IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000170
First-tier Tribunal No:
HU/52473/2022
LH/00185/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GINO MARK ANTHONY JOHNSON
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Youssefian instructed by Masaud Solicitors Limited.
For the Respondent: Mrs Arif, a Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 12 August 2024

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born on 2 June 2001 who entered the UK on 6 June 2018, aged 17.
2. On 1 June 2020 he was convicted of being concerned with the supply of Class A drugs and on 6 June 2020 was sentenced at the Inner London Crown Court to 28 months imprisonment in a young offenders institution. As a result, he is the subject of an order for his deportation from the United Kingdom.
3. The appellant claimed that deporting him will breach his human rights. The human rights application was refused against which the appellant appealed. The appeal became before First-tier Tribunal Judge Coutts ('the Judge') sitting at Hatton Cross on 3 July 2023.
4. In a determination dated 26 October 2023 Judge Coutts dismissed the appeal.
5. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 15 January 2024, the operative part of the grant being in the following terms:

1. The Ground 1 argues there was procedural unfairness in that the appeal before the judge was advanced on the basis the Appellant's deportation was unduly harsh and he met the substance of Exception 1 and Exception 2 of Section 117C. The judge states at paragraph 42 that the exceptions under the Immigration Rules did not apply to the Appellant's situation and it was not suggested by him at the hearing that they did. The Appellant states this is an incorrect record of the proceedings before the judge. The Appellant invites the Tribunal to review the recording of the proceedings. It is arguable the judge failed to deal with the Appellant's arguments and the extent to which the Appellant was able to satisfy the exceptions.
2. The second ground argues that the judge solely considered the Appellant's case exclusively by reference to the Immigration Rules contrary to case law which holds that the structured approach to be undertaken by a Tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act. It appears the judge had failed to consider Section 117C of the 2002 Act. It also appears that the judge had qualified Exception 2 of Section 117C(5) that the Appellant had to be in the UK lawfully when his relationship with his partner was formed.
3. At Ground 4 it is argued there is an error of law in finding there was no family life and a failure to give adequate reasons for this. It is arguable this is an error of law.
4. It is arguable the judge had not considered the very compelling circumstances test when assessing the Appellant and his partner's circumstances. Permission is granted on all grounds.

Discussion and analysis

6. The grounds seeking permission to appeal raise an issue in relation to the chronology and delay between the appeal being heard on 3 July 2023 and the decision being promulgated on 26 October 2023. Mr Youssefian accepts that such delay does not, per se, constitute an error of law which is correct, but there is an issue in the appeal about whether the delay contributed to identifiable errors in the determination.
7. In addition to those pleaded and referred to in the grant of permission to appeal another point arises. At [44] of the determination Judge writes: *"The appellant cannot satisfy paragraph 399a because she did not have, at the time of the hearing, a genuine and subsisting relationship with the child in United Kingdom"*. Whilst that may have been the position that existed on 3 July 2023 the Judge at [20] of the determination states that in September 2023 the appellant and his partner were expecting their first child.
8. A determination speaks from the date of promulgation. Mr Youssefian confirmed that the child was indeed born in September 2023. The child is a British citizen yet the Judge failed to consider whether at the date of promulgation there had been a material change in circumstances such that consideration of the exception to deportation based upon existence of a genuine subsisting relationship with the child should have been re-examined. It was not, albeit it may have constituted a 'new matter' requiring the Secretary of States consent.
9. The finding by the Judge at [42] that no points were taken in relation to the exceptions to deportation under the Immigration Rules, when they clearly were, establishes legal error. Although the Judge refers to the Rules, the correct approach would have been to the address section 117B and 117C of the Nationality, Immigration and Asylum Act 2002 and the exceptions contained therein. Submissions were made to the Judge in relation to both Exception 1 Exception 2 under section 117 C of the 2002 Act which are provisions reflected in the Rules. There is merit in a submission delay in promulgating appears to suggest the Judge forgot what had been said by way of submissions on the day, and therefore failed to deal with all relevant issues.
10. I also find merit in the submission the Judge at [45] introduced a qualification that was not to be found within section 117C(5), which is a legal error.

11. The Judge considered the question of ‘very compelling circumstances’ but clear legally sustainable findings were required in relation to the exceptions to enable proper consideration of Article 8 outside the Rules.
12. A number of other issues are raised in the grounds seeking permission to appeal which I need not set out or comment upon further. I find in light of the matters discussed above that it has been established that the Judge has erred in law in a manner material to the decision to dismiss the appeal.
13. I set the decision of the Judge aside. In light of the incorrect approach, delay in promulgating and credible argument of a lack of awareness of the grounds on which the appeal was pursued, there can be no preserved findings.
14. In light of the fact there will have to be extensive fact finding in relation to the situation that exists at the date of any future hearing, on the basis of the correct legal framework, and in light of the guidance provided by the Upper Tribunal, relevant Practice Direction and decided case law, I find it is appropriate in all the circumstances for the appeal to be remitted to the First-tier Tribunal to be considered a fresh.

Notice of Decision

15. First-tier Tribunal has been shown to have materially erred in law. I set that decision aside with no preserved findings.
16. I remit the appeal to the First-tier Tribunal sitting at Birmingham to be heard *de novo* by a judge other than Judge Coutts.
17. Any further case management directions shall be given by the Birmingham Hearing Centre.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 August 2024