IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26015/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2016	**On 23 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR MICHAEL GEORGE DOUGLAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Quee, Solicitor
For the Respondent: Ms Fijiwala , a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision taken on 3 June 2014 to refuse to vary the appellant's leave to remain in the United Kingdom.

Background Facts

2. The appellant is a citizen of Jamaica who was born on 5 September 1966. The appellant arrived in the UK on 2 May 2007 with leave to remain as a visitor until 23 March 2008. He remained in the UK at the end of his leave unlawfully. During the course of his stay in the UK he married his wife, a British citizen, on 14 July 2011. In September 2011 the appellant was encountered by an official of the Home Office. The appellant voluntarily departed the UK in December 2011 in order to seek entry clearance to return to the UK to join his wife. On 10 January 2012 the appellant was issued with entry clearance to return to the UK as a spouse, his entry clearance was valid until 10 April 2014. On 8 April 2014 the appellant applied for leave to remain in the UK on the basis of his private life and exceptional circumstances. The respondent refused that application. The respondent considered that the appellant did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules HC 395 (as amended). The respondent considered that at the time of the application the appellant was aged 47 and that having spent 40 years in Jamaica and in the absence of any evidence to the contrary it was not accepted that he had lost his ties to his home country. The respondent also considered whether the particular circumstances constituted exceptional circumstances which might warrant a grant of leave to remain in the United Kingdom. The respondent acknowledged that the appellant wanted more time to try to reconcile his marriage, however, the respondent did not see this as an insurmountable obstacle to his family life continuing in Jamaica. His application for leave to remain was therefore refused.

The Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 15 April 2015 First-tier Tribunal Judge Quinn dismissed the appellant's appeal. The First-tier Tribunal Judge found that the appellant did not satisfy paragraph 276ADE. The judge considered that the appellant had only spent about six years in the UK and he was an overstayer in the United Kingdom from 23 March 2008 until December 2011. The judge considered that the appellant had spent over 40 years in Jamaica and he had strong ties to that country and that the appellant's presence in the UK had always been precarious as he was only ever a visitor. He considered that caring for his aunt did not amount to a sufficiently good reason to allow the appellant to remain in the UK. The judge accepted that the appellant had problems in his marriage but he did not consider that that was a sufficiently compelling reason to extend his leave. The judge did not consider that the appellant's removal would be disproportionate to the legitimate public end sought to be achieved such that the United Kingdom would be in breach of its obligations under the 1950 Convention as regards Article 8.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal. On 7 July 2015 First-tier Tribunal Judge Frankish refused permission to appeal. The appellant renewed his application for permission to appeal to the Upper Tribunal. On

11 September 2015 Deputy Upper Tribunal Judge Chapman granted the appellant permission to appeal. The grant of permission sets out that the judge made a factual error at paragraph 24 in that the appellant has been lawfully residing in the UK since 13 February 2012 and that thus his presence has not always been precarious nor that of a visitor. It is just arguable that this is a material error in respect of the proportionality assessment. It was also stated that it is arguable that the judge was required to do more at paragraph 32 than just refer to Section 117B. Judge Chapman did not consider that it was arguable that the judge erred in his consideration of the assistance the appellant provides to his aunt. Thus, the appeal came before me.

The hearing before the Upper Tribunal

5. Mr Quee indicated that there was new evidence that would be relevant if a material error of law was found. The appellant was now reconciled with his wife.

Summary of the Submissions

6. The Grounds of Appeal assert that the First-tier Tribunal Judge made a material error at paragraph 24 of the decision because the judge made unfair, inaccurate findings, namely, that the appellant's presence in the UK had always been precarious as he was only ever a visitor. It is asserted that the appellant has not always had a precarious immigration status in the UK. The grounds assert that the appellant had lawfully returned to the UK having obtained prior entry clearance leave and that the judge overlooked this fact considering him to be a visitor. Mr Quee submitted that this has the effect of undermining the subsequent Article 8 considerations in the case as the proportionality balancing exercise was predicated on an erroneous basis.

7. It is asserted that insufficient consideration was given to the issue of the assistance that the appellant gives to his aunt. It is submitted that the fact that the appellant's aunt may apply for an attendance allowance should not have been permitted to dismiss the requirement of a detailed balancing exercise. The appellant relies on the case of **Beoku-Betts [2008] UKHL 39** for the principle that the effect of removal on the appellant's aunt was an issue that ought to have been given more or adequate consideration.

8. The grounds assert that the First-tier Tribunal Judge, at paragraph 32 of the decision, indicates that he has had regard to Section 117B of the Nationality and Immigration Act 2002 ("2002 Act") but the judge omits consideration of Section 117B(1) and (2). Mr Quee asserted that, as the appellant fluently speaks English. That counts as a plus under the proportionality balancing exercise. It is also submitted that the appellant is not a burden on UK taxpayers and has never had any recourse to UK public funds for the entire period of his residence in the UK which is in his favour. Mr Quee submitted that the appellant is able to integrate into the UK society and has so integrated.

9. The grounds assert that, although the judge states that he has considered the questions in **Razgar**, the determination is not indicative of an adequate balancing exercise having been undertaken. The appellant relies on the case of **AS Pakistan**

[2008] EWCA Civ 1118 at paragraph 22 for the principle that a careful assessment of the factors at play in an individual case both those favouring the interests of the appellant and any others whose rights may be affected and those favouring the interests of the public must be considered and set out by the judge.

10. The appellant relies on the case of **Marvolyn Ann Marie Ferron v SSHD [2007] EWCA Civ 1153** arguing that that case establishes that what is required is an analysis sufficient to show that the conclusion reached by the judge is properly explained. It is asserted that the Judge, in dismissing the appellant's appeal, not only inadequately explained the finding but is further vitiated by an error in making a finding that the appellant's presence in the UK had always been precarious.

11. The Secretary of State submitted a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. The respondent relies on the case of **Singh v the Secretary of State for the Home Department [2015] EWCA Civ 74**. The respondent relies in particular on paragraph 61 of the **Singh** case which refers to the approach set out in the case of **Nagre** - in order to venture into a freestanding Article 8 assessment there has to be compelling circumstances which are not covered by the Immigration Rules. The Secretary of State submits that there was nothing compelling in the appellant's circumstances and there were no issues which were not catered for by the Rules. Ms Fijiwala submitted that the appellant's status was always precarious.

12. The respondent relies on the case of **AM (S117B) Malawi [2015] UKUT 0260 (IAC)**. The respondent asserts that the ratio of the case of **AM Malawi,** as enunciated in the head note of the determination, is that the appellant cannot obtain a positive right to a grant of leave to remain from either Section 117B(2) or (3) whatever the degree of his fluency in English or the strength of his financial resources. The case is also relied on as it provides clarification between what is meant by unlawful status in the United Kingdom and precarious immigration status. In the head note at 4 the Tribunal held that a person's immigration status is precarious if their continued presence in the UK will be dependent upon them obtaining a further grant of leave.

13. Ms Fijiwala submitted that the new evidence should not be considered as it was not before the First-tier Tribunal judge. If the appellant wishes to rely on a change in circumstances he should make a fresh application.

Legislative Provisions

14. Part 5A of the 2002 Act, introduced by section 19 of the Immigration Act 2014 establishes a new regime under the rubric "Article 8 of the ECHR: Public Interest Considerations". Section 117A provides:

> "(1) This Part applies 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.

(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 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

15. Section 117B, embraced by the cross heading "Article 8: Public Interest Considerations Applicable in All Cases", provides:

"(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 the 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) a 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 a person at a time when the person's immigration status is precarious…

Discussion

16. Ground 1- the Judge made a material error by finding that the appellant's presence in the UK had always been precarious as he was only ever a visitor. Whilst it is incorrect that the appellant was only ever a visitor, this is not material. The issue that the judge was considering was the immigration status, namely that it was precarious. In considering the chronology in this case it is clear that the appellant's immigration status has been not only precarious but also unlawful. When his visitor visa expired in March 2008 he became an overstayer and therefore his presence in the United Kingdom was unlawful. He remained in the UK unlawfully until he returned to Jamaica in December 2011. When he entered the UK on 13 February 2012 he entered

lawfully as a spouse with leave to remain that was valid until 10 April 2014. However, his stay in the United Kingdom at that point, although lawful, was precarious. I accept the respondent's assertions that the case of **AM Malawi** clarified that a person who is in the United Kingdom pursuant to a grant of leave that requires the obtaining of a further grant of leave in order to continue their presence in the United Kingdom has a precarious status. That is the status of this appellant as evidenced by his application on 8 April 2014 for further leave to remain in the United Kingdom. At paragraph 4 of the head note in **AM Malawi** the Upper Tribunal set out:

> "(4) Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave".

17. There is no material error of law in the First-tier Tribunal Judge's finding that the appellant's immigration status was precarious.

18. It is asserted that the judge did not give adequate or sufficient consideration to the effect on the appellant's aunt of him being removed from the United Kingdom. The judge at paragraphs 25 to 29 takes into consideration both the role of the appellant in assisting his aunt and her position should the appellant be unable to attend to her needs. The judge took account of the fact that the appellant gave no details of the actual amount of time he spent with his aunt for the purpose of looking after her. The judge referred to the appellant's aunt's witness statement which indicated that the appellant's assistance consisted of preparing and bringing her meals and any other items she may require. The judge also considered that the appellant's aunt was living in sheltered accommodation and as such it was likely that her care needs had been assessed before she had been moved into the accommodation. The judge has considered the effect of removal of the appellant on his aunt. On the facts there is no material error of law in the judge's assessment of the aunt's position.

19. There is no appeal against the First-tier Tribunal's findings in relation to paragraph fr276ADE of the Immigration Rules. The respondent asserts that there are no compelling circumstances that give rise to a consideration under Article 8 outside of the Rules. The First-tier Tribunal has not adopted a clear approach. However the judge considered the position in relation to the appellant's aunt. This is not a matter that would have been considered under the private life provisions in paragraph 276ADE under the Immigration Rules. Therefore I consider that the judge was correct to consider Article 8 outside of the Rules. The grounds of appeal in essence argue that the judge has failed to carry out a proportionality exercise adequately.

20. The proportionality exercise undertaken by the judge is very brief. However, the judge did consider the position of the appellant's aunt. The issue is simply whether or not the First-tier Tribunal Judge adequately weighed all the relevant factors in favour of the appellant and those against the appellant when concluding that removal of the appellant would not be a disproportionate interference with his, or his aunt's, Article 8 rights. When undertaking that proportionality exercise the judge

was mandated to have regard to Section 117A and 117B of the 2002 Act. The appellant asserts that the judge failed to weigh in favour of the appellant the fact that he speaks English fluently, is not a financial burden on the taxpayer and has fully integrated into UK society. The case of **AM Malawi** makes it clear that an appellant can obtain no positive right to a grant of leave to remain from either Section 117B(2) or (3). The judge, at paragraph 32, considered that Section 117B required him to consider that control of immigration was in the public interest. He clearly factored that into the proportionality exercise weighing that in the balance against the interests of the appellant that he had set out in respect of the appellant's private life with his aunt. In the case of **Forman (ss117A to C considerations) [2015] UKUT 412 (IAC)** sets out in the headnote:

> "(i) the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely the significance of these factors is that where they are not present the public interest is fortified".

21. The failure of the judge to consider Section 117B(2) and (3)namely that the appellant fluently speaks English and is not a burden on UK tax payers does not assist the appellant, as no positive right can be obtained from those factors and they are not matters that weigh in the balance such as to dilute the public interest in firm immigration control.

22. The judge failed to consider Section 117B(4). Had he done so this would not have assisted the appellant, as little weight is to be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. At 117B(5) the judge was required to afford little weight to the appellant's private life as it was established at a time when his immigration status in the United Kingdom was precarious.

23. Although the reasons and the proportionality balancing exercise undertaken by the judge were set out very briefly in the decision there was no material error of law in the First-tier Tribunal Judge's decision. The appellant's immigration status has been either unlawful or at best precarious therefore little weight should be afforded to his private life. The interference in the appellant's private life is proportionate to the legitimate aim of the public interest in the maintenance of effective immigration controls. The judge's conclusion that removal of the appellant would not cause the United Kingdom to be in breach of its obligations under the European Convention on Human Rights was one that was open to him.

24. The appellant's appeal is dismissed and the decision of the respondent stands.

25. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

The appellant has not discharged the burden upon him of showing that there is any material error of law in the First-tier Tribunal decision, without which that decision is not susceptible to being set aside. The appeal is therefore dismissed. The decision of the respondent stands.

Signed P M Ramshaw Date 18 February 2016

Deputy Upper Tribunal Judge Ramshaw