



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/13842/2014

THE IMMIGRATION ACTS

Heard at Newport
On 14th August 2018

Decision & Reasons Promulgated
On 29th August 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

GUY DANIEL MOMBOHI DOUE
(Anonymity Direction Not Made)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Fowell, promulgated on 4th July 2017 in which he dismissed the appellant's appeal against the Entry Clearance Officer's refusal (dated 16th September 2014) to grant entry clearance to join his mother in the United Kingdom under the family reunion provisions of paragraph 352D of the Immigration Rules (as amended).
2. The appellant, who is not legally represented, is a national of the Ivory Coast born on 20th December 1996. He appealed (via his mother) against the decision with an

explanation of why the mother had not visited him in Tunisia and as to the discrepancies concerning the dates of departure of the appellant from Tunisia.

3. Permission was granted by Upper Tribunal Judge Plimmer on the following basis:

'it is arguable that in determining whether the appellant was not leading an independent life for the purposes of 353D (iii), the First-tier Tribunal was obliged to consider the position as at the date of decision (16 September 2014), as the older appeal provisions applied to the decision under appeal

Although the First-tier Tribunal Judge directed itself in accordance with this approach at [16], it is arguable that the findings relate to the position well after the date of decision'.

4. At the hearing before there was attendance by the sponsor, the appellant's mother. She handed in a document dated 9th January 2018, a letter written by her and which was already before the First-tier Tribunal and which explained why she had been unable to visit her son in Tunisia. She only sought asylum in 2012 and was granted discretionary leave in February 2013, and then status as a refugee in May 2013.

5. This appeal has already been the subject of appeal and remission to the First-tier Tribunal. Upper Tribunal Judge Grubb found an error of law on the basis that the previous judge had not applied the definition of 'leading an independent life' as defined by paragraph 6 of the Rules and remitted the matter, whereupon the matter was reheard de novo by the First-tier Tribunal.

6. Paragraph 6 of the Immigration Rules gives the current definition regarding an independent life:

'must not be leading an independent life" or "is not leading an independent life" means that the applicant does not have a partner as defined in Appendix FM; is living with their parents (except where they are at boarding school, college or university as part of their full-time education); is not employed full-time (unless aged 18 years or over); is wholly or mainly dependent upon their parents for financial support (unless aged 18 years or over); and is wholly or mainly dependent upon their parents for emotional support. Where a relative other than a parent may act as the sponsor of the applicant, references in this definition to "parents" shall be read as applying to that other relative'.

7. Prior to 2002 the appellant lived with his mother together with his grandparents in the Ivory Coast. In 2002 the mother came to the UK as a student. The appellant was at that time 5 years old. The appellant continued to live with his grandparents as a family unit until 2011 and then went to Tunisia to a football academy.

8. Judge Fowell recognised that the key issue was whether the new definition regarding independent life was met. At paragraph 4 of his decision the judge referred to the documentation before him which included an up to date witness statement from the mother. The judge also recorded in detail the oral evidence given by the mother. The mother gave oral evidence that her son was still in Tunisia, had been at his present address for just over a year living with friends and was a full-time student. She last saw him in 2002. Her parents looked after him until he was 11 years old and she took

over when he went to secondary school. If she was short of funds her parents still provided the money to him and she paid them back. She gave evidence that at the time of his application he was living with a guardian.

9. The judge found there was a discrepancy as to the chronology. In the application form completed by the appellant, he stated he had moved to Tunisia in October 2011, not, as said by the mother, in December 2010. The judge noted that his application form stated that he was 'living with friends' not as the mother had claimed 'a guardian'.
10. The judge correctly directed himself at [16] confirming that the appeal rights were as those set out the Nationality Immigration and Asylum Act 2002 and that by Section 85 '*the position has to be considered at the date of the decision, 16 September 2014*'. Indeed, this appeal is caught by the transitional provisions as the application (and decision) was made prior to 6th April 2015. The appeal needed to be decided on the previous appeal rights thus, under the immigration rules and separately, if claimed, as here, Article 8.
11. The judge made the following findings:
 - (i) the mother came to the UK in 2002 when her son was five and she had not seen him since and he remained with his grandparents until 2010/2011
 - (ii) his mother had misrecalled the later events in question. The appellant had attended the football academy in Ivory Coast and it moved to Tunisia in October 2011.
 - (iii) the statement of the appellant made no mention of a second football academy or of a guardian
 - (iv) the appellant's application form made no mention of education continuing after August 2013. His formal education ceased in or about that date. After the closure of the football academy the appellant was getting by with support from his part-time earnings and support from his mother. There was no supporting evidence of Footafrica Academie at any stage (said to be the second academy he attended).
 - (v) the grandfather's evidence did not go into details about financial matters or events in Tunisia
 - (vi) all the money transfer receipts attached to the mother's recent statement post dated the date of the application (June 2014). The judge did not accept that the sums paid could support living costs and pay the claimed costs of education. This was in the sum of £1,250 per annum. No bills or letters from the school had been provided.
12. At paragraphs 27 and 28 the judge set out the various components with regard independent living. He accepted the appellant did not have a partner. He was not living with his parents and was not in education. The judge accepted he was not employed full time.
13. With regards his financial support the judge found '*no figures have been given*' and that

'I have no evidence about what incomings and outgoings Mr. Doue has, or had at the relevant time, or his earnings in Tunisia, and on this aspect the burden of proof is on him. I note that his mother is providing (at least since then) about £1,250 per year, and this may go much further in Tunisia than in the UK, but I cannot conclude in the absence of more detailed information that this represented his main financial support'.

14. On the last aspect – emotional support – the judge found that

'Mrs Doue accepted that he had emotional support from her parents. It is difficult to parcel out emotional support in this way, but I have to have regard to the fact that the appellant and his mother have not met since he was five (or perhaps six according to his letter), and that during his important formative years since then he lived with his grandparents, as indeed he has done throughout his life until moving to Tunisia. In these circumstances, despite the evidence of continuing contact, I cannot conclude that his mother is his main emotional support, however important the connection is to them both.

It follows that three of the necessary elements are not met – education, financial and emotional ties – and so the appellant does not meet the requirements of the Immigration Rules'.

15. Section 85A (2) of the Nationality Immigration and Asylum Act 2002 and which was applicable to the appeal provisions prior to April 2015 confirmed, further to Section 84(4) and Section 84(5) that

'in relation to an appeal under Section 82(1) against an immigration decision of a kind specified in section 82(2) (b) [which this is] or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision'.

16. A careful reading of the decision shows, however, that the judge did direct himself to the circumstances appertaining as at 14th September 2014. He found the appellant was not in education since 2013, the financial remittances were minimal prior to the decision in September 2014 (starting in June 2014), and that the main emotional support was from the grandparents. Not least the appellant was not living with a guardian but with friends as at the date of his application. The judge was aware for the purposes of the immigration rules that the relevant time was the date of decision and did not deviate from this approach when considering the evidence. Much of the evidence which identified later circumstances was that produced by the sponsor. A careful reading of the decision does not indicate that the judge relied on this to make his key findings. I dismiss the appeal in relation to the Immigration rules.

17. As noted and accepted by Mr Mills, the Home Office Presenting Officer, the 'old' appeal provisions apply – that is prior to the introduction of the provisions under the Immigration Act 2014 which amended the Nationality Immigration and Asylum Act 2002. In **AS (Somalia) and another v Secretary of State for the Home Department [2009] UKHL 32** there was discussion of Section 85 of the 2002 Act (with reference to the 'old' provisions) and this specifically found that in relation to an appeal under Section 82(1) against the refusal of entry clearance, Section 85(4) should not apply and the Immigration Judge may only consider circumstances appertaining *at the time of the decision to refuse*. *This included a consideration of Article 8*. It was stated that where a change of circumstances was alleged by someone who is outside the jurisdiction the Entry Clearance Officer would be in the best position to evaluate the effect of this. The

debate was whether the restriction imposed was proportionate but found that the language in section 85(5) was incapable of being read down.

18. The judge in this instance noted that there was a right of appeal under Article 8 ECHR but first it was necessary to show that right was 'engaged'. He proceeded to find that in order to find a family life '*the normal emotional ties between a mother and an adult son would not, without more, be enough*' [30]. The judge found, relying on his earlier conclusions that the appellant had to be '*seen as a young adult living independently*'. However, by the date of the decision, which is the crucial date, the appellant was not a young adult but aged 17 years and 9 months. This to my mind was an error on the part of the judge. Between mother and son there is a presumption that family life would exist even if tenuous. That can be displaced. The findings of the judge with respect to the Immigration rules are unarguably sustainable.
19. The relevant considerations regarding assessment under Article 8 and the relevant questions are posed in **R (Razgar) v SSHD [2004] UKHL 27** as follows;
 - (a) *In a case where removal [refusal] is resisted in reliance on Article 8, these questions are likely to be:*
 - (b) *Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
 - (c) *If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*
 - (d) *If so, is such interference in accordance with the law?*
 - (e) *If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
 - (f) *If so, is such interference proportionate to the legitimate public ends sought to be achieved?*
20. He was at the date of decision still a minor and it was accepted that they were mother and son. There is some presumption of a family relationship. This, however, is not an appellant who is to be removed. He has never visited the UK and by 2014 had not seen his mother since 2002. The First-tier Tribunal Judge found that the main support emotionally derived from his grandparents and as such, family life and any interference with his family life which even if found to be tenuous would be limited. Even so, the threshold is low.
21. The appellant could not fulfil the requirements of the immigration rules and thus the decision was in accordance with the law. Immigration control is a necessary and legitimate purpose.
22. The crucial question is whether the decision is proportionate. This is an entry clearance case relating to someone who at the date of the decision was almost an adult. No safety considerations have been raised. I cannot find that the best interests of the appellant would be to be with his mother when he has been effectively raised by his

grandparents and his experience until 15 years was to be in the Ivory Coast where he is familiar with the culture. His best interests are to either remain with his friends and the status quo in Tunisia or return to the Ivory Coast.

23. The public interest, that is the position taken by the Entry Clearance Officer, is expressed through the Immigration Rules which the appellant has not satisfied. As the judge stated the rules are also intended to reflect the scope of family life under Article 8 and he could see 'no reason for form a wholly different view, free of the definition in question'.
24. Section 117 is also applicable. This was inserted into the Nationality Immigration and Asylum Act 2002 as from 28th July 2014 the law applies as from that date even if the facts to be considered are as at the date of decision. The judge was obliged to apply the relevant sections which he did not appear to do.

117A - Application of this Part

(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*

....

(3) *In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).*

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.*

25. Mrs Doue told me that the appellant only spoke French and his local language of the Ivory Coast. As at the date of decision by the Entry Clearance Officer, there was no indication the appellant could speak English or that his mother would have been able to support him. According to her statement she was a student in September 2014 with a part time job.

26. I find that the judge was in error in considering the appellant as a young adult, rather than a minor, which was the relevant fact at the date of the Entry Clearance Officer's decision, but on remaking the decision under Article 8, even if finding family life with the mother existed, (which for the reasons given, I find is limited), in the circumstances as found by Judge Fowell with reference to the immigration rules, which include a failure to be able to comply with the immigration rules, reliance on his grandparents, no physical contact with his mother from 2002 to 2014, and his living in a foreign country having part time work and living with friends, I am not persuaded that the refusal decision was disproportionate especially when balancing into the considerations Section 117.
27. With regards Article 8 the crucial question is one of proportionality as at the date of the Entry Clearance Officer's decision and **Huang v SSHD [2007] UKHL 11** confirmed that
- 'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'*
28. The decision does not prejudice the family or private life of the appellant such that it breaches his Article 8 rights.
29. I maintain the decision with respect to the immigration rules because I conclude for the reasons given above that there was no material error of law. I set aside the decision with regards the article 8 decision, remake the decision and dismiss the appeal.

Signed *Helen Rimmington*

Date: 14th August 2018

Upper Tribunal Judge Rimmington