



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19817/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2018

Decision & Reasons Promulgated
On 14 September 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MICHAEL ANTHONY SPENCER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Jibowu, Counsel, instructed by Rogols Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Jamaica against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent, by an Entry Clearance Officer, on 1 July 2016, refusing him entry clearance to the United Kingdom.
2. I begin by considering the reasons for refusal set out in the Notice of Immigration Decision dated 1 July 2016.
3. The respondent found the appellant "unsuitable" because in 2002 he was convicted of criminal offences in the United States of America and sentenced to ten years' imprisonment. He served seven years and was released because of good behaviour. It is a requirement of

the Immigration Rules that a person seeking entry clearance as a partner does not fall for refusal under any of the "suitability" grounds and it is stated at S-EC.1.4 that the exclusion of an applicant from the United Kingdom is conducive to the public good if the applicant has been convicted of an offence for which he has been sentenced to a period of imprisonment of at least four years.

4. It is clear that the appellant had been sentenced to a qualifying term of imprisonment and cannot satisfy the suitability requirements.
5. Additionally the Entry Clearance Officer was not satisfied that the financial requirements of the Rules were met. However that is no longer a live issue in the case. It was made plain that the requirements of the rules had been met and the point was conceded expressly by the Presenting Officer at the hearing before the First-tier Tribunal Judge.
6. It follows therefore that the First-tier Tribunal Judge plainly erred by purporting to dismiss the appeal because of non-compliance with the financial requirements of the Rules. I also accept that the inappropriately adverse finding on financial grounds might have impacted the assessment on other grounds and so gives an appearance of injustice.
7. The appeal is brought on human rights grounds and although the applicant's ability to satisfy the requirements of the Rules illuminates a human rights decision it is not determinative. Even though the requirements of the Rules are strict they are softened by GEN.3.2.(2) that provides that in circumstances that apply here:

"the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights is evident from that information would be affected by a decision to refuse the application."
8. Indeed it is one of the complaints in the grounds that the First-tier Tribunal did not look at evidence that dealt with the difficulties the appellant's wife's child had in the United Kingdom. It is not entirely clear to me if the evidence was before the judge and ignored improperly or if it was not before the judge because of administrative error but either way it was ignored by the judge and there was an error of law. The evidence ought to have been considered.
9. I am also satisfied that the judge misdirected himself by speculating at paragraph 26 that the meaning of paragraph S-EC.1.4, saying that the applicant's exclusion "is conducive to the public good" because of the long prison sentence, is ambiguous. The difficulty the judge found does not exist. It is perfectly possible for the appellant's exclusion to be conducive to the public good but for him to be admitted to the United Kingdom notwithstanding that, for example because of the human rights of others. It will only be in the most unusual circumstances where the appellant's rights outweigh the public good but such circumstances might occur. More commonly, where applications by people who are not "suitable" ought to succeed it is because refusing admission is disproportionate because of its impact on the rights of people other than the applicant but refusing admission is still in the public good.
10. I am quite satisfied that the First-tier Tribunal erred in law. The First-tier Tribunal wrongly found against the appellant on a point that had already been resolved in his favour, it

wrongly misdirected itself about the proper approach and for some reason, that may not have been the judge's fault, wrongly failed to consider evidence about the circumstances of the appellant's wife's child.

11. It follows that the First-tier Tribunal erred in law and I set aside the decision.
12. I am satisfied that there is no need for a further hearing to remake the decision. The facts do not appear to be disputed and there is considerable evidence before me about the circumstances of those involved.
13. I have considered the papers before me including a postdecision medical report dated 8 August 2018 concerning the sponsor's mother. I also acknowledge a letter dated 13 August 2018 confirming the sponsor's job. She is a security officer at a well-known airport and works full-time on a permanent contract and her salary, including a shift allowance, is very close to £35,000 a year (I assume per year, the letter is not actually clear.)
14. The appellant made a statement dated 12 April 2016.
15. The important parts of the statement show that he met his wife C S when they were teenagers but they lost touch.
16. The appellant went to live in the United States and after he returned to Jamaica he was reunited with Ms CS and their relationship "blossomed" so that they married on 6 July 2013.
17. He described in warm terms the wedding ceremony at a church in Jamaica and the subsequent reception or party. He applied to enter the United Kingdom when his wife was with him in Jamaica but in his words, "it was refused as I had not been entirely candid with my complete previous immigration history".
18. That is a very tame way of saying he told lies and pretended that he had not had any convictions for criminal matters. I say immediately that I find the reluctance to confront his dishonesty in the statement a troubling element in the case.
19. He did explain that he believed, correctly, that his imprisonment in the United States of America would adversely affect his application and he desperately wanted to be with his wife. He apologised for what he had done and described his conduct as "foolhardy".
20. He insisted that there were no other criminal convictions that he had not disclosed.
21. He then explained how he kept in contact with his wife as best as they could but they had a long-distance relationship.
22. He then talked about his wife's circumstances in the United Kingdom.
23. He knew that she lived in a three-bedroom property that was rented and which she shared with her young son and her disabled mother.
24. He also explained that his wife's son had daily contact with his father and that his wife cared for her mother.
25. There is a statement from the appellant's wife and sponsor dated 30 March 2016.
26. This complements the statement of the appellant where it deals with their early and mature relationship. She believed that the appellant is hardworking and ambitious and wanted to contribute to society.

27. She then outlined her own personal circumstances. She referred to her young son and her mothers' difficulties and her son having daily contact with his father. She said that her mother and son relied on her and it was "nigh impossible" to remove to Jamaica.
28. It is, I find, helpful to go to the most up-to-date medical evidence. This shows that the sponsor's mother was born in 1940 and is now therefore 78 years old (although it is said in the medical report that she is 79 years old). In outline she has poor mobility because of generalised osteoarthritis and has "abnormal weight loss".
29. The sponsor's son was born in August 2001. He has significant learning difficulties. The First-tier Tribunal accepted that there was evidence that he had difficulties as a child. The more recent evidence that should have been considered shows that his difficulties remain.
30. The report dated 17 July 2007 shows that he was referred for investigation by the Speech and Language Therapy Mainstream Schools Team by the Special Education Needs Coordinator at infant school. He struggled to maintain attention and to follow elementary instructions or concepts such as "same" "bottom/top" "different" "before/after" and "either". His limited understanding was not helped by his taking a long time to process and answer apparently straightforward questions. The boy clearly cannot help his condition but it is surprising to me that the First-tier Tribunal Judge expected or thought it possible that there would be some major improvement so that the son's alleged difficulties could not be accepted without recent expert evidence.
31. The more recent evidence makes it quite plain that there was not any such improvement. There are letters dated 7 and 14 September 2017 from the high school where the boy attends. The specialist SEN teacher noted that he had received considerable support throughout his school years and would find it very hard to cope without the familiar support of someone he knew. The letter of 14 September 2017 is not actually signed but is in the same form as the earlier letter and is written in a register that appears to be entirely genuine. I regard both letters as coming from the school and written by competent teachers as they purport to be. The letter writer observes that:

"A settled school with access to professionals and adults J knows and trust will provide him with the best chance of securing a place at a local college or workplace. If J was to be relocated at this crucial stage he would require additional support, monitoring and guidance from the professionals and that he may not have access to".
32. I have also looked at the bundle of evidence that was before the First-tier Tribunal Judge.
33. There is a letter purportedly from J. His handwriting is neat and there are a few errors on the two sided sheet of lined A4 paper. It shows appreciation of the support the appellant gives him when they visit Jamaica and how he would like the appellant to settle in the United Kingdom. I have no way of knowing how much help he had before writing the letter but the claims made are believable and I accept that the letter is genuine in the sense that it expresses his view even if he may have been helped.
34. I accept that there is almost daily contact between J and his natural father. There is little evidence to support that claim but I see no reason to doubt it.
35. I accept too that his father is not an "alternative carer in waiting". There is a big difference between frequent contact and providing a permanent home for a young person with

learning difficulties who, for reasons that he has explained, does not want to live with his father.

36. I am quite satisfied that the appellant's wife's mother lives with her and her son J as is claimed. I am satisfied that the appellant's wife's mother relies on her daughter for support. I do not accept that she just could not cope without her daughter's intervention but removing that support would very seriously interfere with her private and family life and would require major changes at a stage in life when she would not wish to make them. The consequences would be harsh but bearable.
37. I make similar findings about the son J. He is benefitting from the educational opportunities offered. He is not an academically gifted boy. I see little reason to think he would prosper if he had to go to Jamaica. There is no reason to think he would get there the support that he gets in the United Kingdom. Again although there is little evidence on the point I accept that removing his mother would cause a major change in his life that would be harsh for him. I do not know how he would manage.
38. His relationship with the appellant, his step father, has not been tested with the realities of prolonged day to day living. I find that it cannot be characterised properly as a "parental relationship". They have not lived together for the sufficient time for that to be established, at least not in the case of a young person close to adulthood who has a frequent contact with his natural father but I am satisfied that his best interests lie in continuing to live in the United Kingdom where he has frequent contact with his father but also in living there with his mother and the appellant. They would be happiest if that could happen and that would be good for J. This means that it is in J's best interests that the appellant is permitted entry to the United Kingdom but other interests frequently outweigh the best interests of a child.
39. I accept that the Appellant speaks good English and is willing to work in the construction trade. He would not be a burden on the taxpayer and is well placed to integrate into society in the United Kingdom.
40. I have considered part 5A of the Nationality, Immigration and Asylum Act 2002 but it is of limited assistance and this is not a deportation case.
41. It follows therefore that refusing to admit the appellant creates a dilemma. There is tension between the inevitable findings required by the rules that the appellant's exclusion is conducive to the public good by reason of his criminal past and the harsh consequences for the appellant's partner, her child and her other family member if she chooses to remove to Jamaica with her mother and child.
42. It will be harsh for her too if she leaves them behind to live with her husband.
43. I recognise that it is generally seen as desirable for life partners to live together if that is what they want to do and that is something which in broad terms policy should facilitate.
44. In reality the appellant's wife will not leave her son and mother and they will not go to Jamaica. There is nothing for them there and the appellant's wife wants to support them. The marriage will survive by long range communication and as many visits as she can manage. That is harsh for her. I must ask myself if that harshness is unjustified.
45. I am not able to accept the appellant's assurances that he has put behind him his criminal past. His dishonest failure to declare his criminal past in an application made in 2013 is

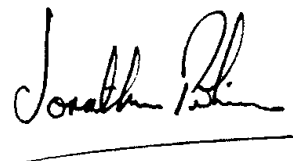
inconsistent with his claims of having faced up to his past and put behind him his criminal behaviour. It is consistent with his being ashamed of it and anxious to start a new life with his wife but it leaves me concerned about his future intentions.

46. Nevertheless I recognise that he has not been in trouble since the serious matters that led to his imprisonment in the United States of America. Although I am a little concerned there is no proper basis for thinking that he would be likely to commit crime in the United Kingdom.
47. I do not make the decision that I do because he would probably commit offences in the United Kingdom but because Parliament has decided, by approving the immigration rules, that excluding people who have been to prison for at least four years is conducive to the public good. It means that in the Article 8 balancing exercise there is a big weight against the appellant.
48. I regret for the appellant's sake that I have to conclude that the harshness is justifiable. It is what happens when people commit serious criminal offences. A criminal record is not something that can be shaken off lightly or quickly. I do not have to justify that view. The rule, approved by Parliament, informs it. The fact is the appellant's wife chose to marry somebody that she knew or ought to have known may not have been able to access the United Kingdom. It was her choice. In any event she is married to somebody who cannot simply be allowed in and given the seriousness of his past behaviour.
49. The appellant's application was refused correctly under the rules.
50. Plainly the decision interferes with his, and his wife's private and family life. The important question is whether the interference is proportionate. I see no basis for finding in favour of the appellant when the rules are so clear.
51. It follows therefore that although the First-tier Tribunal erred in law I too dismiss the appeal.

Notice of Decision

The First-tier Tribunal erred in law. I set aside its decision but I remake the decision and I dismiss the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 12 September 2018