Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01110/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 24th August 2015	**On 1st September 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FUNGAI MOETSABI

Respondent

Representation:
For the Appellant: Ms S Aitken, Senior Presenting Officer
For the Respondent: Mr J Bryce, Advocate, instructed by Mackinlay & Suttie, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The SSHD appeals against a determination by First-tier Tribunal Judge R M M Wallace, promulgated on 15th September 2014. The determination at paragraphs 74 - 77 bears to dismiss the appellant's appeal "on refugee grounds" and "on human rights grounds", to find "no issue of humanitarian protection", and to allow the appeal "under the Immigration Rules".

3. It was apparent during the hearing on 24 August that the approach of the parties had been rather muddled, and had led to some confusion on the part of the judge. On examination of the papers after the hearing, even greater muddle comes to light.

4. Proceedings up to the time of the First-tier Tribunal determination dealt largely with asylum issues, which are no longer live. The record of the asylum interview dated 10th February 2014 shows that the appellant disclosed that on 20th October 2011 she married a UK citizen (also of Zimbabwean origin, now a psychiatric nurse employed by the NHS), and that they were expecting a child in a few months.

5. The respondent issued a letter of 29 May 2014 letter explaining the decision appealed against. The letter records the foregoing family information at paragraph 12 (j) but when it goes on later to deal with family life, it says that the appellant has stated that she "does not have a partner nor children in the UK, they reside in Harare". The parts of the decision with which present proceedings are concerned are all based on that misapprehension of the facts.

6. The appellant's grounds of appeal to the First-tier Tribunal did not seek to correct the error about family circumstances. They simply insisted on that there was risk on return to Zimbabwe.

7. The reality of the appellant's family life did emerge at the hearing in the First-tier Tribunal. It is narrated at paragraphs 21 to 26. The appellant and her husband by that time had a son, born on 23rd March 2014. Paragraph 59 records that the Presenting Officer pointed out the factual mistake in the decision.

8. There is then misconception about the law. The way in which the judge was invited to deal with the aspect of the case which remains live is recorded in the determination under the heading 'Submissions' at paragraphs 38 to 50. Both parties seem to have thought that part 5A of the Nationality, Immigration and Asylum Act 2002 and in particular section 117C(5), Exception 2, is not in a statute but in the Immigration Rules. The submission for the respondent was that the appellant did not benefit from that provision because the effect of deportation on the appellant's partner and child would not be unduly harsh, while the appellant's solicitor submitted to the contrary.

9. The judge's conclusions at paragraphs 64 to 73 are based on finding that section 117C(5), Exception 2, applies in the appellant's favour.

10. At paragraph 73 the judge finds that the effect of deportation would be "unduly harsh on the appellant's partner".

11. The appellant and her spouse made it plain that if she were required to leave the country, their son would stay here, so it is perhaps surprising that the judge did not specifically find that separation of the infant from his mother would also be unduly harsh.

12. As a result of the confusion which had descended, the judge purported to allow the appeal under and not outwith the Rules.

13. The SSHD applied to the First-tier Tribunal for permission to appeal, on grounds which dispute the finding that deportation would be "unduly harsh on [the appellant's] husband and child; develop that argument, based on the circumstances of the case; and stress "the strong public interest in favour of the deportation of foreign criminals."

14. On 6th October 2014 First-tier Tribunal Judge Cox refused permission to appeal, on the view that the decision gave "perfectly adequate and sustainable cumulative reasons why the decision would result in undue harshness in all the circumstances" and that the SSHD's grounds amounted to no more than "special pleading for a different outcome".

15. In my opinion, and having heard the case further, that was all that needed ever to be said about those grounds: they are only disagreement with the way the judge has answered the question, as it was posed by both sides.

16. The SSHD then applied to the Upper Tribunal for permission to appeal, on grounds which try to demonstrate not that Judge Wallace may have erred in law (which would be the right question) but that Judge Cox did so (the wrong question).

17. The application seeks to make two specific points. The first is unclear, but is based on Judge Cox going wrong by addressing section 117C of the Act rather than the Immigration Rules (and saying nothing about how any such confusion arose in the first place). The second complains that Judge Cox concentrated on "undue harshness" whereas the test in section 117C is "very significant obstacles to integration". That second proposed ground confuses section 117C(4) – Exception 1 – with section 117C(5) – Exception 2 – on which the determination is based.

18. On 3rd February 2015 UT Judge Storey granted permission:

> "It is arguable that the FtT erred in failing to decide the appeal under the Immigration Rules, given that the Court of Appeal in *MF (Nigeria)* described the Rules on foreign criminal deportations as a 'complete code'.
>
> It is also arguable that in seeking to apply Section 117C(4) (which could only have application outside the Rules) and deciding that the appellant fell within one of the two exceptions, the FtT erred by applying the wrong test, (undue hardship rather than very significant obstacles to integration). Also a live issue is whether the exceptions are self-contained tests which if met oblige a court or tribunal to find a breach of Article 8 or whether they are still subject to an overall proportionality assessment."

19. The SSHD's application seems to have misled the judge granting permission into thinking that the determination did not purport to decide the appeal under the Rules, when in fact it did so (even if on the basis of a misunderstanding).

20. In a Rule 24 response to the grant of permission (filed late, without objection by the respondent) the appellant submits as follows. The judge

did not fail to have regard to the Immigration Rules, referred to in particular at paragraphs 58 and 59 of the determination. The Rules on foreign criminal deportations are no longer a complete code, following enactment of Part 5A of the 2002 Act. The judge explicitly applied the exception in Section 117C(5) not (4). The "unduly harsh" test is the correct one. As to the live issue identified in the grant of permission, the Secretary of State has not made this point in either application. It is "not good practice for the Tribunal to supply the Secretary of State with a ground of appeal she has not sought to put for herself" and which she might indeed not wish to argue. If one or other of the two Exceptions is satisfied, "that is the end of the enquiry".

21. Ms Aitken referred to *Bossade* (ss.117A-D interrelationship with Rules) [2015] UKUT 415 and in particular head note 3 and 4, which suggest that Part 5A considerations have only indirect application to the Immigration Rules, "limited to their role as statements of principles that can be used where appropriate to inform the meaning of key terms set out in such paragraphs". She submitted that the judge should have looked at the exceptions in the Immigration Rules at paragraphs 399 and 399A, more stringent tests which the appellant could not have satisfied, and the determination should therefore be reversed.

22. Mr Bryce relied upon *MAB* (para 399; "unduly harsh") USA [2015] UKUT 00435, in particular at paragraphs 42 to 49. He accepted that the appellant could not meet paragraphs 399 and 399A of the Immigration Rules as they stood at the date of the decision under appeal. However, he submitted that the judge was not shown to have gone wrong by allowing the appeal, and any error she might have made along the way was not material.

23. Mr Bryce referred to the terms of the Immigration Rules as they presently stand, having been amended on 28th July 2014:

> '399.This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported ...'

24. Mr Bryce said that if the present decision did fall to be re-made it could not be allowed under the Immigration Rules, because the relevant provisions remain those as at the date of the decision under appeal. However, he argued, the Rules as they presently stand could nevertheless inform the

consideration outwith the Rules of what is proportionate, and the appeal would therefore fall to be allowed.

25. A point acknowledged by Mr Bryce is that the judge went wrong at paragraph 65 in considering that the appellant's offences would become "spent" within the next twelve months. Given her immigration status, she does not reap that benefit. However, the point was not made by the Secretary of State in any of her grounds and is incidental.

26. I reserved my determination.

27. The first set of grounds amount to no more than disagreement with the judge's assessment of undue harshness. That assessment was open to her, was reached for good reasons, and in itself is in no way flawed.

28. The second set of grounds is misconceived in its approach, being framed as a challenge to the decision of Judge Cox. Insofar as it is based on the judge having applied Exception 2 rather than Exception 1, these are alternatives, and if either applied to this case it was plainly Exception 2.

29. I do not find anything in either of the SSHD's sets of grounds which amounts to identification of an error on point of law in the determination. The SSHD has not sought to frame further grounds or applied to amend.

30. The judge was asked by both representatives in the First-tier Tribunal to resolve the case on the basis of undue harshness, and that is what she did. Even if the SSHD had framed some accurate ground of appeal, that would first have to overcome the hurdle of whether the judge can be criticised by the respondent for taking exactly the approach which the respondent invited her to do.

31. The appellant has never received a decision from the respondent in terms of the Rules which does take proper account of her family life. The explanatory letter does not deal with it, because she was not thought (at the relevant passages) to have any family life in the UK. If a fresh decision were to be reached now, then on the basis of the First-tier Tribunal Judge's fact-based findings and of the Rules as they presently stand, the outcome should be in the appellant's favour.

32. In all the circumstances, while the judge may have been led by the parties into an error of allowing the appeal under the Rules rather than on human rights grounds outwith the Rules, I see no reason to set aside the determination or to reformulate the outcome.

33. The determination of the First-tier Tribunal shall stand.

34. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

27 August 2015