



IAC-AH-KEW-V1

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

Appeal Number: IA/05029/2015

THE IMMIGRATION ACTS

**Heard at Centre City Tower Decision & Reasons Promulgated
Birmingham
On 22nd April 2016** **On 9th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**LILABHAI BHIMABHAI MODHVADIA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr N Lawrence of Counsel, instructed by Just Legal Group

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Colyer of the First-tier Tribunal (the FTT) promulgated on 25th September 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant.

3. The Claimant is an Indian citizen born 4th June 1994 who on 30th May 2014 applied for further leave to remain in the United Kingdom.
4. The application was refused on 28th October 2014. The Secretary of State noted that the Appellant had applied using form SET(O) for indefinite leave to remain. The application was refused with reference to paragraph 298(i) of the Immigration Rules because the Claimant was seeking leave to remain with his mother (with whom he had entered the United Kingdom) but his mother did not have settled status.
5. The Secretary of State therefore also refused the application with reference to paragraph 322(1) of the Immigration Rules, being satisfied that a variation of leave to remain was being sought for a purpose not covered by the rules.
6. The Secretary of State did not accept that the Claimant could satisfy the requirements of Appendix FM in relation to family life, or paragraph 276ADE in relation to private life. The Secretary of State did not accept that there were any exceptional circumstances that would justify granting leave to remain outside the Immigration Rules.
7. The Claimant's appeal was heard by the FTT on 10th September 2015. By the time of the FTT hearing the Claimant's mother had been granted indefinite leave to remain, which leave was granted on 5th February 2015.
8. The FTT concluded that the Appellant satisfied the requirements of paragraph 298 and allowed the appeal under the Immigration Rules.
9. The FTT found that the Claimant had established family life with his mother, notwithstanding that he was 20 years of age, and that he had established a private life, that engaged Article 8 of the 1950 European Convention on Human Rights. The FTT found that the Secretary of State's decision interfered with the private and family life established by the Claimant, and found (in paragraph 52) that the decision of the Secretary of State was disproportionate and not in accordance with the law. The appeal was therefore also allowed pursuant to Article 8 outside the Immigration Rules.
10. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that it was unclear whether the FTT had allowed the appeal with reference to paragraph 298, but if it had done so, the FTT had erred by failing to consider paragraph 298(iv) and (v) which are set out below;

“(iv) can, and will, be accommodated adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds in accommodation which the parent, parents or relative the child was admitted to join, own or occupy exclusively; and

- (v) can, and will, be maintained adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds;”

11. It was also contended that the FTT had erred in finding that family life which would engage Article 8, had been established between the Claimant and his mother, with the Secretary of State placing reliance on Kugathas [2003] EWCA Civ 31. It was noted that paragraph 36, which contained the FTT reasoning on this issue, was incomplete.
12. It was also contended that at paragraph 38 the FTT had erred in placing weight upon the fact that the Claimant’s removal would have a significant effect on his employment and education, and reliance was placed upon Nasim [2014] UKUT 25 (IAC).
13. It was contended that the FTT had erred in considering section 117B of the Nationality, Immigration and Asylum Act 2002 by failing to appreciate that little weight should be given to the Claimant’s private life because it had been established when his immigration status was precarious.
14. Permission to appeal was granted by Judge Adio of the FTT who found that the FTT had erred in consideration of the Immigration Rules, but found no arguable error in relation to Article 8.
15. The Secretary of State renewed the application for permission to appeal, and permission to appeal was granted by Upper Tribunal Judge Smith, who found it arguable that the FTT had erred, as contended, in consideration of Article 8.
16. Following the grant of permission there was no response from the Claimant pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

The Secretary of State’s Oral Submissions

17. Mr Mills relied upon the grounds contained within the application for permission to appeal. It was submitted that to allow the appeal under the Immigration Rules without considering paragraph 298(iv) and (v) amounted to a material error of law.
18. Mr Mills submitted that the FTT had erred by failing to adequately explain why family life was engaged. In addition the FTT had erred by failing to attach little weight to the private life built up by the Claimant while he had a precarious immigration status.

The Claimant’s Oral Submissions

19. In summary Mr Lawrence argued that the FTT had not erred in law by allowing the appeal under the Immigration Rules. I was asked to accept

that paragraph 298(iv) and (v) did not apply because the Appellant was entitled to rely upon sub-paragraph (vii) because he was over 18 years of age, and had been admitted to the United Kingdom pursuant to paragraph 302, and he had demonstrated sufficient knowledge of the English language, and sufficient knowledge about life in the United Kingdom.

20. Mr Lawrence accepted that the FTT had materially erred by failing, in paragraph 36, to explain why family life was engaged between the Appellant who is an adult, and his mother.
21. Mr Lawrence argued that the FTT had not materially erred in consideration of the Appellant's private life, having correctly applied the factors contained within paragraph 117B of the 2002 Act. I was therefore requested not to set aside the decision of the FTT.

My Conclusions and Reasons

22. I announced at the hearing that the FTT materially erred in law and that the decision must therefore be set aside.
23. The FTT erred in allowing the appeal pursuant to paragraph 298. I do not accept Mr Lawrence's submissions that the FTT was entitled to disregard paragraph 298(iv) or (v) as those sub-paragraphs needed to be considered and findings made thereon. The FTT's failure to do so amounts to a material error of law. No findings were made in relation to the requirement that the Appellant must be accommodated by the parent with whom he is seeking to remain, and maintained adequately by that parent. In fact the FTT found at paragraph 36 that the Appellant was no longer financially dependent upon his parents (his father had passed away) and his widowed mother was now financially dependent upon him. To make such a finding, and then allow the appeal under sub-paragraph (v) is an error of law.
24. As conceded by Mr Lawrence, the FTT erred in failing to provide adequate reasons for finding that the adult Appellant had established a family life with his mother. It is possible for family life to exist between an adult child and his parent, that would engage Article 8, but in this case the FTT did not provide adequate reasons for reaching that conclusion, and paragraph 36, in which it is found that the Appellant has established significant family life with his mother, is clearly incomplete.
25. The error in concluding that family life exists that would engage Article 8, without giving an adequate explanation or reasons for that finding, infected the findings made by the FTT in relation to the Appellant's private life.
26. In paragraph 52 the FTT finds that;

"I find that the Appellant's family and private life should be considered in its totality."

27. In addition the FTT erred in its consideration of section 117B and fails to attach little weight to the private life established by the Appellant while his immigration status was precarious. This conflicts with the requirement in section 117B(5). The Upper Tribunal explained in AM (Malawi) [2015] UKUT 0260 (IAC) that a person's immigration status is precarious, if he only has limited leave to remain. This was not properly applied by the FTT.
28. Therefore the decision of the FTT is set aside. Mr Mills submitted that no findings could be preserved, and that the appeal should be remitted to the FTT to be heard afresh. Mr Lawrence agreed.
29. I have considered paragraph 7 of the Senior President's Practice Statements and find that it is appropriate to remit the appeal back to the FTT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be re-made. No findings are preserved.
30. The appeal will be heard at the FTT hearing centre at Nottingham Magistrates' Court and the parties will be advised of the time and date in due course. The appeal is to be heard by an FTT Judge other than Judge Colyer.
31. If either party seeks to adduce any further documentary evidence, such evidence must be served upon the Tribunal and the other party at least fourteen calendar days prior to the next hearing date.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

Anonymity

The FTT made no anonymity direction. There has been no application to the Upper Tribunal for anonymity. I see no need to make an anonymity order.

Signed

Date 26th April 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FTT.

Signed

Date 25th April 2016

Deputy Upper Tribunal Judge M A Hall