Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04391/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 16th September 2015

Decision & Reasons Promulgated
On the 5th October 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR MOHAMED HUSSEIN IBRAHIM

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr K Stott (Solicitor at Messrs Pickup & Scott Solicitors)
For the Respondent: Miss Brocklesby-Weller (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Respondent's the Entry Clearance Officer appeal against the decision of First-Tier Tribunal Judge O'Hagan promulgated on 11th March 2015, in which she allowed the Appellant's appeal against the Respondent's decision to refuse the Appellant entry clearance on the basis of Article 8 outside of the Immigration Rules. However, for the purpose of clarity, the parties will be referred to throughout this decision as they were referred to at the First-Tier Tribunal

hearing, such that Mr Ibrahim is referred to as the Appellant and the Entry Clearance Officer is referred to as the Respondent.

Background

2. The Appellant is a national of Somalia who was born on the 5th May 1997. The Appellant had applied for entry clearance to the United Kingdom in order to join his brother, the sponsor Mr Omar Hussein Ibrahim. The Respondent had refused the application by means of a Notice of Decision dated the 25th February 2014 under paragraph 319X of the Immigration Rules HC395 as amended. The Respondent had found that there was insufficient evidence to satisfy her that the Appellant was related to the sponsor as claimed and inadequate evidence had been presented to support the contention that the Appellant was a refugee in Uganda. It was further found that the Appellant had not provided adequate evidence of his own identity and that there was inadequate evidence as to the sponsor's income in the United Kingdom. The claim was also rejected not only under the Immigration Rules but also under Article 8 of the ECHR, on the basis that the decision made was proportionate to the interest of maintaining an effective immigration control.

3. That decision was the subject of the appeal to the First-Tier Tribunal, which was dealt with by First-Tier Tribunal Judge O'Hagan on the 9th February 2015. Judge O'Hagan found that DNA testing had proved that the Appellant and sponsor were siblings as claimed and that the issue of fraternity had effectively fallen away. The First-Tier Tribunal Judge accepted on the balance of probabilities that the Appellant was born on the date stated namely the 5th May 1997, such as he would have been 16 years old as at the date of the original decision. She also accepted and found as a fact that the Appellant was part of the sponsor's pre-fight family and that the Appellant was genuinely a refugee in Uganda. However, at [27] of the decision, the First-Tier Tribunal Judge found that the requirements of the Immigration Rules could not be met as at the date of the decision, in that the Appellant could not satisfy the financial requirements of the Rules as at the date of the decision.

4. The Judge however, went on to consider the case on the basis of Article 8 outside of the Immigration Rules and stated that having followed MM (Lebanon) and considered that the rules do not constitute a complete code, she should then consider the 5 steps in Razgar [28]. The Judge went on to find that the decision made was disproportionate to the legitimate public aim sought to be achieved at [33] and allowed the appeal on Article 8 grounds outside of the Immigration Rules.

5. The Respondent sought to appeal that decision and in the grounds of appeal it is argued that the First-tier Tribunal Judge misdirected herself in law and that although the Judge had properly noted at [32] that Article 8 does not exist to provide a remedy for every misfortune or vicissitude of life and that it was also not simply an exercise in sympathy, it is argued that the Judge did in fact conduct

a "freewheeling" Article 8 assessment under the ECHR, liberated from the maintenance requirements which were considered important to the public interest by Parliament having been incorporated within Section 117 B(3) of the Nationality, Immigration and Asylum Act 2002. It is argued that the First-tier Tribunal Judge failed to take account of the sponsor's inability to meet the financial requirements and the inability of the Appellant to be financially dependent when considering the proportionality issue under Article 8 outside of the Immigration Rules.

6. Permission to appeal was granted by First-Tier Tribunal Judge White on the 6th May 2015, on the basis that it was arguable that addressing Article 8 outside of the Rules the Judge had failed to address adequately the requirement of compelling circumstances outside of the Rules and that in considering the issue of proportionality the Judge had given inadequate consideration to the public interest, the Appellant's living conditions and the ability of the sponsor to visit, contact and support the Appellant.

7. In his rule 24 response, the Appellant, through his solicitors in a letter dated the 28th May 2015, seeks to argue that the First-Tier Tribunal Judge did not direct himself inappropriately and even if there was an error of law it was not material. It is argued that the Judge had correctly stated at [29] that the Rules do not constitute a complete code and therefore his considering the Article 8 claim and the 5 steps in Razgar and that the Judge at [29] had found that the Appellant and sponsor had family life together in Somalia before the family was torn asunder by the Civil War and that there was something that went beyond the usual ties of love and affection between siblings such as to constitute family life. It is argued that the Judge had found at [33] that each was the only family member left to the other and that these were compelling factors that served to outweigh the public interest in maintaining immigration control and that the Judge therefore did adequately address the requirement of compelling circumstances outside of the Rules and give adequate consideration to the public interest.

Submissions

8. Miss Brocklesby-Weller on behalf of the Entry Clearance Officer relied upon her Grounds of appeal. She argued that the Judge had adopted a misguided approach when dealing with the issue of Article 8. She argued that although the Judge had stated that the Rules were not a complete code, he then had not gone on to identify any compelling circumstances such as to justify considering the Appellant's appeal on the basis of Article 8 outside of the Immigration Rules. She argued that there is no consideration of Article 8 through the lens of the Rules. It was argued that the sponsor did not even meet the income support threshold, let alone being financially independent, so that he would not be able to maintain the Appellant.

9. Miss Brocklesby-Weller argued that although the Judge had made reference in passing to Section 19 of the Immigration Act 2014 which had introduced Part 5A of the Nationality, Immigration and Asylum Act 2002 containing Sections 117A to D, he had gone no further and had not actually set out when dealing with the

balancing exercise, how the factors in Section 117B applied to the case or how they should be taken into account when considering the balancing exercise and proportionality. She argued that when the Judge at [33] was dealing proportionality, he had not even mentioned that the Appellant, whether on his own or with the aid of his sponsor did not meet the financial requirements of the Rules and was not financially independent for the purpose of Section 117B. She argued that there had to actually be a consideration of the Section 117B factors in substance, not simply in form. She asked me to set aside the decision of First-Tier Tribunal Judge O'Hagan and to remake the decision on the evidence that I had, dismissing the Appellant's appeal on the on Article 8 grounds.

10. Mr Scott on behalf of Mr Ibrahim handed up a copy of the case of Dube (Sections 117A-117D) [2015] UKUT 00090 (IAC). He relied upon his Rule 24 response. Mr Scott argued that the Judge had not made any material error of law and had taken account of the public interest and that it had been recognised within his decision that the Appellant did not meet the financial requirements of the Rules. He argued that the Judge had set out at [33] what the compelling circumstances were in the case that rendered the decision disproportionate, despite the fact that the Appellant did not meet the requirements of the Immigration Rules. He argued that the Judge properly set out at [28] that the Rules do not constitute a complete code and that he was entitled to go on to consider Article 8. He asked me to dismiss the appeal.

My Findings on Error of Law and Materiality

11. The Respondent's argument that the First-Tier Tribunal Judge should have considered what were the compelling or exceptional circumstances in the case before going on to consider the question of Article 8 outside of the Immigration Rules is misconceived. This would effectively introduce the intermediary test that was criticised by Aikens LJ, given the lead judgement of the Court of Appeal in the case of MM (Lebanon) and Others v Secretary of State [2014] EWCA Civ 985. Aikens LJ at [129] referred to Sales J in the case of Nagre v Secretary of State for the Home Department [2013] EWCA 720 (Admin) as having said that "if a particular person is outside of the Rules then he has to demonstrate, as a primary to consideration outside of the Rules, that he has an arguable case that there may be good grounds for granting Leave to Remain outside of the Rules". However, Aikens LJ went on to state “I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker".

12. In the case of Singh & Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74, Lord Justice Underhill, giving the lead judgement of the Court of Appeal at [64] stated that "I am not sure that I would myself would have read Sales J as intending to impose any such intermediary requirement, though I agree with Aikens LJ that if he was it represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ’s comment which casts doubt on Sales

J's basic point that there is no need to conduct a full separate examination of Article 8 outside of the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules".

13. Although the Court of Appeal in the case of Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387, found that there would have to be compelling circumstances before a claim outside of the rules under Article 8 could succeed where an Appellant did not meet the requirements of the Immigration Rules, the Court of Appeal was not seeking to impose an intermediary test in that regard, but was simply indicating that there would have to be compelling circumstances before the decision reached was found to be disproportionate.

14. In such circumstances I do not find that First-Tier Tribunal Judge O'Hagan should be criticised in the circumstances of this case for having gone on to consider Article 8 outside of the Immigration Rules, as clearly in a Leave to Enter case under paragraph 319X of the Immigration Rules, the Rules are not as he correctly stated a complete code and indeed, the Judge did properly set out at [33] what he described as being the "compelling factors that serve to outweigh the public interest in maintaining immigration control".

15. However, I do find that First-tier Tribunal Judge O'Hagan has materially erred in his assessment of the public interest element when considering the proportionality issue. Sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 which were brought into force on the 28th July 2014. The sections were added to the 2002 Act by Section 19 of the Immigration Act 2014. The Part 5A public interest considerations set out and contained within Sections 117A-D apply to all cases where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts-

    (a) breaches a person's right to respect for private and family life under Article 8, and

    (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

16. Pursuant to section 117A (2):

    "117 A (2) In considering the public interest question, the Court or Tribunal must (in particular) have regard-

        (a) in all cases, to the considerations listed in Section 117 B…"

17. Section 117B reads that:

    "section 117B Article 8: public interest considerations applicable in all cases

    (1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in United Kingdom are financially independent, because such persons-

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to-

(a) a private life, or

(b) the relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by person at a time when the person's Immigration status is precarious.

(6) in case person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom".

The applicable subparagraphs in the present appeal are Section 117B (1)-(3).

18. First-Tier Tribunal Judge O'Hagan at [31] has stated that "the importance of an weight to be given to immigration control has recently been underscored by Parliament itself in Section 19 Immigration Act 2014 which introduces Part 5A of the 2002 Act containing Sections 117A to D". However, the First-Tier Tribunal Judge had in fact failed to specifically set out within his consideration of proportionality at [33], the relevant factors under Section 117B, and has failed to set out for example that it is in the public interest and in particular in the interests of the economic well-being in the United Kingdom that persons who seek to enter

are able to speak English in order that they are less of a burden on taxpayers and are better able to integrate into society and are financially independent, because such persons are not a burden on taxpayers and are better able to integrate into society. It is not simply a case that these factors relate to the importance of weight to be given to immigration control, although clearly under Section 117B (1) the maintenance of an effective immigration control is in the public interest. Although the Judge makes reference to the weight to be given to immigration control, he has made no reference to the interests of the economic well-being of the United Kingdom in considering the public interest question as to whether or not an interference with the Appellant's right to respect for his family life is justified under Article 8 (2).

19. Further, no consideration had been given in the balancing exercise as to whether or not the Appellant is able to speak English or to the question as to whether or not the Appellant would be financially independent. Although I bear in mind that the Judge had previously found that the Appellant did not meet the financial requirements of the Immigration Rules for the purpose of paragraph 319X, clearly, these issues do need to be specifically dealt with and considered when considering the proportionality issue.

20. As was stated by the Upper Tribunal in the case of Dube (Sections 117A-117D) [2015] UKUT 00090 (IAC), Judges are required statutorily to take into account the enumerated considerations and they are not an à la carte menu of considerations. In that case it was found that it was not an error in law to fail to refer to Sections 117A- 117D considerations if the Judge had applied the test he or she was supposed to apply according to its terms and that what mattered is substance, not form. However the substantive consideration is what is wholly missing in First-Tier Tribunal Judge O'Hagan's consideration of the proportionality issue. Although making reference in form to Section 117A-117D, and the maintenance of an effective immigration control, he has failed to go on to consider in substance Sections 117B (2) and (3), in regard to the public interest and the interests of the economic well-being of the United Kingdom in terms of both the Appellant's ability to speak English and the question as to his financial independence. These do have to be placed into the balancing exercise when considering whether or not the decision to refuse the Appellant Entry Clearance was proportionate. The Judge's failure in this regard does amount to a material error of law. I therefore set aside the decision of First-Tier Tribunal Judge O'Hagan in respect of his consideration as to whether or not the decision reached was disproportionate such as to give rise to a breach of Article 8 outside of the Immigration Rules.

21. Although it was suggested by Miss Brocklesby-Weller on behalf of the Respondent that I could simply remake the decision, in my judgement the material error of law made by First-Tier Tribunal Judge O'Hagan in considering the proportionality issue goes to the core of his assessment of that issue. In my judgement, in the interests of justice, the whole of the proportionality issue needs to be reconsidered, taking full account of the factors counting on the Respondent's side, having regard, in particular, to those factors set out between Section 117A-D. I do not

have evidence before me regarding the Appellant's ability in English or direct evidence as to the extent to which he would be financially independent, other than knowing the sponsor's level of income was insufficient. Given that the entirety of the proportionality exercise needs to be redone, it is appropriate to remit the case back to the First-Tier Tribunal for a rehearing on this issue. The Respondent's appeal is allowed.

Notice of Decision

The decision of First-tier Tribunal Judge O'Hagan did contain a material error of law and is set aside in respect of her assessment of proportionality for the purposes of Article 8 outside of the Immigration Rules. The matter is remitted back to the First-Tier Tribunal to be heard by any Judge other than First-Tier Tribunal Judge O'Hagan.

The First-Tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed Dated 17th September 2015

RF McGinty

Deputy Upper Tribunal Judge McGinty