



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07010/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7 January 2019

Decision & Reasons Promulgated
On 30 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR SATISH HARICHARAN PARCHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Robinson, Counsel instructed by Tilson Solicitors

For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, date of birth 18 December 1985, appealed against the Respondent's decision dated 1 June 2017 to refuse an application for leave to remain. His appeal came before First-tier Tribunal Judge J C Hamilton who, on 8 August 2018, dismissed his appeal on all grounds. Permission to appeal was given on 5 November 2018. As a result of representations made, it has been properly

accepted on behalf of the Secretary of State that at the material date, relevant to the Judge's decision, the requirements in relation to temporary absences from the United Kingdom were in fact different from those applied by the Judge. In all other respects there is no real challenge to the fact that by amended grounds the issue of the five year partner route in Appendix FM was to be considered. It was plainly the subject of evidence before the Judge and submissions made by the parties. The Judge in what might be described, as marginally ambiguous, set out [D29-33] the extent to which the five year route as submitted was arguably met, although it had not been the subject of an actual fresh decision or amended decision by the Secretary of State prior to the hearing.

2. The Judge concluded having made comments about the question of whether the Appellant had complied with Appendix FM-SE in relation to specified documents, nevertheless had before him evidence that went to show what the earnings of the Sponsor and the Appellant were and was able to make an informed decision, which he did on the basis as follows:-

"I have therefore proceeded on the basis that the Appellant is able to meet the financial requirements of the Rules on the basis that he and his wife (the Sponsor) between them are easily able to earn in excess of the required threshold. There were no other issues evidently arising under the five year partner route which militated against that appeal succeeding."

3. Mr Whitwell has identified the possibility that maybe there is more to the specific evidence and/or earnings issues, but he left it to me to determine whether there is enough evidence to deal with the appeal. I was satisfied that the Original Tribunal made an error of law. I was satisfied that all the Judge's findings should stand. In those circumstances, whilst there was a material I decided to remake the decision in the context of the submitted evidence and the findings made by the Judge. There was, quite simply, in the relatively long and detailed decision provided by Judge Hamilton, the evidence and material needed to reach a concluded view on the issues.

I find that there was sufficient evidence to show that the Appellant discharged the burden of proof upon a balance of probabilities that he met the relevant requirements of the Rules in relation to the five year partner route.

4. In the light of Mostafa [2015] UKUT 00112, overtaken to a degree by TZ (Pakistan) [2018] EWCA Civ. 1109, this is a case where the correct outcome was that the appeal should have succeeded. The compliance with the Rules on a balance of probabilities was not dispositive of the issue under Article 8 ECHR. For my own part and in any event it seemed to me that it was appropriate in the light of the case law that the appeal should be allowed: Albeit since this is a human rights based appeal, I do so under the provisions of Article 8 ECHR being satisfied that those protected rights family/private life rights were engaged, that the Respondents' decision was an interference, the decision was lawful and properly served the purposes of the maintenance of immigration control. It was not argued, in the above circumstances that the Respondent's decision was proportionate. For my own part, I found, considering this matter and the evidence through the prism of the immigration rules that the public interest was not adversely affected, the Appellant and sponsor are able and willing to integrate and well able to be a productive part of British society. They will not be a burden on the taxpayer. There are no other general grounds for refusal. I find the Respondent's decision is disproportionate.
5. For my part, in my judgement, I am satisfied that this is one of those few cases, particularly looked at through the prism of the Immigration Rules, which indicates that it is one of the few which should succeed on Article 8 ECHR grounds, not least in the context of the decision of the Court of Appeal in TZ.

NOTICE OF DECISION

6. I substitute the decision for that of the Original Tribunal. The appeal is allowed on Article 8 ECHR grounds.

7. No anonymity direction was made, nor was one sought.

Signed

Date 16 January 2019

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

In this case a fee award is made in the sum of £140.00 because the issue, not originally dealt with by the Secretary of State, was raised in the amended grounds. It was raised at the hearing and the grounds of refusal maintained, not least driven in part by an error which the parties made as to the correct date to be addressed.

Signed

Date 16 January 2019

Deputy Upper Tribunal Judge Davey