IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08838/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6th January 2015	**On 22nd January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

NELSON DEDI KOUTALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss P Solanki (Counsel)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M R Oliver, promulgated on 25th September 2014, following a hearing at Richmond, on 5th September 2014. In the determination, the judge dismissed the appeal of Nelson Dedi Koutala. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Congo, who was born on 8th April 1979. He arrived in the United Kingdom on 27th September 2003 as a student. His leave extended until 22nd January 2004. That leave was subsequently extended five times to 5th August 2013. On that day, he applied for further leave to remain, and his solicitors, in that letter of application, emphasised the extent of the Appellant's private life, his life with the church, his life as a volunteer, and his work in IT.

3. A feature of the Appellant's claim was that he had been in the UK for ten years, though not in a manner in which he would qualify under the long residence policy, because of two gaps which were in February 2008 for six weeks, at a time when he had returned to Congo to renew his passport; and secondly from 1st January 2011 to 11th June 2012, at a time when he had returned to Congo to see his parents, who were ill. During this time, when he was in Congo, the family home was destroyed on 4th March 2012 in an explosion caused at the arms depot.

4. Then, the Appellant's father died on 27th March 2012. His mother then died a few days later, after the Appellant had returned to the UK. The position that the Appellant now finds himself in is that he has no family home and no parents in Congo who can help him re-establish himself in that country, were he to return.

The Judge's Findings

5. The judge was, on the whole, favourably impressed by the Appellant. For example, he recognised that the Appellant spent seventeen months outside the United Kingdom and that, "On his own account he is to be applauded for showing such care for his father until his father's death in March 2012", although "By then he had already been absent for well over a year" (paragraph 13).

6. The judge also observed that the Appellant had observed immigration law while in the United Kingdom. Moreover, "He has commanded the respect of his fellow worshippers and others" in his church (paragraph 15). The judge also recognised that the Appellant's removal would cause an interference with his private life such as to engage Article 8 and that, "I further accept that he used his stay well and has helped others; to this extent the importance of the public interest in maintaining firm but fair immigration control is less important than it otherwise would be, but I find on balance that there are no exceptional circumstances which make his removal disproportionate" (paragraph 8.15). The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge ought to have taken into account the "public interest provisions" enacted by Part 5 of the Nationality, Immigration and Asylum Act 2002, once he had made the sort

of findings that he did, in favour of the Appellant, such as to minimise the impact of immigration controls, as against his own individual rights, upon him.

8. On 12th November 2014, permission to appeal was granted.

9. On 19th November 2014, the Secretary of State entered a Rule 24 response, to the extent that the Appellant had relatives in Congo and had qualifications acquired over many years of study in the UK, which would assist him to set up himself as an IT specialist in that country.

Submissions

10. In her submissions before me, Miss Solanki, appearing on behalf of the Appellant, stated that the judge was required, by way of a mandatory obligation upon him, to apply Section 117B of the 2004 Act, and the failure to do so was an error of law in itself. The Grounds of Appeal deal with this at paragraphs 12 to 13.

11. Second, had the relevant factors been considered, then the balance of considerations would have fallen in favour of the Appellant. This is because the Appellant spoke English and this Appellant had financial sustainability. Both of these were considerations specifically going to the issue of how the "public interest" was to be assessed in Section 117B of the 2004 Act. The failure of the judge to have regard to these factors was another reason why he had fallen in error.

12. Third, there was the weight to be given to "private life", and this also fell in the Appellant's favour because he had always been in the UK with leave to remain, and yet this was not a matter that was considered by the judge. Fourth, the extent and nature of the Appellant's private life activities were most significant such that they could not be overlooked. For example, the work that the Appellant did for the Africa Centre (set out at pages 46 onwards of the bundle) was such that it was said that his going away would be a "real loss to the centre". This was not considered by the judge.

13. Moreover, Mr McNally states (at page 33 of his witness statement) that the Appellant was playing a pivotal role in the organisation following the standing down of the current manager due to health reasons. The Appellant was described there as a "key figure". Yet, when the judge refers (at paragraph 8) to the "seven witnesses who gave evidence of benign influence" that the Appellant had on children and youths, there is no reference made to these matters, and no proper assessment undertaken, with respect to how this would go to the consideration of the "public interest" factors.

14. Finally, whilst the judge observes that the Appellant's devoted care of his father was commendable, he wrongly concludes that, "But this unfortunate event appears to have no relevance to the Appellant's claim" (paragraph 13).

15. Miss Solanki submitted that it does have relevance because the death of the Appellant's father meant that he would have to struggle in the Congo, even as an IT specialist, to start a new life. There was no home and there was no father to help him. Miss Solanki submitted that, given the errors in this determination, the proper course was to make a finding of an error of law, and remit the case back to the First-tier Tribunal.

16. For his part, Mr Tufan submitted that the reference to speaking English and to having financial sustainability in Section 117B was neutral. The fact that somebody spoke English or was financially secure did not create compelling circumstances in his favour. Mr Tufan drew my attention to paragraph 36 of the determination in **UE (Nigeria) [2010] EWCA Civ 975**. In that case, Sir David Keene decided that,

> "I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in **Bakhtaur Singh**. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case ..." (paragraph 36).

Second, Mr Tufan submitted that the case of **Patel** had long established now that the expectation for a student in the UK was to return back to the country of his origin, and this must apply here.

17. In reply, Miss Solanki submitted that she was not relying upon the "**Patel** argument". It was not being submitted that the Appellant should stay in the UK because of his private life. What was being submitted was that the private life had not been properly analysed and considered. For example, paragraph 6 of the determination did consider the Appellant's skills as an IT specialist but no findings were made in relation to the Appellant's contentions that he could not find work in Congo because of high levels of corruption there. He would need family support and this was absent on account of the death of his father. In the same way, the judge refers to "compelling circumstances" but this is not now a requirement (paragraph 15).

Error of Law

18. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

19. First and foremost, there is a mandatory obligation under the 2004 Act to consider the "public interest" provisions in Section 117B. This has not been done. This failure in itself is enough to grant permission. What needs to be understood about Section 117B is that it does not carry a fixed rate in all the circumstances when it reads that, "the maintenance of

effective immigration controls is in the public interest", because otherwise Section 117B(2) and (3) would not make any sense, when these refer to the fact that "it is in the public interest" that an applicant is able to "speak English" and that "it is in the public interest" that an applicant is "financially independent". Section 117B is also a non-exhaustive list. It was accordingly important for the judge to assess Section 117B considerations in this case.

20. Second, the judge's assessment of Article 8 in the context of a requirement of "any compelling circumstances which have not been properly addressed under the Rules" is now misconceived in the light of the latest High Court and Tribunal jurisprudence which maintains that the way in which Article 8 is to be structured is without a stipulation of a threshold requirement to be met.

21. The determination at paragraph 15 approaches the facts on this basis. It ends by saying that,

> "I accept that his removal will cause an interference with his private life such as to engage Article 8 and I further accept that he used his stay well and has helped others; to this extent the importance of the public interests in maintaining firm but fair immigration control is less important than it otherwise would be, but I find on balance that there are no exceptional circumstances ...".

Such an approach is now to be astute. On this basis, I conclude that there has to be a finding of an error of law, and that this matter should be remitted back to the First-tier Tribunal under paragraph 7.2 of the Practice Statement.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Oliver so that matters can be considered de novo in accordance with the facts above.

23. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st January 2015