



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

Appeal Number: HU/11279/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 2 November 2017**

**Decision & reasons Promulgated
On 29 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

RANJIT SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Young, Wimbledon Solicitors, London

For the Respondent: Miss Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 28 March 1991. He appealed the respondent's decision dated 6 November 2015 curtailing his leave to remain in the United Kingdom on the basis of his family life with Jyoti Singh and his private life. His appeal was heard by Judge of the First-Tier Tribunal Amin on 20 January 2017. The appeal was dismissed on all grounds in a decision promulgated on 10 February 2017.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Paige on 6 September 2017.

The permission states that the appellant's grounds of appeal are arguable and reference is made to the appellant's son who has highly specialised medical needs which require weekly medical oversight with home visits, as well as multiple doctors and hospital visits each month. The Judge found at paragraph 24 that there was no reason why the child would not be able to access medical treatment in India. The permission refers to paragraph 18 of the decision in which the Judge states that there is medical evidence in support of the appellant's child's medical needs but at paragraph 24 he states that the child's level of illness is not corroborated by medical evidence and the appellant has not shown why the child would not be able to access medical treatment in India. The grounds state that it is unreasonable for the Judge to conclude that the appellant's son, who is a British citizen, can be expected to relocate to India. The grounds go on to refer to the Judge applying the wrong test under the Immigration Rules. They state that the Judge has placed insufficient weight on the evidence of the appellant and his wife and also the medical evidence which goes to the issue of their son's needs.

3. There is a Rule 24 response. The Rule 24 response states that the application was submitted late and there is nothing in the permission to extend time so the application cannot proceed. The response goes on to state that the Judge was entitled to consider all the evidence before him and he was entitled to find, based on that evidence, that there is nothing preventing the child returning to India. The existence of a British child does not trump removal of the appellant even though there is no removal decision for that child, nor is removal of the child being sought by the respondent. The response goes on to state that the appellant's child was not born at the date of the decision so there is no right of appeal against the decision under the Immigration Rules as the appellant could not have satisfied the requirements of EX1 on the basis of his child. Paragraph 15 of the decision relates to the respondent's consideration of the appellant and his wife only.
4. I put to the appellant's representative that perhaps the child is not British as the appellant's second wife, who is the mother of this child, has indefinite leave to remain in the United Kingdom but is not British. There is however a British passport for the child on file. I take it that it must have been found that the appellant's second wife is settled in the United Kingdom and was settled when the child was born and this is why the child has been granted a British passport.
5. The representative submitted that the Judge used the wrong test, being EX1(b) which is insurmountable obstacles instead of EX1(a) which is based on a genuine and subsisting relationship. Unreasonableness should have been used not insurmountable obstacles.
6. I addressed the appellant's representative on the Rule 24 response which deals with the child not being born at the date of the decision so there being no right of appeal against the decision under the Immigration Rules, as the appellant could not have satisfied the requirements of EX1 on the

basis of his child. The representative submitted that it was known that the appellant was going to have a child and this issue was never raised or challenged. She submitted that this is a belated attempt by the respondent to raise a new issue and is unfair.

7. The representative submitted that the Judge has used the test of insurmountable obstacles at paragraphs 16, 19, 22, 23, 26 and 27 and this is the wrong test.
8. The representative referred to the child being dependent on an oxygen supply and this was not disputed on the date of the hearing. He requires specialist medical treatment and constant monitoring. The appellant helps his wife with translating when she goes to the doctor as she has poor English and in Dr Gupta's medical report it is stated that the appellant's wife could not manage without her husband being there to translate. She submitted that the Judge did not properly consider the whole of Dr Gupta's letter and although it is stated that in the future the child might not require constant oxygen he needs it just now.
9. I was asked to find that the appellant's evidence is corroborated by his wife and I was referred to the bundle for the first hearing. The representative submitted that had the Judge used the correct test he would have come to a different conclusion. She submitted that because of this there is a material error of law in the Judge's decision.
10. She submitted that Article 8 also applies to the appellant's wife who, if she has to go to India, will have no family to support her. She submitted that the fact that the child is British is very significant in this case.
11. The Presenting Officer made her submissions submitting that there is no appeal right and yet this was not raised until the Rule 24 response was submitted. She submitted that the appeal should not have gone ahead but in any case the Judge applied the wrong criteria. She submitted that there are errors.
12. The appellant's representative asked me to grant the application.
13. The Presenting Officer submitted that as the whole case is based on an error it requires to be reheard and the up-to-date position of the child has to be taken into account.

Decision and Reasons

14. The child was not born at the date of decision. There was therefore no right of appeal against the decision under the Immigration Rules, based on the child's health. Clearly the appellant could not have satisfied the requirements of EX1 on the basis of the child at the date of application.
15. At paragraph 15 of the decision the Judge states that the appellant has a genuine and subsisting relationship with his wife who is in the UK. He

states that she is a British citizen but she is not. She is settled in the UK. The Judge then refers to insurmountable obstacles and EX1(a). This is the wrong test.

16. The Judge applied the wrong criteria and the wrong standard of proof so there are clear material errors in his decision. The appeal should not have gone ahead but as it has reached the stage it has, I am prepared to remit it back to the First-tier Tribunal.

Notice of Decision

I find that there are errors of law throughout Judge Amin's decision and that these are material. I therefore find that the decision of Judge Amin must be set aside.

I direct that this application is referred back to the First-Tier Tribunal. It should not be heard by First-Tier Tribunal Judge Amin.

Signed

Date

Deputy Upper Tribunal Judge Murray