IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01178/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 November 2015	**On 25 November 2015**

Before

THE HON. MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAGALI OMANGA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr R Bartram, Counsel, instructed by Migrant Law Partnership

DECISION AND REASONS

1. This is an appeal by the Appellant (hereinafter called the Secretary of State) against the decision of the First-tier Tribunal who, in a determination promulgated on 16 January 2015, allowed the appeal of the Respondent (hereinafter called "the Claimant") a citizen of the Democratic Republic of Congo, born on 17 September 1976, against the decision of the Secretary of State made on 5 June 2014 to refuse to revoke her deportation order by virtue of Section 5(2) of the Immigration Act 1971.

2. The Claimant arrived in the UK in June 1991 and on 16 June 1992 was included as a dependant on an asylum claim. On 11 March 1999 she was granted Indefinite Leave to Remain in the UK under the special measures introduced for clearing the asylum backlog and this was a grant of leave exceptionally outside the Rules.

3. On 19 June 2008 at Wood Green Crown Court, she was convicted of three counts of making false representations and making an article for use in fraud for which she was sentenced to two years' imprisonment.

4. On 4 November 2008 she was served with a Liability to Automatic Deportation letter and a Deportation Order was signed against her on 19 December 2008.

5. The Claimant's appeal against that decision was dismissed on 20 April 2009 and she became Appeal Rights Exhausted on 28 April 2009.

6. The Claimant claimed asylum on 23 July 2009. She refused to be interviewed regarding her asylum claim on 10 September 2009, as she wanted the interview to be tape recorded. On 14 October 2009 she was interviewed regarding her asylum claim. No decision was made on this claim until 5 June 2014 nearly 5 years after interview.

7. In the meantime, the Claimant gave birth to a daughter on 10 June 2011.

8. In March 2014, further consideration was given to deportation. The Claimant was given the opportunity to state why she should not be removed from the UK including the opportunity to rebut the presumption that she posed a danger to the security of the UK in a letter dated 14 March 2014 to which she responded via her representatives on 14 April 2014.

9. On 14 March 2014 the Secretary of State notified her about the intention to exclude her from Convention protection on Section 72 grounds and following consideration of her response by way of rebuttal, it was decided to refuse her claim by a letter dated 5 June 2014. It was decided in light of her conviction to certify her claim in that the presumption under Section 72(2) applied to her, where it followed that the effect of the certificate was that at any subsequent appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 which included the decision to refuse her client's claim for asylum, the First-tier Tribunal Judge was required to consider the certification first and if he (or she) upheld that certificate then the asylum aspect of the appeal would be dismissed without any consideration of the asylum claim.

10. In the event at the outset of the hearing of the Appellant's appeal before the First-tier Tribunal Judge at Hendon Magistrates' Court on 12 December 2014, he recorded that the Appellant's representative and the Appellant herself confirmed that she did not wish to proceed with her appeal on asylum, humanitarian protection and Article 3 of the ECHR grounds, but

would proceed solely in relation to her claim under Article 8 of the ECHR. It was further recorded that the Presenting Officer for the Respondent indicated that he would not be challenging any of the matters relating to the private and family life advanced on behalf of the Appellant and accepted that Article 8(1) of the ECHR was engaged.

11. At paragraph 15 of the determination, the Judge stated that as Article 8(1) of the ECHR had been engaged, the issue turned on the application of the five-limb test in Razgar [2004] UKHL 27 as to whether it would be a disproportionate interference with the Appellant's right to private and/or family life were she to be returned to the DRC. He recorded:

> "The parties accepted the test was whether there were exceptional factors about the Appellant's case which would result in her deportation amounting to a breach of Article 8 of the ECHR."

12. Under the subheading "My Findings" the First-tier Tribunal Judge had this to say:

> "16. The respondent relied upon the fact that the Appellant had committed a relatively serious criminal offence in 2008 for which she received a total sentence of two years' imprisonment. The Sentencing Judge referred to it being 'a sophisticated fraud over a very long period of time'. Although the Appellant has other convictions, they are of a relatively unserious nature and did not feature in the representations made on behalf of the respondent. Although the Sentencing Judge made no recommendation for deportation, he indicated that that would no doubt be looked at by the respondent and they are regarded as a neutral feature that no such recommendation was made.
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> 17. However the Appellant has been in the United Kingdom since the age of 14. She has no parents, was brought up with her grandmother with whom she presently resides and looks after on a daily basis. She has a daughter born in the United Kingdom and is pregnant with a second child and has a partner. A significant period of over five years was unexplained by the respondent and occurred between the date of the application and its refusal. The Appellant has committed no other criminal offences over a period of over some six years now. She has no relatives remaining in the Democratic Republic of Congo. She was lawfully in the United Kingdom for seventeen years before the decision was made to deport her and given the period she has spent in the United Kingdom, her commitment to her grandmother who has effectively brought her up since a young child, the fact she has committed no offences since 2008 and the long delay before a decision was reached during which time she has had one child and is expecting a second child, I find that there are exceptional circumstances taking into account the respondent's legitimate interest in immigration control and the seriousness of the offences to which the Appellant pleaded guilty and I find that applying the five-stage test in Razgar, it would be a disproportionate interference with the Appellant's right to family and private life were she to be deported to the DRC."

13. The Claimant's appeal under Article 8 of the ECHR was therefore allowed.

14. In successfully obtaining permission to appeal that decision, the Secretary of State contended that the First-tier Tribunal Judge's approach to the evidence was marred by a misdirection in law such that it be set aside, with the advent of the Immigration Rules which were a complete code in deportation appeals in respect of Article 8 rights. The Court of Appeal had given guidance that an Appellants' rights should be assessed by way of reference to those alone. In that regard reference was made to the decision in AJ (Angola) [2014] EWCA Civ 1636 that indeed held that the new Rules, introduced by the 2012 amendment to the Immigration Rules, were intended to operate as a comprehensive code. The assessment of claims for leave to remain for foreign criminals, based on the Convention rights for themselves, their partners, their relations or children should be carried out "under the lens of the new Rules".

15. Thus when the appeal came before us on 18 November 2015 our first task was to determine whether the determination of the First-tier Tribunal Judge contained an error or errors on a point of law such as may materially have affected the outcome of the appeal.

The Legal Framework

16. The decision in AJ (Angola) reflected the decision in MF (Nigeria) [2013] EWCA Civ 1192 that was authority for the proposition that the amendments to the Immigration Rules introduced in July 2012 comprised a self-contained code regulating the expulsion of foreign criminals and that any claims of entitlement to remain on Convention grounds were no longer to be considered separately from the application of the new Rules. It was important to ensure uniformity of approach between different officials and indeed the courts, and that decisions were made in a way that were properly informed by the considerable weight to be given to the public interest in the deportation of foreign criminals as declared by Parliament in the UK Borders Act 2007 and reinforced by the Secretary of State so as to promote public confidence in that system.

17. There has been an abundance of case law subsequent to MF (Nigeria) that reinforce such guidance. In Chege (S.117 – Article 8 approach) [2015] UKUT 00165 it was held that a tribunal must ask itself whether there were "very compelling reasons" such as to outweigh the strong public interest in deportation.

18. MA (Somalia) [2015] EWCA Civ 48 restated the guidance in MF (Nigeria). It was pointed out that the scales were heavily weighted in favour of deportation, in that something very compelling was required to outweigh the public interest in deportation. Great weight had to be attached to the public interest.

19. More recently in PF (Nigeria) [2015] EWCA Civ 251, the Court of Appeal have emphasised the supreme importance of the Tribunal identifying

exceptional, or compelling, factors sufficient to outweigh the public interest in deportation.

Assessment

20. Having heard the parties' respective submissions we were able to inform them that we were satisfied that the First-tier Tribunal Judge had erred in law and that as a consequence his decision should be set aside. We informed the parties of our decision with reasons to follow.

21. We were satisfied that the First-tier Tribunal Judge simply failed to have any regard to the relevant Immigration Rules and the statutory scheme, in his consideration of this appeal. We cannot be satisfied that the Judge would necessarily have reached the same conclusion had he adopted the correct approach to his assessment of the evidence. For these reasons we have concluded that the determination of the First-tier Tribunal Judge, did disclose material errors on a point of law such that the determination should be set aside.

22 There remains a need to consider whether consideration of the facts of the case and applying them to the appropriate legal framework, demonstrates that there are very compelling circumstances in the Claimant's case, sufficient to justify and demonstrate that they outweigh the considerable weight to be given to the public interest in this appeal.

23. In that regard it is right to say that there are a number of factors in the Claimant's favour, that could amount to very compelling circumstances. She arrived in the United Kingdom in June 1991 at the age of 14 with her grandmother. She has lived in the UK for the past 24 years and most of her life. She continued to live with her grandmother in the UK who is a British national. It is claimed that her grandmother has eyesight and mobility problems. The Claimant helps her on a daily basis. Further, the Claimant's grandmother is extremely close to the Claimant's daughter, now aged 4. A particular concern taken together with all the other facts is that it took the respondent more than five years to determine the Claimant's asylum claim.

24. We considered how the decision should be remade. After discussion both parties submitted that the case ought to be heard afresh. We agree. The primary facts are not in dispute. We do not know a great deal about the Claimant's current domestic arrangements and when they first arose. What is in issue is whether on an holistic assessment of the case set against the background of the rules, there are the most compelling circumstances to outweigh the public interest.

25. It was further agreed that having regard to the error of law found, the length of the hearing (estimated at three hours) there were highly compelling reasons falling within paragraph 7.2(b) of the Senior President's Practice Statement as to why the decision should not be

remade by the Upper Tribunal. It was clearly in the interests of justice that the appeal of the Claimant be heard afresh in the First-tier Tribunal.

26. For the reasons that we have above given and by agreement with the parties, we conclude therefore that the appeal should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judges Metzer QC and T R Hollingsworth (the latter of whom presided over the Claimant's grandmother's appeal), to determine the appeal afresh at Taylor House Hearing Centre on the first available date. We are informed that for that purpose no interpreter will be required.

Decision

27. The First-tier Tribunal erred in law such that the decision should be set aside and none of their findings preserved.

28. We allow the Secretary of State's appeal to the extent that we remit the making of the appeal to the First-tier Tribunal at Taylor House before a First-tier Tribunal Judge other than the Judges to whom we have above referred.

No anonymity direction is made.

No fee was payable and no fee award is made.

Signed Date 20 November 2015

Upper Tribunal Judge Goldstein