



IAC-FH-NL-VI

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/10218/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 July 2015**

**Decision & Reasons Promulgated  
On 26 August 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**L.A.A.  
(ANONYMITY DIRECTION MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: No representation

For the Respondent: Mr K Norton, Home Office Presenting Officer

**DECISION AND REASONS**

1. An application for permission to appeal was made by the Secretary of State but for the purposes of this appeal I will refer to the parties as they were termed before the First-tier Tribunal.
2. The appellant is a citizen of Jamaica born on 27 August 1968 and he appealed against the decision of the Secretary of State taken on 14 February 2014 to remove him from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999.

3. The appellant first entered the United Kingdom on 4 August 2000 and was refused leave to enter and removed on 6 August 2000 to Jamaica.
4. He returned to the UK in December 2001 giving the name of MD with a forged Jamaican passport and he lived for thirteen years in the UK undiscovered by the authorities.
5. On 14 September 2014 he was arrested for possession with intent to supply controlled drugs, namely cannabis and in possession of a folding flick knife.
6. He was charged with the possession of an offensive weapon in a public place and possession of controlled drugs, cannabis, and he pleaded guilty at Camberwell Green Magistrates' Court receiving a custodial sentence of eight weeks in total.
7. He had a long-term partner, CD with whom he had been living for over two years and they had two children together. Ms D also had three children from previous relationships. All of the children are British citizens as indeed was Ms D. One of Ms D's children was in poor health and undergoing medical treatment.
8. The appellant also had two children in Jamaica and a child born on 8 March 2012 with another woman in the UK.
9. First-tier Tribunal Judge Gibb and Cockrill allowed the appellant's appeal both under the Immigration Rules and outside the Rules under Article 8.

### **Application for Permission to Appeal**

10. The Secretary of State contended in the application for permission to appeal that that there was a material misdirection in law further to S-LTR.16.
11. The Tribunal concluded that it had not been established the Appellant's conduct character or associations were such that it made his presence in the UK undesirable [103]. This conclusion by the Tribunal was unsupported by the evidence as there was a clear basis for concluding that the appellant's conduct and character were such that his presence in the UK was undesirable. The Secretary of State was entitled to reach such a conclusion and she was not palpably wrong in her assessment.
12. The application for permission to appeal asserted that the Tribunal concluded, at [91], that the appellant was not a witness of truth, finding that he made a calculated decision to use a different alias 'perfectly knowingly' [94-95]. Despite this, the Tribunal appeared to make *positive* credibility findings ("having said that there are a number of areas in which we accept the appellant's evidence") effectively on the sole basis that the appellant used a false identify to avoid detection by the authorities [92-93].
13. Thus, in assessing the facts of the case, the Tribunal sought to minimise the appellant's character and conduct by way of generalisation [104-106] and despite the previous adverse credibility findings.

14. The appellant's conduct was undesirable for several reasons: his poor immigration history, his willingness to lie to immigration officials, and the authorities as well as his convictions and his reprimand in the UK. At [106] when assessing suitability the Tribunal reasoned that the appellant's conduct 'needs to be placed in the scales' with his family life. There was no scope to take account of the strength of a person's family life when considering whether the suitability requirements are met. If the suitability requirements were not met then it was the respondent's policy of exceptional circumstances which allows for all relevant factors including family life to be taken into account. Taken cumulatively, as the factors must be, the appellant's character and conduct did disclose a basis to refuse his application under S-LTR 1.6.
15. Despite previous adverse credibility findings [90-95] the Tribunal in assessing the factors sought to minimise the appellant's character despite having concluded that he was not a witness of truth. Moreover the Tribunal erred at [106] in concluding the appellant's conduct needed to be placed in the scales with his family life. There was no scope to take into account the strength of a person's private and family life when considering the suitability requirements.
16. It was stated that taken cumulatively as the factors should be the respondent asserted that the appellant's character and conduct disclosed a basis on the balance of probabilities to refuse his application under S-LTR1.6.
17. Further, in concluding that the appellant could take advantage of EX.1 the Tribunal had approached the provision as a stand-alone clause which ran contrary to the decision in **Sabir (Appendix FM EX.1 not freestanding) [2014] UKUT 00063**. In adopting the parent route the Tribunal should have found that EX.1 was not available to the appellant as he could not meet other Rules under E-LTRPT. The appellant also fell foul of FLTR 1.6.
18. It was also contended that the judge exercised a freewheeling Article 8 analysis unencumbered by the Rules.
19. Although there was reference to Section 117B(6) of the Immigration Act 2014, the Tribunal was required to have regard to all the public interest considerations and Section 117B(6) was not a stand-alone test. This states the public interest does not *require* the appellant's removal but does not go so far as to state that the public interest was *defeated*. Had the Tribunal undertaken a holistic assessment as required the public interest in the appellant's removal would prevail.
20. In addition the Tribunal had erred in addressing the subsistence of the appellant's relationship with his claimed partner and children as well as the genuineness of their cohabitation. This was an appellant who had habitually lied and used deception to benefit himself.
21. Permission to appeal was granted by First-tier Tribunal Shimmin in that the Tribunal had regarded Appendix FM EX.1 as a stand-alone clause and had also erred in its assessment of Article 8 and the application of Section 117B.

## The Hearing

22. Mr Norton explained the position of the Secretary of State carefully to the appellant who was unrepresented at the error of law hearing before me. He was given a copy of the papers so that he might familiarise himself with the position prior to commencement of the hearing.

## Conclusions

23. At paragraph 13 of the decision the Tribunal stated:

“The way in which that subsection (LS-LTR.1.6) is worded gives the Secretary of State a discretion. Accordingly we must consider whether or not the discretion should have been exercised differently”.

24. In fact S-LTR1.1 states:

“The applicant **will be** refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2 to 1.7 apply.”

S-LTR.1.6 states:

“The presence of the applicant in the UK is not conducive to the public good because their 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 them to remain in the UK.”

25. Should the appellant fall for refusal under Section 1.6 it is mandatory to refuse t limited leave to remain on grounds of suitability. It was accepted that the appellant had criminal convictions. Had the appellant contested that he had a criminal conviction or that he had entered the UK illegally there may have been grounds to challenge the basis of the application of S-LTR.1.6 but in the circumstances of this appeal it is not the case that there is a discretion to be exercised by the Tribunal where the facts, as in these circumstances, are not disputed. As recorded by the Tribunal the appellant had entered the UK using a forged Jamaican passport, had used the friend’s name perfectly knowingly [94] and

“This was a calculated decision from the start to use someone else’s identity with a view, so to speak, to remain below the radar” [94].

26. With relation to the conviction the Tribunal noted at [96]:

“We note specifically the conviction and sentence. It seems that he received one caution rather than two”

and

“... this is a case that does not involve violence” [104].

From the evidence it is clear, however, that the appellant was convicted of possession of an offensive weapon and for possession of drugs.

27. There was no challenge by the appellant to the effect that he had indeed been convicted of these offences and therefore there was a sound basis for the adoption by the Secretary of State of paragraph S-LTR.1.6. This was not in the discretion of the Tribunal. At this point in the deliberations there was no scope to take into account the strength of a person's private and family life when considering the suitability requirements.
28. It is also the case that there appeared to be contradictory findings of fact, regarding credibility, within the decision and which supported the Tribunal's conclusions.
29. As a result and because the appellant had not fulfilled the relevant substantive parts of the Immigration Rules, the Tribunal erred in law by stating at paragraph 115 that the appellant
- "... succeeds under the Rules on the premise that he is not barred from consideration of the application of EX.1 by the suitability requirements."
30. In particular **SS Congo v SSHD [2015] EWCA Civ 387** confirms that the Immigration Rules are the starting point of a proportionality consideration under Article 8, and in this particular instance the foundation of the decision under the Immigration Rules was concluded in error. In particular the Secretary of State's position as set out in the Rules should be given weight and this was not the case that was addressed effectively by the Tribunal because of the error committed in the previous assessment.
31. Although I find that this was not necessarily a "free wheeling Article 8 analysis unencumbered by the Rules" the Tribunal had failed to identify the difficulties with the appellant's case under the Immigration Rules as highlighted above and also failed to apply Section 117B(6) of the Immigration Act 2014 correctly. Section 117B(6) does not necessarily 'trump' all the other public interest considerations. In an assessment of proportionality the Tribunal was required to have all relevant considerations set out in Section 117B and other factors which may be relevant following **Huang v Secretary of State for the Home Department [2007] UKHL 11. Dube** (ss.117A-117D) [2015] UKUT 00090 (Immigration and Asylum Chamber) confirms that Sections 117A to 117D 'do not represent any kind of radical departure from that "override" previous case law on Article 8 so far as concerns the need for a structured approach. In particular they do not disturb the need for judges to ask themselves the five questions set out in **Razgar [2004] UKHL 27**. Sections 117A to 117D are essentially a further elaboration of **Razgar's** question 5 which essentially about proportionality and justifiability'.
32. An assessment of the same may have made a material difference to the outcome.

### **Notice of Decision**

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the

First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement

**Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Rimington