Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04958/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 23 March 2016	**On 6 April 2016**

Before

Deputy Upper Tribunal Judge Pickup
Between

Salem Boubeker
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr R Soloman, instructed by Kanaga Solicitors
For the respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Wyman promulgated 10.9.15, dismissed his appeal against the decision of the Secretary of State, dated 16.1.15, to refuse his application for further leave to remain in the UK and to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 19.8.15.

2. First-tier Tribunal Judge Hollingworth granted permission to appeal on 27.1.16.

3. Thus the matter came before me on 23.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Wyman should be set aside.

5. I have carefully considered all of the materials present in the case file and put before me at the error of law hearing, together with the able and helpful submissions of both Mr Solomon and Ms Brocklesby-Weller.

6. The relevant background can be summarised briefly as follows. The appellant claims to have entered the UK unlawfully in 2001 and has remained ever since. In 2010 his application for leave to remain on the basis of private and family life was rejected. A further such application was made and refused in 2011. The refusal was reconsidered but still refused. The appellant then appealed that refusal, which Immigration Judge Flynn allowed in October 2011, on the basis of his family life in the UK with a partner and her child. In consequence, he was granted discretionary leave for a period of 3 years, expiring 3.11.14.

7. Shortly before expiry of that discretionary leave, the appellant made the application the refusal of which is the subject of this appeal, seeking further leave to remain. It is relevant to note that Judge Wyman found as a fact, that the appellant was no longer in a relationship with a partner, has no child in the UK, and thus has no family life in the UK.

8. I have considered the reasons for refusal in more detail hereafter. However, in summary, the application was refused on the general grounds under 322(5) and under paragraph 276ADE, both relying on a criminal conviction for passport offences and the failure to disclose that conviction in his application for further leave. The Secretary of State also concluded that there were no very significant obstacles to his integration in Algeria, and further that there were no exceptional circumstances to justify granting leave outside the Rules.

9. Judge Wyman found that there had been a material change in circumstances since the discretionary leave had been granted following Judge Flynn's decision allowing the appellant's appeal in 2011. Judge Wyman went on to find that the appellant did not meet the requirements of paragraph 276ADE in respect of his private life and considering the matter outside the Rules, that the decision was not disproportionate to his article 8 ECHR rights to respect for private life. The judge also did not accept that the appellant is at risk on return under article 3 because of a pending prison sentence in Algeria. Thus the appeal was dismissed on both immigration and human rights grounds.

10. In granting permission to appeal, Judge Hollingworth considered the following to be arguable:

(a) That the judge was not sufficiently precise in making findings on S-LTR 1 in relation to the appellant's record, given the reference at §61 of the decision to Mr Solomon's submission that the Home Office Guidance for general grounds of refusal states that it is unlikely that a person will be refused under the character, conduct or association grounds for a single conviction that results in a non-custodial sentence outside the relevant timeframe;

(b) That the judge has not evaluated the relevant factors and attached the appropriate weight to each;

(c) It is arguable that the judge has not provided sufficient analysis leading to the conclusion that there was a deliberate attempt to deceive the Secretary of State with respect to convictions;

(d) It is arguable that the judge approached the question of risk on return on an incorrect footing, given the previous findings by another judge in the circumstances referred to in the decision, and that too much weight was attached to the absence of a further claim for asylum.

11. The Rule 24 response of the Secretary of State, dated 16.2.16, submits that the grant of permission was overly generous to the appellant, and that the decision discloses no material errors of law. It is further submitted that there is no arguable error of law in relation to the issue of the conviction, as the general ground of refusal and application of S-LTR were concerned not just with the conviction but the appellant's failure to disclose it. Finally, it is submitted that the judge properly addressed the risk on return, noting that the appellant chose not to make an asylum claim and there would not be a breach of article 3 on his return.

12. The grounds of appeal to the First-tier Tribunal argued that the refusal decision was not in accordance with the law and in particular with the Home Office policy on considering applications to extend previously granted discretionary leave. The grounds contain an extract from the policy suggesting that "if there have been significant changes or the applicant fails to meet the criminality thresholds (see criminality and exclusion section above), the application for further leave should be refused." The grounds asserted that there had been no significant change in the circumstances prevailing at the time of the grant of discretionary leave and that the criminality threshold did not apply since suspended sentences are treated as non-custodial.

13. However, Judge Wyman found that there had been a material change in circumstances, in that the appellant was no longer in a relationship with a partner or her child and had no family life in the UK. The judge gave detailed consideration to the reasons why the appellant's appeal was allowed on human rights grounds pursuant to article 8 ECHR back in 2011, setting out a summary of Judge Flynn's decision between §44 and §50. It is clear that the appeal was allowed on the basis of family life with a partner and her child.

14. The judge found that the appellant was dishonest in his oral evidence at the appeal hearing in August 2015, claiming that he had only broken up with his partner two months earlier and expected to reconcile shortly. The judge pointed out that he made no reference to his partner and her child when he made his application in October 2014. The judge thus concluded he has no family life in the UK.

15. I find that Judge Wyman was entitled to conclude that the appellant has no family life in the UK, for the reasons very clearly given in the decision and which were open to the judge on the evidence. Thus the judge was entitled to conclude there was a material change in circumstances since the decision of Judge Flynn and the grant of discretionary leave. It is clear that the judge addressed the ground of appeal to the First-tier Tribunal relating to Home Office policy. It follows that the refusal decision of the Secretary of State was in accordance with the law, even though the refusal decision did not directly address the policy in relation to further extension of discretionary leave and there is no material error of law in Judge Wyman's refusal to accede to this ground of appeal.

16. The first reason for the refusal decision relates to paragraph 322(5) of the Immigration Rules. In February 2013 the appellant was convicted of offences of possession of a false identity document, and given a suspended sentence of imprisonment. This related to his use of a false French passport to gain entry to the UK in 2001. In the light of this conviction, the Secretary of State considered that it would be undesirable to permit him to remain in the UK and his application was refused under the discretionary general grounds of paragraph 322(5) of the Immigration Rules, grounds on which leave "should normally be refused," namely, "the undesirability of permitting the person concerned to remain in the UK in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security."

17. The grounds submit that the First-tier Tribunal Judge failed to reach a clear finding in relation to the refusal under paragraph 322(5). At §61 of the decision Judge Wyman took into account Mr Solomon's reference to the Home Office guidance, suggesting that it is unlikely that a person will be refused on the general grounds for a single conviction that results in a non-custodial sentence. However, as the judge pointed out, it wasn't just the conviction but also the failure to disclose that conviction either in the application form or the 7-page letter of his legal representatives accompanying the application. This is also part of his 'conduct.' The judge rejected the argument that this failure was accidental. The judge concluded that the appellant deliberately attempted to deceive the Secretary of State by failing to disclose his 2013 conviction, pointing out that the box in the form signed by the appellant was ticked no to the question relating to convictions and no reference was made in the detailed letter submitted in support by his legal representatives.

18. Although the judge doesn't specifically address paragraph 322(5), it is clear from a reading of the decision as a whole that on the basis of the findings, including those set out at §61, the criteria for refusal under 322(5) is made out.

19. Even if the judge was in error in respect of paragraph 322(5), it follows that in the light of the other findings and conclusions in relation to private life, the appeal would still have been dismissed and thus any such error cannot be material.

20. The second ground of appeal to the First-tier Tribunal related to private life under paragraph 276ADE and the refusal in reliance on both S-LTR and very significant obstacles.

21. 276ADE has a preliminary hurdle of a suitability requirement, imported from Appendix FM: "The appellant must not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3 and S-LTR 3.1 in Appendix FM."

22. S-LTR 1.1, which is not imported into 276ADE, provides that S-LTR 1.2 to S-LTR 1.7 are mandatory grounds for refusal. However, S-LTR 2.1 provides that "the applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR 2.2. to 2.4 apply." It is clear from the wording of paragraph 276ADE that if this hurdle is not overcome, an applicant cannot rely on any of the subsequent provisions, including the 'very significant obstacles to integration' test.

23. The Secretary of State considered that pursuant to S-LTR 1.6, the presence of the appellant is not conducive to the public good because his conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow him to remain in the UK. Reliance was placed on his criminal convictions.

24. The Secretary of State also relied on S-LTR 2.2, which provides that whether or not to the applicant's knowledge, false information, representation or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or there has been a failure to disclose material facts in relation to the application. Relying on S-LTR 2.2, the Secretary of State points to the fact that the appellant failed to disclose his criminal convictions, which were material facts in relation to his application.

25. Although the First-tier Tribunal Judge found the appellant to have no family life in the UK (but family life with his 3 children in Algeria), it was accepted that he has a private life in the UK. That he speaks English and has set up his own business are amongst other matters referred to in the decision. However, the judge went on to find that the appellant did not meet the requirements of paragraph 276ADE, as there would not be very significant obstacles to his integration in Algeria.

26. I agree that the judge has not been entirely clear when addressing the S-LTR suitability requirements, but it is referenced at §23 and the judge took account of the evidence of and submissions on behalf of the appellant as to his criminality and the failure to disclose the conviction, which it was submitted was a mistake and not deliberate. There are clear and cogent reasons for the judge's reject of that submission and her conclusion that the appellant deliberately sought to deceive.

27. In fact, according to S-LTR 2.2 it matters not whether the appellant knew that false information, representation, etc. was submitted, or a failure to disclose material facts. His knowledge might be relevant as to whether to exercise the discretionary refusal under S-LTR 2.2, but as the judge found he did have knowledge and attempted to deceive, there is no merit in this ground of appeal. Applying the findings to the test there is no foundational basis for arguing that on those facts the discretion should not have been exercised. Thus there is no material error of law in this regard.

28. Further, there is no discretion in S-LTR 1.6. It is the decision of the Secretary of State that his presence is not conducive to the public good and it cannot be said, taking account of the facts and the findings of the First-tier Tribunal Judge, that such a decision was unreasonable or irrational, or otherwise perverse. It was entirely open to the Secretary of State to rely on S-LTR 1.6, particularly given the serious nature of the criminal offence, relating as it did to identity documents.

29. It follows that irrespective of any 'no ties' or 'very significant obstacles' test, the appellant could not meet the requirements of the Rules for leave to remain.

30. The conclusion that there is no material error of law in the decision of the First-tier Tribunal also follows from the fact that the judge nevertheless went on to consider the very significant obstacles test in paragraph 276ADE, finding that there are no such very significant obstacles, for the reasons stated.

31. Even if the appellant could have overcome the suitability requirements, the Secretary of State points out that the appellant has not been in the UK for a period of 20 years and does not accept that there are very significant obstacles to his integration into Algeria, where, on his own account, he spent the first 35 years of his life before coming to the UK. The application relied on an assertion of no ties. In fact, the relevant test is not the former "no ties (including social, cultural or family)" under 276ADE(1)(vi), but since 28.7.14, "there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK." In any event, the judge also rejected the claim that the appellant had lost all ties to Algeria, given that he admitted remaining in regular contact with his parents and also his three children.

32. I reject Mr Solomon's argument that Judge Wyman should have considered the issue of significant obstacles settled by the decision of Judge Flynn in 2011, in which that judge accepted that the appellant had been sentenced to one year in prison plus a payment of a fine for abandoning his family. I accept that Judge Flynn stated at §52 of that decision that, "I consider it very likely that he will be sent to prison in accordance with the court decision and that this will give rise to a real risk of inhuman treatment." I also accept that Judge Wyman's suggestion that the appellant will be able to pay the fine and avoid the prison sentence is no more than speculation. However, the appeal before Judge Flynn was not allowed on the basis of article 3, but article 8 ECHR. This appellant was advised in the refusal decision that if he wished to rely on article 3, he would have to make that claim in person as an

asylum claim. He has declined to do so. Thus the Secretary of State has not addressed it in the refusal decision.

33. In any event, the judge considered the submissions and evidence submitted by Mr Solomon as to prison conditions and concluded at §66 that whilst they were overcrowded and did not meet international standards, the evidence did not demonstrate a likely breach of article 3 ECHR, pointing out that prosecution does not amount to persecution. The judge's conclusions were entirely open on the evidence. In the circumstances, there is no merit in this ground of appeal.

34. In relation to private life the Judge went on to consider article 8 ECHR outside the Rules, applying the stepped Razgar assessment. In the light of SS (Congo) it is not clear that there are on the facts of this case any compelling circumstances insufficiently recognised in the Rules to justify considering the appellant's private life outside the Immigration Rules. In the refusal decision the Secretary of State considered that there are no exceptional circumstances to warrant a grant of leave to remain outside the Rules on the basis of private or family life under article 8 ECHR.

35. Whilst each case has to be considered on its own merits, on the facts as found by the First-tier Tribunal Judge it is far from clear that article 8 private life is engaged at all. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR, observing that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "served to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

36. However, the judge did make a reasoned article 8 ECHR assessment and concluded that the appellant's removal from the UK would be proportionate to the legitimate and necessary aim of protecting the economic well-being of the UK though immigration control, for the cogent reasons set out in the decision.

37. Mr Solomon drew my attention to UE (Nigeria) & others v SSHD [2010] EWCA Civ 975, to suggest that the First-tier Tribunal Judge should have considered the contribution of the appellant to society, relying on evidence including a news report that he had offered training to local youths in his business, and that the loss of such public benefit was a matter that should have been brought into account in the proportionality balancing exercise. However, at §36 of that decision Sir David Keene explained that he would expect such a consideration 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… 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 appellant's favour…" Frankly, in the light of his conviction and the material change of circumstances there is nothing in the

appellant's story and background that could or would reasonably have been sufficient to outweigh the considerable public interest in his removal.

38. I should mention at this stage that the judge should have also considered the public interest considerations under section 117B of the 2002 Act, taking into account in that proportionality assessment that immigration control is in the public interest and that little weight should be given to a private life developed whilst a person's immigration status is precarious, as is the case for this appellant. In the circumstances, it is difficult to envisage how the appellant could have succeeded in a private life claim on the facts of this case.

39. In all the circumstances, it is clear there is no merit in any of the grounds of appeal. Whilst the judge could and should have specifically and directly addressed the reasons for refusal and the grounds of appeal, in the event there was no material error of law as the ultimate dismissal of the appeal at the First-tier Tribunal was inevitable on the facts found by the judge.

Conclusions:

40. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **8 March 2017**

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **8 March 2017**