Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/32764/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly **Decision and Reasons Promulgated**
On 15 July 2015 **On 24 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between
DAVIE CHITANZO NALIKATA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Wilkins for GMIAU
For the Respondent: Ms C Johnson Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Foudy promulgated on 5 December 2014 which allowed the Appellant's appeal and

held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove him and his dependents to Malawi.

Background

3. The Appellant was born on 8 May 1981 and is a national of Malawi.

4. The Appellant and his spouse arrived in the United Kingdom in 2003 and 2005 as students. Their leave was extended until 2011 and 2010. The Appellant's last application was made on 29 January 2011 for leave to remain as a student and his spouse as dependent was refused on 22 February 2011. They were issued with a notice of liability for removal on 25 October 2013.

5. Their son Evan Andrew Nalikata was born 14 April 2012 with a number of health problems.

6. On 11 February 2014 an application for leave to remain was refused with no in country right of appeal on 4 June 2014.

7. On 14 July 2014 the Appellant made further representations to remain under Article 8.

8. On 30 July 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:

   (a) The Appellant could not meet the requirements of the Rules under Appendix FM and paragraph 276 ADE.

   (b) The health issues of Evan did not meet the threshold of Article 3.

   (c) The particular circumstances described by the Appellant in relation to Evan did not constitute exceptional circumstances.

The Judge's Decision

9. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Foudy ("the Judge") allowed the appeal against the Respondent's decision under Article 8 outside the Rules. The Judge found :

   (a) The Appellant could not meet the Rules as a partner or parent.

   (b) The Appellant did not meet the requirements of paragraph 276ADE as she found he had ties to Malawi where he had lived the majority of his life although she found that the needs of Evan might hamper his efforts to reintegrate.

   (c) She then considered the matter under Article 8 outside the Rules.

   (d) She found the circumstances in the case to be compelling and exceptional.

   (e) She considered the involvement and commitment of the Appellant and his wife to their local church.

   (f) At paragraph 30 she acknowledged that she had taken into account s 117B of the Nationality Immigration and Asylum Act 2002 and those factors are referred to throughout the decision including that fact that the Appellant is an overstayer although this was after a period of lawful residence(para 15); that there is a

significant public interest in removing overstayers and the cost of the family to the NHS (para 25); that while they are not working now they are highly qualified fluent English speakers and are likely to make a contribution to the United Kingdom economy in the future(para 26).

(g) The particular feature of the case that persuades her to look at the case outside the Rules and that she finds exceptional and compelling is Evans health situation.

(h) She acknowledges that Evans health does not reach the threshold for engagement of Article 3.

(i) She examines in detail the medical evidence and Evans health problems and concludes that returning the family to Malawi is a disproportionate interference with the family life of the Appellant , his wife and child.

10. Grounds of appeal were lodged arguing that the Judge had given no consideration to the public interest factors set out in s 117B of the Nationality Asylum and Immigration Act; the Judge had failed to have regard to Gulshan [2013] UKUT 00640 (IAC) and had failed to identify what was exceptional about the Appellant's case.

11. On 27 January 2015 First-tier tribunal Judge Osborne gave permission to appeal.

12. At the hearing I heard submissions from Ms Johnson on behalf of the Respondent that :

(a) She suggested that the Appellant did not meet the Rules and therefore there is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules relying on Singh and Khaled [2015] EWCA Civ 74

(b) She suggested that paragraph 276ADE(vi) should have been considered in relation to the child.

(c) In relation to paragraph 117B she suggested that the Judge had applied the wrong test as the Appellant's leave was precarious and then unlawful.

(d) The Judge had failed to consider the cost to the taxpayer of the child's heath care.

(e) It was irrelevant that the Appellant and his wife might be able to find well paid jobs in the future as the relevant date was the date of hearing.

(f) There was no consideration of whether the child could have the treatment in Malawi or indeed what treatment would be required as of the date of hearing.

13. On behalf of the Respondent Ms Wilkins submitted that :

(a) The argument about applying the Rules to the child was difficult to understand and had not been in the grounds of appeal.

(b) The decision had to be looked at in the round.

(c) The Judge had rightly considered the position of the whole family.

(d) This was not a standard Article 8 case and the child's health was the central feature of the case and there was a clear examination of his best interest.

(e) Those features that Ms Johnson claimed had not been assessed were all considered in the decision.

(f) It would be open to the Respondent to grant a limited period of leave and review after their circumstances changed.

(g) The conclusion reached by the Judge balanced all of these considerations against the public interest.

Finding on Material Error

14. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

15. This was in essence an application for leave outside the Rules on the basis of the health circumstances of the Appellant's two year old child.

16. The grounds of appeal challenge the Judge's decision on the basis that she did not give weight to those factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. I am satisfied that this is without merit. The Judge clearly states at paragraph 30 of the decision that she 'fully considered' the provisions. While she does not specifically identify them in the decision they are clearly factored in:

- The Judge acknowledges that the Appellant does not meet the requirements of the Rules (paragraph 6-10) and that it is in the public interest to remove overstayers which reflects 117B(1)
- The Judge acknowledges that the Appellant and his wife are fluent English speakers(paragraph 26) which reflects 117B (2)
- She acknowledges that they are not working at the time of the decision (paragraph 26) but notes that they have worked in the past and are well qualified and likely to find work in the future which given the focus on the economic well being of the United Kingdom reflects 117B (3)
- She recognises that in assessing the evidence in this appeal the Appellant is an overstayer but also fairly points out that he lived in the Uk lawfully for 8 years (paragraph 15) and that the circumstances in which they came to overstay were rather unusual (paragraph 19).

17. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. I am satisfied that the Judge in her proportionality assessment has taken into account all the factors relevant to the public interest.

18. The grounds argue that the Judge failed to identify what was exceptional in this case in allowing it under Article 8 and indeed Ms Johnson suggested that having found that the Appellant did not meet the Rules no separate assessment was required. I am satisfied that this is not a completely fair reflection of the law. It is now generally accepted that the new IRs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

> "30. … if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life

> or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

19. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

> "64. … there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

20. However more recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

> "In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. "

21. The Judge in a careful, focused and balanced decision analysed the medical evidence from both the United Kingdom and Malawi in relation to unusual health problems of the child of the family and concluded that these amounted to compelling circumstances that warranted a grant of leave outside the Rules. That was the correct test to apply and she was entitled to reach this conclusion having taken into account all of the relevant evidence. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law.

22. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

23. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

24. **The appeal is dismissed.**

Signed Date 23.7.2015

Deputy Upper Tribunal Judge Birrell