



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

Appeal Number: IA/10734/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 January 2015**

**Decision & Reasons  
Promulgated  
On 3 February 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MUHAMMAD ISMAAIL KHODABOCUS  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood of the Specialist Appeals Team

For the Respondent: Mr H Kannangara of Counsel by direct access

**DECISION AND REASONS**

**The Respondent**

1. The Respondent to whom I shall refer as the Applicant is a citizen of Mauritius born on 13 July 1995. He says he first entered the United Kingdom in 2005 with leave as a dependant child which was extended on several occasions ultimately expiring on 31 March 2010. He was then given discretionary leave expiring on 4 January 2014.

2. On 29 June 2011 he was convicted of sexual assault and exposure to each of which offence he had pleaded guilty. He was given a community sentence of youth rehabilitation for twelve months and required to do 80 hours' unpaid work. He has also been convicted of driving without a licence or insurance. The sentences have been completed and it was accepted at the hearing that all the convictions were spent under the Rehabilitation of Offenders Act 1974.
3. On 10 December 2013 the Applicant applied for further leave and on 10 February 2014 the Appellant (the SSHD) refused the application and decided the Applicant should be removed by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

### **The SSHD's Decision**

4. By a letter of 10 February 2014 the SSHD gave reasons for the decisions. She noted the Applicant's previous leave had been discretionary leave granted by way of reference to Article 8 of the European Convention and that since the grant of such leave the Applicant had been convicted of two sexual offences and of driving without a licence or insurance. Having referred to the Applicant's criminal record the SSHD said:-

Therefore, the Secretary of State is satisfied, in light of your persistent criminal behaviour and convictions, that it would be undesirable to permit you to remain in the United Kingdom.

The SSHD refused the Applicant any further leave by way of reference to paragraphs 322(5) and 322(5A) of the Immigration Rules.

5. The SSHD went on to consider the Applicant's claim by way of reference to paragraph 276ADE of the Immigration Rules and Appendix FM. She noted the Applicant did not satisfy any of the time conditions referred to in paragraph 276ADE and considered that he still had ties to Mauritius and there were no exceptional circumstances which warranted consideration of the grant of leave under Article 8 outside the Immigration Rules.

### **The First-tier Tribunal Decision**

6. On 27 February 2014 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds referred to the length of time the Applicant had been in the United Kingdom as a minor and the immigration status of his parents, siblings and other family members. They asserted the Applicant had acknowledged his past behaviour and shown his intention to re-build his life in the United Kingdom with his family. The other grounds are formulaic or generic.
7. By a decision promulgated on 6 November 2014 Judge of the First-tier Tribunal T Jones allowed the appeal on grounds which would appear to relate to paragraphs 322(5) and 322(5A) of the Immigration Rules.

8. On 22 December 2014 Upper Tribunal Judge Martin sitting as a Judge of the First-tier Tribunal granted the SSHD permission to appeal. The SSHD had asserted in its application for permission that it was unclear on what basis the Judge had allowed the appeal under the Immigration Rules. He had referred to Section 117B of the 2002 Act which would indicate that he was considering a claim under Article 8 of the European Convention but then had referred to criteria imposed by the Immigration Rules. In short the Judge had not adequately explained why or given reasons for his decision to allow the appeal which amounted to an error of law.
9. The permission grounds continued that the refusal had been based on the Applicant's criminal conduct which made his presence in the United Kingdom undesirable. The Judge had referred to the Applicant not representing a threat to national security and not having caused serious harm or shown a particular disregard for the law but the SSHD's decision had been based on his conduct, character and associations making his presence in the United Kingdom undesirable. The Judge's decision had not engaged with this aspect of the SSHD's decision. The Applicant had failed to show the SSHD's assessment of his conduct was wrong and she was not entitled to decide pursuant to the public interest that the Applicant's criminal convictions made it desirable that he should be removed from the United Kingdom. It is of note the decision under appeal was not a deportation decision.
10. The grounds went on to complain that the Judge had not engaged with the criteria of paragraph 276ADE of the Immigration Rules and this also was an error of law.

### **The Hearing in the Upper Tribunal**

11. The Applicant attended with his parents, brothers and a cousin. I explained the purpose and procedure of the hearing insofar as it related to deciding whether the First-tier Tribunal's decision contained a material error of law. In the event it was not necessary for the Applicant to participate in any active way during the course of the hearing.

### **Submissions for the SSHD**

12. Ms Isherwood relied on the grounds for permission to appeal. The reasons letter to which reference has already been made was clear why the SSHD had made the decision to refuse leave and remove the Applicant. At paragraph 5 of his decision the Judge had set out the provisions of paragraphs 322(5) and 322(5A) of the Immigration Rules. The Judge had failed to address the issue of paragraph 322(5A) that the SSHD considered it undesirable to permit the Applicant to remain in the United Kingdom. He had failed to refer to paragraph 276ADE of the Immigration Rules dealing with claims said to engage the State's obligations under Article 8 of the European Convention. It could not be said the Judge had given proper consideration to the SSHD's position. For these reasons the original decision contained material errors of law and could not stand.

### **Submissions for the Applicant**

13. Mr Kannangara who had represented the Applicant in the First-tier Tribunal submitted the decision contained no material error of law. When the Applicant had sought further discretionary leave on 10 December 2013, he had declared his convictions although spent. The SSHD in refusing him further leave had relied on spent convictions.
14. The Judge had allowed the appeal under paragraph 322(5A) of the Immigration Rules and therefore it had not been necessary for him to proceed to consider any claim under Article 8 under the Immigration Rules by way of reference to paragraph 276ADE.
15. The Judge's reasoning at paragraphs 12 and 13 of his decision could be brief because he had adopted the submissions which had been made for the Applicant by Mr Kannangara and which he had set out at paragraph 10 of his decision. The Judge found the Applicant had not committed any further offences, his convictions were spent and he had by the time of the First-tier Tribunal hearing established a pattern of reformed behaviour. The Judge had given sufficient reasons to support his conclusion and decision to allow the appeal.
16. I asked Mr Kannangara to explain how the Judge had dealt with the issue of the undesirability of permitting the Applicant to remain in the United Kingdom. He referred me to the latter part of paragraph 10 and to paragraph 13 of the decision. The Judge had taken into account the Applicant's age, his positive response subsequent to the conviction which response had been evidenced by the various letters of reference and support which were before the Judge who had noted the offences had merited only a community penalty. The Applicant was fully supported by his family and this was sufficient to show his continued presence in the United Kingdom would not be "undesirable". The Judge had given adequate reasons to support his conclusion.

### **Findings and Consideration**

17. The Judge took account of the sexual nature of two of the offences and that they had been dealt with by way of community penalty. The evidence was the Applicant had positively responded and had been given substantial support from his family. He had not been charged with any further offences. Although references to Section 117B of the 2002 Act in relation to a consideration of the appeal against the decision under paragraphs 322(5) and 322(5A) of the Immigration Rules are irrelevant, the various factors identified in Section 117B are indicative of the SSHD's view of the public interest. These show the Judge did have in mind the SSHD's views of the public interest referred to at ground D under the heading 'Immigration Rules' of the permission grounds.

18. Given the Applicant's original grounds of appeal, the Judge should probably have considered paragraph 276ADE and the Applicant's claim under Article 8 of the European Convention outside the Immigration Rules and addressed with some particularity the factors identified in Section 117B which were relevant to the Applicant. In these respects, the decision is deficient and at paragraphs 11-14 lacking in any structured reasoning.
19. The SSHD reached her decision on the basis that the Applicant had exhibited persistent criminal behaviour of a type making it undesirable to permit him to remain in the United Kingdom. The Judge was entitled to conclude the evidence did show persistent criminal behaviour on the part of the Applicant. Disentangling the somewhat disjointed reasoning at paragraphs 10, 12 and 13 of the Judge's decision, I am satisfied the Judge gave a minimum of reasoning sufficient to justify his conclusion. Having considered the First-tier Tribunal's decision and the SSHD's reasons letter together with the other documents in the Tribunal file I am also satisfied that there is no realistic prospect that a differently constituted Tribunal would have come to any other conclusion. Consequently, I find the Judge's decision did not contain a material error of law such that it should be set aside in whole or in part. The First-tier Tribunal decision shall stand.

### **ANONYMITY**

20. There was no request for an anonymity order and having considered the circumstances of the appeal I find that none is warranted.

### **NOTICE OF DECISION**

**The decision of the First-tier Tribunal did not contain a material error of law such that it should be set aside. It shall therefore stand with the consequence that the appeal of the Applicant is allowed under paragraph 322(5A) of the Immigration Rules.**

**Anonymity order not made.**

Signed/Official Crest

Date 03. ii. 2015

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal