



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08854/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18th June 2018

Decision & Reasons Promulgated
On 27 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

PRAVENENA [M]
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms. Seehra, Counsel, instructed by Nag Law, Solicitors

For the respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a national of Sri Lanka, born on 30 January 1984. She is married to [AR], a British citizen. They have two children, [AA], born on 12 May 2011 and [AAR], born on 19 December 2015. They are also British citizens.

2. On 7 December 2015 she applied in country for leave to remain on the basis of her family life. She was here on a visit visa. This was refused on 18 March 2016. The application was considered under the 10 year route in appendix FM of the immigration rules. The respondent was not satisfied that she met the eligibility requirements which requires an applicant and their partner to intend to live together permanently and they must produce evidence that they have lived together in the United Kingdom or there is a good reason consistent with a continuing intention to be together for any period of absence. The appellant had been living in the Republic of Ireland. This was part of her training to be a medical doctor.
3. Furthermore, the appellant was in the United Kingdom with leave as a visitor. Consequently, she did not satisfy the immigration status. EX 1 did not assist.
4. She was also refused under the private life route and no other circumstances were seen to justify the grant of leave outside the rules. At the time of application her eldest child had been born and the respondent noted that she had been living with her father. The respondent concluded that the appellant could return to Sri Lanka and seek the correct entry clearance whilst her daughter remained with her father.
5. The grounds of appeal include the statement that the appellant's husband frequently visited the Republic of Ireland to be with the appellant.

The First tier Tribunal.

6. The appeal was heard at Taylor house on 16 August 2017 before First-tier Judge Twydell. In a decision promulgated on 19 October 2017 it was dismissed. At paragraph 25 the judge found that the appellant did not meet the eligibility requirements of the immigration rules because she and her husband had not lived together permanently in the United Kingdom. This was because she had been pursuing her career as a doctor elsewhere.
7. The judge found that paragraph EX 1 did not apply because she did not meet the eligibility requirements and was here as a visitor.

The Upper Tribunal

8. Permission to appeal was granted on the basis it was arguable the judge erred in law by concluding the eligibility requirements were not met because the appellant and her partner had not lived together permanently in the past whereas the rules were forward-looking. The judge had also referred to the appellant remaining in the United Kingdom illegally and to her blatant regard for immigration law whereas in fact she had not been here without leave. Furthermore, the judge failed to consider section 117 B (6) of the Nationality, Immigration and Asylum Act 2002.

9. At hearing Ms. Seehra relied on the grounds for which permission had been granted. The 1st point was that the judge was mistaken in focusing upon the permanency of the relationship by reason of past events whereas this should have been assessed on the basis of a forward-looking approach. A 2nd point was that the judge incorrectly recorded the appellant's immigration history. For instance, the reference to her being in the country illegally was incorrect. The appellant in fact was here on a visit Visa when she made the application. It was also argued that the judge should have considered matters under EX 1 and concluded in the appellant's favour on the basis her partner and children are British and it would be unreasonable to expect them to leave. Ms. Seehra also referred to the judge's failure to refer to the respondent's guidance which was applicable. It was argued that the judge should have considered the reasonableness of expecting the appellant to leave and then make an application for re-entry bearing in mind the case law, for example, from Agyarko and Chickwamba. Reference was also made to the absence of consideration of section 117B(6).
10. Ms A Everett acknowledged that the grounds advanced did indicate a material error of law which would require the decision to be set aside. She accepted that the judge had made errors of fact in relation to the appellant's immigration history. She did have reservations as to whether EX 1 was applicable given that the application was made when the appellant had leave as a visitor. In any event, she acknowledged that there was no evaluation of the reasonableness of expecting the appellant to leave and make application for re-entry or consideration of the Chickwamba point. She did not accept that the appellant would inevitably succeed but nevertheless this issue should have been considered. She also accepted that the guidance was relevant and had not been considered as was section 117 B (6).
11. I was invited by both parties to set the decision aside and to remake it.

Conclusions

12. The papers indicate that the appellant married her sponsor on 21 January 2010 at which stage he was a medical student. They live together in the United Kingdom and then on 25 February 2014 she took up an appointment as a doctor in Cork hospital in the Republic of Ireland. Her husband and their children have been living with his parents at their home in England and the appellant would, whenever she could, travel to visit them. Her most recent visit before the application was on 14 November 2015. She entered the United Kingdom on a visit Visa which was valid until 17 December 2015. Before the visas expired she made an application for leave to remain on the basis of her family life.

13. The refusal was on the basis the eligibility requirements were not met. The judge may well have been misled by the wording in the refusal letter which uses the phrase 'have lived together permanently' suggesting the past tense. However E-LTRP 1.10 of appendix FM refers to an *intention* (my emphasis) to live together permanently. Clearly this envisages life in the future. It then states that any application for further leave to remain or indefinite leave to remain must include evidence that since entry was given as a partner they have lived together or there is a good reason if they have not done so consistent with a continuing intention to live together. This is not the appellant's situation as there was no earlier leave to remain.
14. First-tier Judge Twydell at paragraph 25 refers to the appellant entering the United Kingdom on a visit Visa rather than a spousal Visa. The judge then concluded from this that the appellant and her husband had not lived together permanently in the United Kingdom because of her work outside and therefore she did not satisfy E-LTRP.1.10. Both representatives are in agreement that the judge has misinterpreted this provision which involves a forward-looking approach. I would agree with this. Consequently, the conclusion that she did not meet the relationship requirement towards her partner was incorrect. Therefore, the conclusion that the eligibility requirements were not met was erroneous. What the rule requires is a forward-looking approach as to their future intention.
15. EX 1 applies where the person has a genuine and subsisting parental relationship with a British child as is accepted here. The test then is whether it would be reasonable to expect the child to leave the United Kingdom. A further head relates to a genuine relationship with a partner who is a British citizen and there are insurmountable obstacles to family life continuing outside the United Kingdom. Again, there is no dispute as to the genuineness of the relationship.
16. The refusal letter concluded that EX 1 did not apply because the eligibility requirements were not met. However, this was premised upon the view taken of the relationship. There is a difficulty for the appellant however under the immigration status requirements in that she made the application why she had a valid visit Visa. Consequently E-LTRP.2.1 applies.
17. Appendix FM with its interrelated provisions and difficult referencing system does not make a judge's task easy. This is so in determining when EX1 applies. Although the eligibility issue in relation to intention is resolved the remaining difficulty for the appellant is that she is here as a visitor. On my reading she cannot benefit from EX1 because of this.
18. On appeal the grounds relate to article 8. At 1st instance matters must be considered through the prism of the rules. However, that is not the end of the matter.

19. The appellant's husband and children are British. There is nothing to suggest the relationship is anything but genuine and subsisting. The applicable guidance to caseworkers applicable at the time at 11.2.3 considered the reasonableness of expecting a British child to leave the United Kingdom. It states that where the decision would require a parent or primary carer to go outside the EU then the case must be assessed on the basis it would be unreasonable. The judge had found that it was in the children's best interests for them to be with both parents. The judge recorded their progress at school. They have no direct experience of living in Sri Lanka. All of course are British citizens. The judge referred to such a move meaning the direct contact with their grandparents would end.
20. The alternative is for the appellant to leave and the children remain with their father while she makes a further application. The success of such an application cannot be guaranteed. However, the primary objection originally related to an intention to live permanently in the United Kingdom and I find this is no longer an issue. On this basis it is my conclusion when all the family circumstances are taken into account and the grounds for refusal analysed it would be disproportionate to expect the appellant to leave and reapply. This conclusion would also be consistent with section 117 B (6).
21. In conclusion therefore I find that the decision of First-tier Judge Twydell materially errs in law and cannot stand. I would remake the decision allowing the appeal.

Decision.

22. The decision of First-tier Judge Twydell materially errs in law and cannot stand. I remake the decision allowing the appeal.

Francis J Farrelly

Deputy Upper Tribunal Judge

Fee order

Although the appeal has now succeeded following further argument I see no reason for changing the original no fee award.