



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

Appeal Number: IA/18420/2013

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons

On 16th July 2015

**Promulgated
On 23rd July 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MERVIN TSANDOU
ANONYMITY DIRECTION NOT MADE**

Respondent

Representation:

For the Appellant: Miss A Holmes (Senior Home Office Presenting Officer)

For the Respondent: Mr R Solomon (Aschfords Law)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State with regard to a decision of the First-tier Tribunal (Judge Quinn) promulgated on 28th January 2015 by which it allowed the Respondent's appeal against the Secretary of State's decision to refuse to vary his leave to remain in the UK and to remove him to India.
2. The grounds upon which permission to appeal was granted assert that the First-tier Tribunal failed to give reasons or adequate reasons for its findings, in particular for finding Article 8 family life between the Appellant

and his mother, why he would qualify for a derivative right of residence under the EEA Regulations and that the First-tier Tribunal Judge did not give reasons for finding that the Appellant would live an openly gay lifestyle in India.

3. Permission to appeal was granted on the basis that the First-tier Tribunal had arguably erred in failing to identify the circumstances justifying considering Article 8 outside the Immigration Rules, failing to adequately reason why the Appellant would qualify for a derivative right of residence, failing to consider s.117 of the Nationality, Immigration and Asylum Act 2002 and failing to give adequate reasons for finding that the Appellant would suffer ill treatment in India on account of his sexuality.
4. My first task is to decide whether the First-tier Tribunal made an error of law in its decision and if so whether and to what extent the decision should be set aside.
5. For the sake of continuity and clarity I will refer in this determination to the Secretary of State as the Respondent and Mr Tsandou as the Appellant.
6. The Appellant arrived in the UK on 21st December 2004 with a student visa accompanied by his mother, a British citizen. His student visa was extended and he was then granted further leave to remain as a Tier 1 (Post Study Work) Migrant. In January 2012 he made an application for further leave to remain on Article 8 grounds which was refused. That decision was the decision under appeal to the First-tier Tribunal.
7. The Judge noted in his Decision and Reasons that the Appellant was born in Madagascar where he lived until he came to the UK and had never been to India. His Indian father is deceased. The Appellant's mother came to the UK in 2004 because all of her family is here.
8. The Judge noted that the Appellant had been advised to claim asylum but had not done so.
9. The Judge noted that although he clearly could not meet the requirements of the Immigration Rules, the Secretary of State had considered Article 8 outside the Immigration Rules and it was appropriate for him to do likewise. I can see no error of law in that decision.
10. The Judge noted that in fact the Appellant had been in the UK lawfully for a continuous period of ten years.
11. At paragraph 20 of his decision the First-tier Tribunal Judge found that the Appellant was fluent in English although he had did not have the required test certificate. In that he erred as, since the Appellant had achieved both a Bachelors and a Masters degree in England, he did not need to take an English language test.
12. The Judge noted that the Appellant worked, earned a good salary and claimed no public funds.

13. At paragraph 24 the Judge found that the Appellant would be entitled to a derivative right of residence under Reg 15A(4A) of the EEA Regulations as he was the primary carer of his British citizen mother. In that he is in error because he cannot be said to be his mother's primary carer when he works full time. He also found at paragraph 29 that his mother manages her daily needs herself. That conflicts with his finding that he is her primary carer. Nevertheless he is significant in her care, being present at night and at weekends, moreso given that she is housebound.
14. The Judge's justification for considering Article 8 outside the Rules was that the Immigration Rules did not include a provision for caring for an elderly relative. That does not constitute an error of law.
15. The Judge found that the relationship between the Appellant and his mother gave rise to a dependency over and above the normal emotional ties between a parent and an adult son such as to engage Article 8. That was a conclusion he was entitled to reach on the evidence.
16. At paragraph 36 the Judge referred to the Appellant's good immigration history, that he has been in the UK lawfully for 10 years, that he has achieved qualifications, that he is not reliant on the public purse, that he is of economic benefit to the UK and is highly skilled. The Judge found, unsurprisingly, that there would be significant obstacles to the Appellant's integration in India given that he has never lived there and has no ties to that country. The fact that he is gay would add to that difficulty. The Judge did not allow the appeal on asylum grounds.
17. At paragraph 38 the Judge found that the effect of removal to India on the Appellant would be devastating given that it is a country that he had never visited and where he has no connections.
18. At paragraph 39 he found that the Appellant's mother's safety would be in jeopardy without her son's presence and she would become reliant on social care.
19. It is true that the Judge failed to specifically refer to s.117A-D of the Nationality, Immigration and Asylum Act 2002 inserted by s.19 of the Immigration Act 2014 and in force since 28th July 2014. However he has taken into account all the relevant factors that s.117 requires him to do. Section 117 provides:-
 - (1) This part applies where a court or tribunal is required to determine whether the 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 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.

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

20. Section 117B which applies in all cases provides as follows:-

(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 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.

(6) In the case of person who is not liable to deportation, the public interest does not require the persons removal where-

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

21. The Appellant, as found by the Judge, is not a burden on the state, speaks English, is integrated in the UK and has at all times been in the UK lawfully.

22. What s117B does not provide is an exception for a person who has been in the UK for many years and who has no connections with his country of

nationality and who would have significant difficulties integrating there. Significantly there is a similar exception in regard to the deportation of a foreign criminal contained in paragraph 399A of the Immigration Rules which provides that it would not be in the public interest to deport someone (sentenced to less than 4 years) if:-

- (a) the person has been lawfully resident in UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and
- (c) there will be very significant obstacles to his integration into the country to which it is proposed he is deported.

23. Although this Appellant has not been in the UK for most of his life, he has been here for 10 years and he is not a foreign criminal. The apparent anomaly may be explained by the provisions in the Rules for long residence and paragraph 276ADE. Unfortunately for this Appellant he does not meet either as he did not make an application under the long residence provisions (he did not have 10 years residence when he made his application) and he does not meet the provisions of paragraph 276ADE.
24. However taking all of the factors into account the Judge was clearly entitled to allow the appeal on Article 8 grounds for the reasons he gave and as I have set out above.
25. The Judge did give reasons for considering Article 8 outside the Rules and despite not setting out the provisions of s.117 or referring to it specifically, he did take the factors set out therein into account which is what is required.
26. Miss Holmes did not seek to persuade me otherwise.
27. Accordingly, the decision of the First-tier Tribunal is not tainted by a material error of law and the decision is upheld. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Date 22nd July 2015

Upper Tribunal Judge Martin

There was no application for an anonymity order and no justification for making one and I do not do so.

Signed

Date 22nd July 2015

Upper Tribunal Judge Martin