Avery submitted that the issue of

access should be considered in the context in which paragraph ELTR-PT was set, i.e. to reflect Article 8 considerations. He submitted this was an unusual set of circumstances; the appellant was not required to remain in the UK to continue access to his child, as ordered by the court. There was no immediate prospect that order would change. This was a removal case; the appellant could apply for entry clearance from abroad.

11. Both Mr Avery and Mr Saini agreed that if I found there was no material error of law in relation to the FTTJ's findings as regards the appellant's status as a parent, any error in relation to her findings with regard to his status as a parent would be immaterial.

Discussion

12. The respondent notes in the refusal letter that the appellant met the suitability requirements for consideration of limited leave to remain in the UK as a partner or parent [10]. It was considered that the appellant did not meet the eligibility requirements because he had failed to provide evidence that his relationship with the sponsor was genuine and subsisting; he did not therefore meet the criteria in E-LTRP.1.7. The respondent then turned, in the refusal letter, to considering whether the appellant met the criteria in Appendix FM as a parent and found that he did not do so either in relation to his own child or his wife's children. The respondent then considered whether the appellant qualified under EX.1 and decided that he did not. The application was refused under D-LTRP.1.1-1.2 and D-LTRPT.1.1-1.2 of Appendix FM. There is no reference in the letter to a decision being taken by reference to the financial requirements in the Immigration Rules.
13. The appellant's grounds of appeal to the First-tier Tribunal identify and address the three reasons for the refusal, as I have set them out above. Paragraph 8 of the decision refers. Mr Saini's submissions for the appellant (which are recorded at length at paragraphs 7-28 of the decision) focussed on those issues which had been raised in the reasons for refusal. To state the obvious, this did not therefore include the appellant's ability to meet the financial requirements. There is reference in his submissions to the production, by the appellant to the respondent, of his wife's wage slips, rent statements and bank statements, but this is in the context of demonstrating they had a genuine and subsisting relationship. There is reference to Mr Saini's submission that the existence of such documentary evidence supported the appellant's claim that he had been supported by his wife so that he did not have to work illegally, until he had regularised his status. There was no reference at all in the appellant's submissions (as recorded by the FTTJ) to demonstrating the appellant was able to meet the financial requirements, presumably because there had been no challenge to this in the reasons for refusal.
14. Nor is there any suggestion in the decision that the respondent's representative had identified as a new issue the appellant's inability to meet the financial requirements of the Rules. There is a brief reference (paragraph 9) to the appellant stating that he is supported financially by his wife. The appellant's evidence under cross-examination is noted as being that his wife has two jobs, he looks after the children while she provides food and other necessities to the family; she pays for everything with her bank card. This evidence has the appearance of being given in the context of the claimed relationship.
15. The FTTJ asked the appellant some questions and his evidence is noted at paragraph 11. No questions were asked relating to his ability to meet the financial requirements of the Rules.
16. The appellant's wife gave oral evidence about her employment since 2008 and currently.

According to the decision, she did not give oral evidence about how much she earned. She said she had two jobs at the date of hearing and supported her husband financially. She had her own bank account, allowing the appellant to use her bank card to pay for items. There is no suggestion that she gave this evidence other than in order to demonstrate a genuine and subsisting relationship. For example, she said the appellant was “not using her to stay in the country”. The FTTJ does not refer to asking questions of this witness about her income from employment.

17. The FTTJ finds that the appellant and his wife have a genuine and subsisting marriage. She also finds that the parties intended to live together as husband and wife. These findings are not challenged by the respondent.
18. The FTTJ then goes on to say (paragraph 22):

“The respondent did not consider whether the appellant and sponsor meet [sic] the financial requirements under the Immigration Rules. [The appellant’s wife]’s P60 with Tesco’s Stores Ltd for the tax year 5 April 2015 shows that her total earnings were £18,851.50. The appellant’s bundles contain her payslips for 2014. Her P60 for the tax year 5 April 2014 relating to Bespoke Hotels Goldie Ltd shows earnings of £13,367.22. I find on the balance of probabilities that [the appellant]’s wife’s earnings were above £18,600 as required under the Immigration Rules.”
19. It is not clear why the FTTJ made findings on this issue when it was not one which had been raised in the reasons for refusal letter or the respondent’s submissions. Not surprisingly, the appellant had not addressed it in the grounds of appeal. Nor did his representative address it in his oral submissions at the hearing.
20. The respondent submits that the FTTJ’s findings amount to an error of law because she should have considered the appellant’s wife’s earnings at the date of application, either the first application in 2012 or the second application in 2014.
21. Given the complete absence of any reference to the appellant’s ability or otherwise to comply with the financial requirements of the Rules, either in the reasons for refusal or at the hearing itself, it would have been procedurally unfair for the FTTJ to make an adverse finding in the absence of giving the appellant the opportunity to address her on the issue. I am unable to find therefore that the FTTJ made a material error of law in her consideration of the appellant’s ability to meet the financial requirements of the Rules. Even if she has failed to assess the evidence in accordance with the Immigration Rules, to have made an adverse finding on the issue would have amounted to procedural unfairness in the absence of notice and any opportunity for the appellant to address her on the issue.
22. For this reason I do not accept that the FTTJ made a material misdirection in law in her findings with regard to the appellant’s wife’s earnings.
23. It follows from the above that the FTTJ’s findings with regard to the appellant’s ability to fulfil the criteria in Appendix FM as a parent must stand. As agreed by the parties’ representatives before me, such a finding means that any error of law in relation to the FTTJ’s findings on the appellant’s relationship with his son are immaterial: the appellant qualifies for leave to remain on the basis of his relationship with his wife, irrespective of his relationship with his son.

24. I find there is no material error of law in the FTTJ's decision.
25. Given my references to the appellant's relationship with his wife and son, he is entitled to an anonymity order and I make one accordingly.

Decision

26. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
27. I do not set aside the decision.

A M Black

Dated 11 July 2016

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The FTTJ made a fee award and that stands.

A M Black

Dated 11 July 2016

Deputy Upper Tribunal Judge A M Black