IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35269/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd June, 2015	**On 10th June, 2015**
Given extempore	

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR VINCENT EMEJE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Not represented

DECISION AND REASONS

1. In this appeal the Secretary of State is the appellant and Mr Vincent Emeje is the respondent. The appellant appeals the decision of First-tier Tribunal Judge Denson promulgated on 15th January, 2015 following a hearing at Taylor House on 8th January, 2015, in which he allowed the appeal of the respondent, a citizen of Ghana who was born on 13th September, 1980.

Immigration history

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2. The respondent has a lengthy immigration history.

3. He made application for entry clearance as a visitor in Accra on 5th May, 2000, and was granted entry clearance valid from 8th May, 2000, until 8th November, 2000. He submitted a second application for entry clearance as a visitor in Accra on 20th December, 2000, which was granted and was valid from 18th May, 2001 until 18th November, 2001. He then made an application for entry clearance as a student in Accra on 3rd October, 2001. That application was refused with a right of appeal on 1st November, 2001. He lodged an appeal against the decision to refuse and this was dismissed on 24th September, 2002. He then made a further entry clearance application as a student in Accra on 21st March, 2002, and this was also refused.

4. On 6th February, 2006 he was encountered by UK Border Agency officials, at which time he advised that he had entered the United Kingdom as a visitor sometime in 2000 and had remained here since that date. He was served with form IS.151A as an overstayer and was removed from the United Kingdom on 14th February, 2006.

5. The respondent was then encountered by UK Border Agency staff following his arrest by police at Plaistow on 9th February, 2007, and again was served with form IS.151A Notice to a Person Liable to Detention, and when interviewed he said that he had entered the United Kingdom using a Dutch passport which contained his photograph but not his personal details. He was released on reporting restrictions.

Application of leave to remain

6. On 10th May, 2010 the appellant then made application for leave to remain in the United Kingdom on the basis of private and family life. This application was refused on 28th June, 2011. He lodged an appeal on 15th July, 2011 which was dismissed on 30th August, 2011 and permission to appeal was refused on 16th September, 2011. His appeal rights became exhausted on 28th September, 2011. The appellant remained in the United Kingdom and on 12th March, 2012 applied for indefinite leave to remain in the category of a spouse of a settled person. That application was refused and the appellant appealed to the First Tier Tribunal.

Appeal to the First Tier Tribunal

7. First-tier Tribunal Judge Denson noted that it was accepted that the respondent could not meet the requirements of the relevant Immigration Rules to remain in the United Kingdom as the spouse of a person present and settled and neither could he meet the requirements of the Immigration Rules with regard to his family or private life under Article 8, notwithstanding the fact that he has two children by his wife and one by somebody else in the United Kingdom.

8. Having noted that the appellant could not meet the requirements of the Immigration Rules in relation to Article 8, the judge then noted the provisions of Section 117B of the 2002 Act and in particular Section 117B(6). He found that the respondent was in a genuine and subsisting relationship with qualifying children who are British and in the circumstances found that it would not be reasonable to expect them to leave the United Kingdom.

9. The judge then purported to undertake a *Razgar* step by step consideration of the question of proportionality. He noted the provisions of Section 117B(6) and concluded that the respondent had shown that his removal would be disproportionate.

Submission on error of law

10. The appellant, dissatisfied with that decision, appealed and in addressing me today Ms Fijiwala on behalf of the respondent, said that effectively there were two errors in the judge's determination. The first was in applying the Rules. The judge noted at paragraph 7 of the determination that the Immigration Rules could not be met in relation to an application to remain as a spouse and at paragraph 31 found that the respondent could not meet the requirements of the Immigration Rules in respect of Article 8 either. He then went on to consider Section 117B(6) ignoring the fact that Section 117B(6) is not freestanding.

11. Ms Fijiwala prayed in aid Section 44 of *SS (Congo)* [2015] EWCA Civ 387 where Lord Justice Richards said this:

> "The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, to see if an applicant for leave to remain or leave to enter satisfies the conditions laid down in those Rules (so as to be entitled to leave to remain or leave to enter within the Rules) and to assess the force of the public interest given expression in those Rules (which will be relevant to the balancing exercise under Article 8, in deciding whether leave to remain or leave to enter should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of leave to remain or leave to enter outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules, then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant leave to remain or leave to enter, as the case may be, is disproportionate and hence unlawful by virtue of Section 6(1) of the Human Rights Act read with Article 8."

12. The Presenting Officer submitted that the Rules must be identified and the public interest needs to be considered. Then, if the appellant does not satisfy the Rules there needs to be a reasonably arguable case which has

not already been dealt with by the Rules. If is proper to consider the matter outside the Rules then the public interest needs to be balanced with the matters due for consideration outside the Rules. Considering the matters outside the Rules, the judge has taken an incorrect approach because he simply has not followed *SS (Congo)* and failed to identify some compelling circumstance to support such a claim outwith the Immigration Rules.

13. The partner route and the parent route under the Immigration Rules were considered in the case of the respondent under the Rules and there is no other reason for the judge to look outside the Rules. He also failed to engage with the public interest element expressed within the Rules. It is clear from the refusal letter that the respondent did not meet the requirements of the Rules, because he did not have leave to enter the United Kingdom as a spouse. He had actually been removed by the United Kingdom Border Agency and re-entered the United Kingdom illegally using false documentation. That was not considered by the judge, as it should have been, if the judge was considering the matter as a question of proportionality.

14. The respondent did not meet the parent route because he did not demonstrate that he had full responsibility for his two children with his current partner and it is said on behalf of the Home Office that he failed to provide evidence of access rights to his other child and, therefore, the appeal fails under the Rules and there was nothing further for the judge to consider outwith the Rules. The Immigration Judge simply erred by taking into account Section 117B(6) as a separate matter outwith the Rules.

15. I heard a response from the respondent, who was not represented. He suggested that he had provided three separate pieces of evidence showing that he has access and has supported his third child. He also indicated to me that following submission of his application he attended an interview and provided medical evidence showing that his current partner has type 1 diabetes. He said that were he to be removed from the United Kingdom and she were to suffer a hypo attack that there would be nobody to look after her, because she would be at home with two young children. He said that she was vulnerable to such attacks and had had them in the past. Unfortunately no evidence could be found within the Home Office file and I have no medical evidence before me.

16. In the circumstances I am satisfied that there is an error of law in the determination of the First-tier Tribunal Judge Denson which is material, such that the determination cannot stand. Given that the respondent has further evidence on which he wishes to rely I have concluded that the most appropriate method of dealing with this matter is to remit it to the First-tier Tribunal for hearing afresh before a judge other than First-tier Tribunal Judge Denson and in doing so I hope that the respondent will seek to be represented at any such hearing. Two hours should be allowed for the hearing.

Richard Chalkley

Upper Tribunal Judge Chalkley