Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23161/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10 June 2015

Decision sent
On 26 June 2015

Before

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

RENNISON MARIGA OKEMWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not represented
For the Respondent: Ms A. Fijiwala, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Kenya born 12 December 1981. He entered the United Kingdom as a student on 13 January 2003, his leave subsequently being varied so as to expire on 31 October 2004. The appellant was thereafter granted four years leave to remain as a UK Ancestry Migrant, leave in this capacity last being conferred until 11 September 2013.

2. On or around the 29 July 2011 the appellant made an application for Indefinite Leave to Remain. This application was refused by the Secretary of State in a decision dated 9 May 2014, pursuant to paragraphs 193(iv), 322(1A) and 322(2) of the Rules – ostensibly on the basis the appellant

© CROWN COPYRIGHT 2015

submitted documents with his application (and previous applications) which the Registrar of Births and Deaths in Kenya has now identified as not being ‘genuine’.

3. On the same date the Secretary of State made a decision to remove the appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The appellant appealed the aforementioned decisions to the First-tier Tribunal. This appeal was heard by First-tier Tribunal Judge Pacey and dismissed in a determination promulgated on 13 November 2014 – Judge Pacey being satisfied that the birth certificates the appellant had relied upon in his application to the Secretary of State were not genuine.

5. The appellant sought, and obtained, permission to appeal to the Upper Tribunal; the grounds lodged in support of such application being in the following terms:

> “1. In the grounds submitted the Appellant raised Article 8 and in the skeleton argument submitted it is stated “in the alternative the Appellant relies on Article 8 ECHR. He has been settled in the UK for valid leave for 11 years and most of his adult life. He is working in the UK, as is his partner, and he has 2 young children who have lived their whole lives in the UK. Family are not reliant on public funds. He has settled family life and strong private life. To force him to return to Kenya would breach Article 8 ECHR. The Tribunal is asked to find the Appellant and his family’s Article 8 will be breached if he is forced to leave the UK.”
>
> 2. No findings were made in the determination dated 12 November 2014 in relation to Article 8 and there was no consideration of Section 55 to safeguard the welfare of the Appellant’s children and this results in an error of law.”

6. Thus the appeal came before us.

Error of Law

7. It is not in dispute that the appellant raised Article 8 ECHR grounds, albeit briefly, in his notice of appeal to the First-tier Tribunal and that such grounds were also particularised in a skeleton argument drawn on his behalf for the hearing before the First-tier Tribunal.

8. By section 86(2) of the Nationality, Immigration and Asylum Act 2002 the First-tier Tribunal is required to determine any matter raised as a ground of appeal. Despite the clarity with which this provision is drawn, and the obvious intention of the appellant to rely upon Article 8 ECHR as a ground before it, the First-tier Tribunal failed to give any consideration to such ground.

9. Ms Fijiwala accepts that such a failure constitutes an error of law in the First-tier Tribunal’s determination. Whilst she, initially, sought to persuade us that despite this failure in the First-tier Tribunal’s determination should

stand, it was subsequently accepted that where, as in the instant case, there had been no engagement at all with one of the grounds relied upon by an appellant, the appropriate course is to set the First-tier Tribunal's determination aside and for the decision under appeal to be re-made in relation to such ground.

10. We agree that this is so and set the First-tier Tribunal's aside for its failure to consider a matter raised as a ground of appeal, namely whether the appellant's removal would lead to a breach of Article 8 ECHR.

11. We announced this conclusion during the course of the hearing and subsequently directed that the Upper Tribunal would re-make the decision under appeal for itself.

Re-making of decision

12. Although the appellant sought to assert before us that both the Secretary of State and First-tier Tribunal were incorrect in their conclusion that he had produced documents to the Secretary of State that were not genuine, we observe that the First-tier Tribunal's finding in this regard was not the subject of challenge in the grounds of application lodged in support of the application for permission to appeal. Whilst this is not determinative of the scope of the re-making of the decision, in the instant case there is nothing before us that leads us to re-open this aspect of the appellant's case.

13. The appellant produces little evidence of substance on this issue, in the face of evidence from the Secretary of State - which was accepted by the First-tier Tribunal - to the effect that contact had been made by the FCO in Nairobi with the Acting Senior Assistant Director of the Register of Births and Death in that city, who confirmed that neither of the birth certificates relied upon by the appellant are genuine.

14. Having considered whether to exercise our discretion to remake the decision under the Rules we have decided, in the all the circumstances of this case, that we should not do so. The scope of our consideration is therefore limited to Article 8 ECHR. For the sake of completeness we identify that had we considered the appeal under the Immigration Rules, on the evidence available to us we would have dismissed it. We are entirely satisfied that the Secretary of State has demonstrated to the required standard that the birth certificates relied upon by the appellant are not genuine.

15. Turning then to Article 8 ECHR. Although the appellant made his application for settlement prior to 9 July 2012 i.e. the date HC 194 came into force, that application did not include within it a human rights application based on his private and family life. Given this, and the date of the Respondent's decision, we must give consideration to whether the appellant meets the requirements of Paragraph 276ADE or Appendix FM to the Immigration Rules. We find that he does not.

16. It is immediately apparent from what we say above as to the production by the appellant of documents which are not genuine, that he fails to meet the suitability requirements of the Rules. In any event, the appellant also fails to meet other substantive requirements of these Rules.

17. In relation to paragraph 276ADE, the appellant has not lived in the UK for 20 years [sub-paragraph (iii)] , is not under the age of 25 [sub-paragraphs (iv) and (v)] and there is no evidence before us that there are any very significant obstacles to his integration into life in Kenya, a country where he grew up and where his brother resides.

18. As to Appendix FM, Ms Obure – the appellant's partner - is not a British citizen and neither is she settled in the UK. As a consequence the Applicant cannot meet the requirements of section E-LTRP (leave as a partner). Neither can he meet the requirements of section R-LTRPT (leave as a parent) because neither of his children are British citizens nor have they lived here for 7 years continuously.

19. We therefore turn to consider Article 8 ECHR outwith the confines of the Rules. There have been numerous judicial pronouncements relating to the task that the Secretary of State and the Tribunal must undertake when considering such issue – the most recent statements by the Court of Appeal being found in Singh v The Secretary of State for the Home Department, Khalid v The Secretary of State for the Home Department [2015] EWCA Civ 74; PG (USA) v The Secretary of State for the Home Department [2015] EWCA Civ 118 and Secretary of State for the Home Department v SS (Congo), BM (Afghanistan), BB (Pakistan), FA (Somalia), AC (Canada), KG (India) [2015] EWCA Civ 387. We have taken into account and applied the *ratio* of these decisions.

20. In summary, a failure to meet the requirements of the Immigration Rules is a weighty factor in determining an Article 8 claim outside the Rules, such weight being particularly significant where the Rules provide a *"complete code"* or where *"any gap between the Rules and what Article 8 requires is comparatively narrow"*; this being because such claim will already have been addressed to a significant extent when rejecting it under the Rules. Where there are matters that are substantial and which could play no, or no significant, part in the consideration under the Rules, then a full assessment will be required in which they are balanced against all other relevant considerations including the public interest in effective immigration control.

21. Moving on to the relevant circumstances of the appellant's claim. The appellant's immigration history in the UK is set out above we do not recite it again at this stage. He has now lived in the UK for in excess of 12 years and speaks English fluently. We accept that he has been working in the UK – the documents before us including within them copies of payslips in the appellant's name relating to employment at an organisation named "Dimensions", which assists persons with learning difficulties. We accept the appellant's evidence that he is a youth worker at this organisation. We

also accept that he raises funds for charity and helps coach young footballers.

22. The appellant met his partner, Miss Lorna Obure, in the UK in 2004, and there are now two children of the relationship - born 21 February 2009 and 13 March 2012 respectively. We accept that the appellant, his partner and children reside together and form a family unit in the UK.

23. Miss Obure, who is also a Kenyan national, arrived in the UK on 6 September 2001 with leave to enter as a student, which was subsequently extended until 30 November 2007. She thereafter remained in the UK under the International Graduate Scheme with leave conferred until 28 December 2008 and, subsequently, applied in time for leave as a Tier 1 Highly Skilled Post Study Migrant. Such application was refused. Miss Obure was thereafter unsuccessful in her appeal against such refusal, her appeal rights being exhausted on 14 April 2009. On 25 May 2009 she applied for leave to remain as the appellant's dependent, leave being granted in this capacity until 11 September 2013.

24. On 9 September 2013 Miss Obure made an application for Indefinite Leave to Remain outside the Immigration Rules, an application which was refused by way of a decision dated 29 March 2014. The appellant's children were named dependents on this application. A subsequent appeal against the aforementioned decision was dismissed by the First-tier Tribunal in October 2014 and permission to appeal was subsequently refused. We have not been provided with a copy of the First-tier Tribunal's determination. On 15 April 2015 Miss Obure made a further application for leave to remain – this time on the basis of her length of residence here. We have not been provided with a copy of this application, which we are told remains pending before the Secretary of State.

25. Returning to the children, we are told nothing of the circumstances of the appellant's youngest child, which is unsurprising given the child's age. As the circumstances of the eldest child, we accept that he attends primary school and, according to a school report for the year 2013-2014, is exceeding the expected level of development in every area that is monitored. We have no doubt that the appellant's eldest child has established emotional bonds both with his school friends and with his teachers.

26. Given what we have said above, we accept that the appellant has established a substantial private and family life in the UK and we further find that the interference caused by his removal would engage Article 8.

27. There can also be no dispute that the appellant's removal to Kenya would not be anything other than in accordance with the law (in the wider sense given to this phrase when the ECHR is under consideration), and would be in pursuance of a legitimate aim.

28. The final issue before us in relation to article 8 is that of proportionality.

29. From 28 July 2014, as a consequence of the introduction of sections 117A-117D of the Nationality Immigration and Asylum Act 2002, the Tribunal is required to take into account a number of specified considerations. In doing so in this case we observe that the appellant can speak English fluently and has passed the Life in the UK Test. Furthermore, he has, during his time in the UK, been financially independent and we accept that if he were allowed to remain here this would continue to be so.

30. By section 117B(5) we are required to give little weight to private life established by a person at a time when that person's immigration status is precarious. The appellant's status in the UK has at all times been precarious, given that his continued presence here has, at all times, been dependent on obtaining a further grant of leave (See AM (s117B) Malawi [2015] UKUT 0260 (IAC)).

31. The appellant can gain no benefit from section 117B(6), Ms Obure not being a qualifying partner, and the appellant's children not being qualifying children (as to which see s117D).

32. We are further required by section 55 of the Borders Citizenship and Immigration Act 2009 to consider the circumstances and best interests of the appellant's children: see JO Nigeria [2014] UKUT 00517 (IAC).

33. We have set out above that which we have been told about the circumstances of the appellant's children, evidence we unhesitatingly accept. Having considered this evidence we find that the best interests of the children will undoubtedly be served by the existing state of affairs being preserved. However, whilst we treat such interests as a primary consideration, they are not a trump card.

34. Despite the best interests of the children being to remain in the UK in the family unit, given all that we are told we nevertheless conclude that it is entirely reasonable to expect the children to accompany their parents to Kenya. There is no evidence before us (i) that either child would have any difficulty adapting to life in Kenya, (ii) that there is any well-founded fear for the children's safety there, (iii) that they would suffer significantly, or at all, in their education by moving to Kenya or (iv) that either child has a relevant health issue that cannot be treated in Kenya.

35. Although Ms Obure has an outstanding application for leave to remain in the UK, this, in our view, does not render it unreasonable for her to return to Kenya either immediately, with the appellant, or after awaiting the outcome of such application – even if such outcome is positive. She is a Kenyan national and like the appellant has built up her private life in the UK whilst her leave here has been precarious. We have not been provided with any evidence that she would face any difficulties integrating back into Kenyan society. It is Ms Obure's choice whether she awaits a decision on her, and her children's, pending applications, but the fact of such applications having been made does not, in our view, render it

unreasonable to expect her and the children to return to Kenya with the appellant.

36. There is a significant public interest in refusing permission to remain to those persons, such as the appellant, who have failed to establish a right to remain under the Immigration Rules. Looking at the evidence before us as a whole, we find that there are no compelling circumstances not sufficiently recognised under the Rules that lead us to conclude that it would not be proportionate to remove this appellant to his homeland. Whilst the appellant has a significant private life in the UK, this was built up at a time when his leave was precarious and we attach little weight to it. As to the appellant's family life, despite it being in the best interests of the children to remain in the UK, and having treated such interests as a primary consideration, we nevertheless find that it is reasonable to expect them and their mother – Ms Obure – to move to Kenya to be with the appellant.

37. The public interest in removing a person who does not meet the requirements of the Immigration Rules is ample justification, on the facts of this particular case, for the appellant's removal to Kenya. In our conclusion there is nothing in the facts of this case, as presented, which comes anywhere close to leading us to conclude that the appellant's removal would be a disproportionate interference with his private and family life in the United Kingdom.

38. For this reason we remake the decision by dismissing the appeal brought on Article 8 ECHR grounds – both within and outwith the Rules. As identified above, the First-tier Tribunal also found that the Secretary of State had made out her case in relation to the application of paragraph 322 of the Rules – a conclusion which we do not disturb.

<u>Decision</u>

For the reasons given above:

(i) The decision of the First-tier Tribunal is set aside;
(ii) Having remade the decision under appeal for ourselves, we dismiss it on all grounds.

Signed:

Upper Tribunal Judge O'Connor
Date: 12 June 2015