



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

Appeal Numbers: HU/12966/2018  
and HU/12971/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 April 2019**

**Decision & Reasons Promulgated  
On 18 April 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**KULWINDER SINGH  
AND  
SURINDER KAUR  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr E Nicholson of Counsel instructed by JJ Law Chambers,  
solicitors

For the Respondent: Mr S Kotas of the Specialist Appeals Team

**ERROR OF LAW DECISION AND REASONS**

**The Appellants**

1. The Appellants are husband and wife, born respectively in 1964 and 1967. They have a child born in 1998 who is a second year university student and has limited leave to remain expiring on 13 May 2019. They are all citizens of India. On 16 November 2006 they entered with leave as

visitors, expiring on 17 April 2017. They overstayed and upon being encountered by the authorities on 30 March 2009 the husband made a subsidiary protection claim with the wife as his dependant. On 15 December 2009 the Respondent (the SSHD) refused the protection claims and certified them as clearly unfounded. The Appellants sought permission to bring proceedings for Judicial Review which was refused on 4 April 2010. Two years later, on 6 April 2012 they submitted an application for further leave outside the Immigration Rules on the basis of their private and family life. On 2 May 2013 the SSHD refused the applications with no in-country right of appeal. On 2 December 2016 the Appellants made a further application for leave based on their family life with their child which is the decision under appeal.

### **The SSHD's decision**

2. On 5 June 2018 the SSHD refused the Appellants further leave for reasons given in a letter of the same date. The part of the reasons letter dealing with whether the Appellants met the relevant requirements of the Immigration Rules and in particular, Section R-LTRPT of Appendix FM are far from clear: see for instance the part dealing with Section EX of Appendix FM. The SSHD concluded the Appellants did not meet the relevant requirements of the Immigration Rules or any of the time critical requirements of paragraph 276ADE(1) of the Rules. The SSHD noted there was evidence that the majority of their wider families lived in India and that they were in contact with them. Consequently, there were no very significant obstacles to their re-integration on return to India where they had lived until they came to the United Kingdom. Additionally, there were no exceptional circumstances warranting the grant of leave outside the Immigration Rules. At the date of the Appellants' applications their child was a minor and an adult by the date of the SSHD's decision.
3. At the very end of the reasons letter the SSHD cited paragraph R-LTRPT 1.1(d)(ii) without stating what it provides or giving any explanation how it might be applicable to the decision. Similarly in the sentence the SSHD cited paragraph 276CE which provides that leave is to be refused if the requirements of paragraph 276ADE(1) are not met. There was no attempt to link the reference to R-LTRPT 1.1(d)(ii) to any earlier part of the letter, in particular the part asserting that the provisions of Section EX were not applicable to the Appellants.

### **Proceedings in the First-tier Tribunal**

4. On 13 June 2018 the Appellants lodged notices of appeal. The grounds are entirely generic and formulaic. By a decision promulgated on 6 February 2019 Judge of the First-tier Tribunal NJ Osborne dismissed both appeals on all grounds. On 12 March 2019 Judge of the First-tier Tribunal O'Garro granted permission to appeal because the Judge had arguably erred in deciding not to apply the provisions of Section EX of Appendix FM. The Appellants' child at the date of their applications had been a minor but by the date of the hearing was an adult and that it was arguable the Judge

had erred in taking the relevant date for the application of Section EX as the date of the hearing and not the date of the applications for further leave.

### **The Upper Tribunal Proceedings**

5. At the start of the hearing I requested the advocates to take me through the relevant parts of Appendix FM to enable me to understand how it came about that the decision of the First-tier Tribunal focused on Section EX and the date at which it was considered to be applicable since my understanding was that Section EX merely served to exclude the need for an applicant for further leave to meet certain eligibility requirements if, first, the Section was engaged and, second, its requirements satisfied.
6. In the course of doing this, it became apparent that Section EX was not relevant to the Appellants' circumstances because the provisions of paragraph R-LTRPT 1.1(d)(ii) stated the Appellants had to meet the requirements of paragraphs E-LTRPT 2.2 - 2.4 which apply only when the applicant has

... sole parental responsibility for the child all the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or ...

and paragraphs ELTRPT.3.1 and 3.2.

7. Paragraph E-LTRPT 2.3 is the provision of immediate concern. The relevant part is recited in the preceding paragraph. I enquired whether the Appellants could meet the requirements of this paragraph because if they could not, then Section EX could not be engaged.
8. On my motion I adjourned the hearing for a short period to enable Mr Nicholson for the Appellants to consider the position, marshal his thoughts, take instructions and, if appropriate, discuss possible ways forward with Mr Kotas for the SSHD.
9. After some 20 minutes, the hearing resumed. I was informed the parties agreed the lack of a response under Procedure Rule 24 from the SSHD had not helped. The original SSHD decision had not adequately set out the SSHD's approach to the applicability or otherwise of Section EX so that the Appellants had not been able to understand the basis for the SSHD's adverse decision. Further and following on, the decision of the First-tier Tribunal contained a material error of law in its approach to the engagement of Section EX.

### **Conclusion**

9. My concern is whether the decision of the First-tier Tribunal contains a material error of law and in the light of the above and the parties' agreement, I am satisfied that it failed adequately to address the

relevance and applicability of Section EX and so contains a material error of law such that it should be set aside with no findings preserved.

10. Given the erroneous basis upon which the First-tier Tribunal proceeded and that in effect the whole appeal needs to be heard afresh and the Appellants who hopefully now have a clear idea of the case they have to answer may wish to submit further evidence, I find it appropriate to remit the appeal for hearing afresh before a different Judge in the First-tier Tribunal.
11. At the close of the hearing, I suggested the SSHD may wish to consider the preparation of a supplemental reasons for refusal letter to address at greater length the Appellants' claim based on their private and family life protected by Article 8 of the European Convention outside the Immigration Rules. I gave leave to the Appellants to file and serve any further evidence not less than two weeks before the next hearing.

### **Anonymity**

12. There was no request for an anonymity direction and having considered the appeal, I find none is warranted.

### **SUMMARY OF DECISION**

**The decision of the First-tier Tribunal contains an error of law and is set aside.**

**The appeal is remitted to the First-tier Tribunal for hearing afresh.**

Signed/Official Crest

Date 15. iv. 2019

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal