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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th December 2015	**On 19th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

NELSON DEDI KOUTALA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Solanki, Counsel; instructed by Elizabeth Millar Solicitors
For the Respondent: Ms S Sreeraman, Senior Presenting Officer

DECISION AND REASONS

1. For ease of comprehension, the parties are referred to by their appellate status and positions before the First-tier Tribunal.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Owens allowing the Appellant's appeal against the Secretary of State's refusal under the Immigration Rules and under Article 8 ECHR.

3. The First-tier Tribunal promulgated its decision allowing the Appellant's appeal against the Respondent's decision on 3 June 2015.

4. The Respondent appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Heynes on all grounds.

5. The grant of permission gives no reasons for the decision granting permission to appeal, but merely recites the Respondent's grounds followed by a bland statement that they are "arguable". I shall return to this topic momentarily.

6. I was not provided a Rule 24 response from the Appellant however was provided with a Skeleton Argument (numbering 10 pages), a copy of HC532 Statement of Changes in Immigration Rules, *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292, and *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 by his counsel. These documents were available to the Respondent and myself and sufficient time was given prior to the hearing in order that those documents could be comprehensively addressed.

7. It is of note that the Respondent chose not to be represented at the hearing before the First-tier Tribunal, but was represented at the hearing before me.

No Error of Law

8. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding follow shortly.

9. Before I turn to my reasons, I formally note my dissatisfaction with the grant of permission. As mentioned above, Judge Heynes granted permission to appeal on all grounds, merely stating that they are "arguable". Whilst this must surely be an oversight, it is an unhelpful one as I am not provided with any reason why the Respondent's grounds were arguable and this omission further demonstrates non-compliance with the second headnote in the Presidential decision of *MR (permission to appeal: Tribunal's approach)* [2015] UKUT 29 (IAC) wherein the following was stated:

> "When granting permission to appeal to the Upper Tribunal, it is unsatisfactory merely to state that the applicant's grounds are arguable."

Discussion

10. Turning to the Respondent's first ground, the judge is first criticised because of placing reliance upon rule A362 which relates to deportation. I find that there is nothing whatsoever in this ground of complaint. Indeed, the ground itself has been poorly drafted and was misleading. The determination reveals that the reference to rule A362 only comes about by the judge's consideration of the judgment of *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 at [39] which happens to refer to that rule. The judge obviously did not err in law by considering a binding judgment of the Court of Appeal.

11. The second ground is premised upon the judge considering the wrong version of rule 276ADE(1)(vi). Ms Sreeraman submitted that given the content of HC532 Statement of Changes in Immigration Rules, the applicable rule was the "no ties" test incepted by HC194. She submitted the changes introduced by HC532, which includes a new test of "very significant obstacles" being substituted for the "no ties" test at paragraph 6 of those changes, does not bring the new substituted paragraph into effect as the Implementation paragraph makes clear:

> 'The changes set out in paragraphs 4 to 12 and 49 to 64 of this statement take effect on 28 July 2014 and apply to all applications to which paragraphs 276ADE to 276DH and Appendix FM apply (or can be applied by virtue of the Immigration Rules), and to any other ECHR Article 8 claims (save for those from foreign criminals), and which are decided on or after that date.'

12. Therefore, the newer version of rule 276ADE(1)(vi) would apply to all applications decided on or after 28 July 2014 and for those applying earlier whom are foreign criminals. The Appellant's application was decided on 17 January 2014 and was served on 4 February 2014. Both of those dates precede the 28 July 2014 and therefore the new version of rule 276ADE(1)(vi) could only apply to the Appellant if he were a foreign criminal, which of course, he is not. Ms Sreeraman agreed that this ground of challenge was essential to the success of her application and that should she fail to demonstrate a material error, the grounds concerning Article 8 ECHR outwith the Rules and section 117 are irrelevant.

13. Ms Solanki remained steadfast in her submission that the new version of the Rule could apply as she had maintained before the First-tier Tribunal. For my part, I do not see how reliance upon [39] of *YM (Uganda)* nor [15] of *MF (Nigeria)* can be of assistance to the Appellant in this scenario. The implementation of the Rules as reflected in HC532 are surprisingly clear to my mind. Consequently, the judge ought to have applied the "no ties" test.

14. However, that is not the end of the matter. Ms Solanki drew my attention to the Explanatory Memorandum annexed to HC532 at paragraph 7.16 which states as follows:

> '… The amendments to the Immigration Rules on family and private life in Appendix FM and paragraphs 276ADE-276DH made by this Statement of Changes do not represent any substantive change to the policies reflected in the Statement of Changes HC 194 which came into force on 9 July 2012, but ensure consistency of language with that used in section 19 of the 2014 Act, which now provides statutory underpinning for those policies …

15. To my mind, it is absolutely clear that the changes to rule 276ADE(1)(vi) upon which the Respondent's main ground of appeal turns, did not introduce any substantive change to the rule in question. That is made plain by the above passage and represents the view of the Secretary of

State put before Parliament when implementing the proposed changes. Therefore, given the Respondent's stance upon those rules, I find that even if the judge should have applied the "no ties" test, there is no difference between the application of the "no ties" test and the "very significant obstacles" test. Consequently, the judge did not materially err in law as the application of either rule should and would have yielded the same outcome in considering the Appellant's private life under the Immigration Rules.

16. As accepted by Ms Sreeraman, as that ground was unsuccessful the remainder become irrelevant given the Appellant's success under the Rules. Notwithstanding that stance, in any event, I do find that the judge's findings are sufficiently reasoned and the complaint that the decision is unlawfully deficient in its reasoning is wholly without merit. It is also plain that the judge's consideration of Article 8 is compliant with higher jurisprudence and the judge was aware that the Rules are not a complete code and was considering Article 8 for the sake of completeness. Such diligence, whilst unnecessary given my findings on rule 276ADE(1)(vi), is not consequently an error in law given that it is superfluous. Finally, it is clear that the judge gave consideration to section 117 of the 2002 Act given her extensive consideration of these matters at paragraphs 61-70 of the determination.

17. Consequently, given my findings above, the grounds do not reveal an error of law such that the decision should be set aside.

Decision

18. The appeal to the Upper Tribunal is dismissed.

19. The decision of the First-tier Tribunal is affirmed.

Signed Date

Deputy Upper Tribunal Judge Saini