Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13527/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 25th February 2015	**On 11th March 2015**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AH
(ANONYMITY DIRECTION CONTINUED)

Respondent

Representation:
For the Appellant: Mr Irwin Richards, Home Office Presenting Officer
For the Respondent: Ms Katherine Grubb, Counsel

REMITTAL AND REASONS

1. In this appeal I will refer to the parties by the style in which they appeared before the First-Tier Tribunal.

2. The appellant is a male citizen of Jamaica, born 21 December 1963. His full immigration history is set out in the determination of Judge of the First-Tier Tribunal Page, promulgated on 2 October 2014. His history culminated in an application made to the respondent to vary leave to remain. That application was refused and the respondent also made a decision to remove him from the United Kingdom.

3. As indicated above the appellant appealed that decision and his appeal came before Judge Page on 26 September 2014. Both parties were represented. The appellant by Ms Grubb.

4. Judge Page heard a number of witnesses and noted that there was a form of concession made on behalf of the appellant that he could not meet all the requirements of the Immigration Rules, and that he was pursuing the appeal outside those rules under Article 8 ECHR.

5. In his determination Judge Page reviewed the evidence before him with regard to the appellant's contact with his children and also made comment regarding criminal convictions by reference to paragraph 322 of the Immigration Rules. Particular reference was made to paragraph 322(1C)(iv) and in particular the nature of offences committed by the appellant, and the sentences that he received. In summary Judge Page rejected any adverse effect on the appellant of paragraph 322 and found that the respondent had been wrong to assume that the appellant had no contact with his children. Paragraph 32 of the determination then records "Appeal allowed".

6. The respondent sought leave to appeal.

7. There is only one ground alleging the making of a material misdirection of law. There are then 10 paragraphs explaining the argument. It is not necessary to detail all 10 paragraphs, but in summary they allege that the appellant's application fell to be refused under paragraph 322(1C)(iv). It was then an error dealing with the Article 8 assessment. Reference was made to the Immigration Act 2014, which amounts to a detailed expression of government policy on immigration. Reference is also made to the case of **Gulshan [2013] UKUT 00640** and **Nagre [2013]**. Further reference is made to a Presenting Officer's minute of the proceedings relating to contradictory evidence given at the hearing and that there was nothing exceptional regarding the appellant's circumstances.

8. The respondent's application came before Judge of the First-Tier Tribunal TRP Hollingworth who granted leave. Judge Hollingworth's reasons make reference to the original application made by the appellant and also makes comment regarding the nature of the appellant's offending. However he then goes onto make comment regarding use of children as a "trump card". He then makes various other comments to the nature of the appellant's original application/appeal, but then indicates that "all grounds are arguable".

9. Hence the matter came before me sitting in the Upper Tribunal.

10. In his submission Mr Richards relied upon the grounds seeking leave. He suggested that Judge Page was wrong in coming to the conclusion at

paragraph 27, that the respondent's original decision was not in accordance with the law. He had misread paragraph 322(1C)(iv). The refusal would be mandatory. Had the judge been able to find that the decision was not in accordance with the law, he should have allowed the appeal to that extent, so that the application remained outstanding before the respondent. He was then wrong to proceed to deal with a stand alone Article 8 consideration.

11. Ms Grubb referred to her skeleton argument (which was handed in a few minutes prior to the hearing) and invited me to consider the parameters of the appeal. The application was for indefinite leave to remain, but the respondent (in the decision notice) went onto consider further leave to remain. That was rejected and a decision to remove the appellant was also made. There was not an appeal against the decision not to grant indefinite leave to remain. Ms Grubb said that Judge Page was clear as set out in paragraph 27. He had carried out a proportionality exercise. There was no mandatory refusal.

12. Ms Grubb referred to the comments made by Judge Hollingworth with regard to original application. I indicated that I did not find Judge Hollingworth's comments particularly helpful.

13. Ms Grubb referred to paragraphs 6 to 10 of the grounds seeking leave. This amounted to no more than disagreement. Any reference to the Presenting Officers notes should be ignored because they were not available. Any alleged inconsistencies in the evidence have not been particularised.

14. When reading the determination as a whole, Judge Page had reviewed all the evidence and he found the witnesses either credible or impressive. Ms Grubb accepted that Section 117 of the 2002 Act was relevant but that any lack of reference was not fatal. The judge had clearly weighed the appellant's case against public interest. There were clear findings that the children were not able to join the appellant in Jamaica. It would be disproportionate for them to spend their lives apart.

15. At the end of the hearing I reserved my decision which I now give with reasons.

16. In reaching a conclusion in this matter, I have noted the comments that have been made with regard to paragraph 322 of the Immigration Rules HC395. In particular to paragraph 322(1C)(iv). The respondent's decision notice refers to both 322(1) and 322(1C)(iv). Ms Grubb correctly refers me to the fact that 322(1C) applies to persons seeking indefinite leave to remain, whereas it is contended that the appellant was seeking further leave to remain. However it is clear that the appellant originally sought indefinite leave as is confirmed by paragraph 7 of Ms Grubb's skeleton argument. It is then suggested by Ms Grubb that the basis of the appellant's appeal before Judge Page was on a refusal to grant

further leave. If the appeal was in respect of further leave paragraph 322(1C) would not apply. Ms Grubb refers me to paragraph 1 of her skeleton argument before Judge Page which indicates an appeal against a refusal "to grant continued leave". The grounds of appeal lodged by or on behalf of the appellant make no distinction. Parameters of the appeal were, in my view, not clearly defined before Judge Page.

17. However it maybe that this is of academic interest only, given the acceptance by Ms Grubb (before Judge Page) that the appellant could not meet the requirements of the rules.

18. Judge Page went on at length to review the evidence before him with regard to the appellant's contact with his children. Having reviewed the evidence, Judge Page made findings favourable to the appellant and the final sentence of paragraph 27 of the determination indicated that the decision had not been made in accordance with the law. At this stage I agree with Mr Richards that the appropriate course would have been for Judge Page to have allowed the appeal to the limited extent that the application remained outstanding before the Secretary of State.

19. I note that despite finding that the appellant could not succeed under the rules (paragraph 2) the judge did go onto consider in some depth the effect of paragraph 322(1C).

20. A reading of the determination as a whole leads to the conclusion that Judge Page allowed the appeal under Article 8 ECHR although paragraph 32 is unclear. However no other conclusion would apply, which leads me then to consider the particulars set out in paragraphs 3 to 5 of the grounds seeking leave.

21. Those grounds in summary suggest the judge should have had concern as to the effect of the Immigration Act 2014 and its amendment to the 2002 Act. The determination is silent with regard to that. The grounds also suggest the judge should have considered whether or not there were "compelling circumstances" not recognised by the rules and that the judge was wrong to proceed without giving consideration as to whether there could be a stand alone consideration of Article 8.

22. Ms Grubb correctly refers me to **R (Aliuy) v SSHD [2014] EWHC 3919 (Admin)** where Judge Andrew Grubb sitting as a Deputy High Court Judge was said to have reached a conclusion that it was not necessary to say that an Article 8 assessment should only be carried out where there are compelling circumstances. However Judge Page did not direct himself at all with regard to this area of consideration. I consider that to be an error which is material to the outcome of the appeal.

23. As to paragraph 6 of the grounds seeking leave, I do not consider this amounts to an error on the part of the judge. There is no evidence

before me that any of the witnesses gave contradictory evidence, thereby making the judge's findings perverse. I reject that ground.

24. I conclude that the determination does contain a material error of law and accordingly the decision of Judge Page falls to be set aside.

25. Having canvassed the opinion of each representative, I am of the view that this appeal should be remitted back to a judge of the First-Tier Tribunal (other than Judge Page). No findings are preserved. No doubt at the next hearing the judge will define the parameters of the appeal that falls to be determined.

Signed Date

Upper Tribunal Judge Poole