IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43307/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th May 2015	**On 30th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GODFREY MUIRURI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala (Home Office Presenting Officer)
For the Respondent: Ms H Masih (Counsel)

DECISION AND REASONS

1. It is convenient to refer to the parties as they were before the First-tier tribunal. The appellant is a citizen of Kenya. On 15th October 2014 the Secretary of State decided to remove him from the United Kingdom. His appeal against that decision was allowed by First-tier Tribunal Judge Lodge, on human rights grounds, in a decision promulgated on 3rd February 2015.

2. In deciding to remove the appellant, the Secretary of State took into account his immigration history, which included unsuccessful applications

for leave, his offending behaviour and the family and private life ties he claimed to have established, including relationships with a British citizen partner and with his son, born in August 2011. The appellant's case was advanced before the judge on the basis that he met the requirements of Appendix FM of the Immigration Rules ("the rules") in EX.1 and on the alternative basis that even if he could not meet these requirements, his removal would nonetheless be a disproportionate response.

3. The judge found that the appellant could not meet the suitability requirements of the rules in the light of his convictions, which included an offence of fraud. The appellant arrived in the United Kingdom in 2002 and, found the judge, had no family members left in Kenya although there was unclear evidence regarding contact with his stepmother's relatives there. He accepted that the appellant plays a full role in his son's life and that the relationship with his partner continues, although they have never lived together. He found that the appellant's partner would not accompany him to Kenya. Overall, he concluded that removal would be disproportionate.

4. In grounds in support of an application for permission to appeal, the Secretary of State contended that the judge misdirected himself in law in relation to Article 8. In the light of the finding of fact that the appellant was a persistent offender, so that paragraph S-LTR.1.5 and 1.6 applied, he could not bring himself within the rules. The judge erred in simply proceeding to make an Article 8 assessment outside the rules, on the basis of guidance given in Razgar [2004] UKHL 27. The Secretary of State contended that the appellant's circumstances disclosed no exceptional or very compelling circumstances and that his family here would be able to visit him in Kenya or maintain contact. Whilst it might be in the best interests of the appellant's son for him to remain here, so that he could continue to act as a father, the best interests of the child were not a "trump card" and, in the instant appeal, had not been balanced against the public interest in the appellant's removal in the light of his failure to meet the requirements of the rules. Overall, the proportionality assessment was fundamentally flawed.

5. Permission to appeal was granted on 24th March 2015. The judge granting permission observed that it was arguable that the appellant's failure to meet the requirements of the rules was not adequately weighed in the proportionality balancing exercise.

6. Before the hearing, the appellant's solicitors provided a bundle and a notice under section 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The further evidence which they sought to adduce was obtained in the light of the grant of permission. The bundle included a recent assessment of the appellant's risk of reoffending, prepared in April 2015 by a probation officer. The bundle also included a rule 24 response in which it was contended that it was apparent that the judge's findings of fact were not challenged and should be preserved. The grant of permission was made on the basis that there was an inadequate weighing

of the competing interests. In the alternative, the grounds revealed a disagreement with the outcome but nothing else. It was open to the judge to make an Article 8 assessment outside the rules in the light of his favourable findings regarding the appellant's relationships with his partner and child. These were not fully catered for under the rules, in the light of the particular circumstances of the case.

7. In particular, the Secretary of State suggested in the decision letter of 18th October 2014 that she would not consider it reasonable to expect the appellant to leave the United Kingdom, if his relationship with his son were accepted as genuine and subsisting. The judge made favourable findings of fact in this context. He did what was required of him as part of an assessment under section 55 of the 2009 Act.

8. So far as section 117A to D of the 2002 Act was concerned, the rules did not amount to a complete code and took no account of the particular factor identified in section 117B(6). The appellant could show that this provision applied in his case.

9. Ms Fijiwala handed up a copy of the judgment of the Court of Appeal in SS (Congo) and Others [2015] EWCA Civ 387.

Submissions on Error of Law

10. Ms Fijiwala said that the public interest considerations were not properly considered by the judge. There was a clear finding that the appellant could not bring himself within the rules as he fell within paragraph S-LTR.1.5. The relevant findings were in paragraphs 27 and 28 of the decision. The judge then simply went on to make an Article 8 assessment outside the rules, without considering whether the rules in fact properly catered for the appellant's circumstances. In this regard, the decision was not consistent with guidance given in paragraph 44 of the judgment in SS (Congo), where the Court of Appeal held that if an assessment took place outside the rules, the individual interests of a claimant and others whose Article 8 rights are in issue had to be balanced against the public interest, including as expressed in the rules. In the present appeal, the judge made no mention of the appellant's convictions in paragraph 28, a plainly material factor in the balance. Again, this was clear from the judgment in SS (Congo), at paragraph 33, where the Court of Appeal held that the rules will provide significant evidence about the relevant public interest considerations which should be brought into account. The judge did not give sufficient weight to the rules.

11. There was also no proper factoring in of the public interest considerations in section 117B, and a failure to properly apply the guidance given in Dube [2015] UKUT 90 (IAC).

12. The best interests of the child of the family were plainly material, as identified in the rule 24 response, the child being a British citizen. However, as was made clear in paragraph 39(iv) of the judgment in SS

(Congo), this is plainly not a trump card. The judge failed to consider whether or not the appellant's family and private life ties were established while he had precarious immigration status and there was no assessment of whether or not he could show financial independence, matters relevant to section 117B. It appeared from the evidence that the appellant's partner was on benefits but there was no separate consideration of the appellant's own financial circumstances.

13. Ms Masih relied upon the rule 24 response. At paragraph 25 of the decision, there was a reference by the judge to the most important conviction and, at paragraph 26, the judge summarised the convictions overall. It was plain that he had dealt with them. Although not expressly mentioned in the Article 8 assessment which followed, the judge considered matters in the round. The overall conclusion at paragraph 32 was one which was open to him. Similarly, the judge made clear findings that the suitability requirements of the rules were not met. There was no error of law.

14. In any event, if there were an error it was not material. It was clear from Dube that there was no particular need to expressly mention section 117A to D of the 2002 Act. The substance was what mattered. The appellant's status was not the subject of argument as it was perfectly clear that it was precarious and, similarly, it was also clear from the evidence that the appellant was not financially self-sufficient. He had no permission to work. The judge plainly gave weight to the relationships with the appellant's partner and child and, in substance, took into account section 117B(6) of the 2002 Act. The appellant was entitled to succeed in his appeal.

15. Moreover, the Secretary of State's decision letter, written in October 2014, itself appeared to suggest that if the relationship between the appellant and his child were accepted, it would not be reasonable to require the appellant to leave the United Kingdom. This too was perfectly consistent with section 117B(6) of the 2002 Act.

16. In a brief response, Ms Fijiwala said that even if the appellant's precarious immigration status and the absence of financial self-sufficiency were plain, they did not appear in the judge's reasoning, as was required. They were not identified as factors weighing in the balance against the appellant, as they should have been. There was no particular weight given to the rules, and the appellant's failure to meet the suitability requirements, as required. None of this appeared in the proportionality assessment.

Conclusion on Error of Law

17. The judge cannot be criticised for failing to directly apply the guidance given by the Court of Appeal in SS (Congo) as the judgment only appeared three months after his decision was promulgated. On the other hand, the approach identified in SS (Congo) was anticipated and to an extent prefigured in the earlier decision in Nagre [2013] EWHC 720 (Admin), which was affirmed by the Court of Appeal in several subsequent decisions

(as noted at paragraph 5 of the judgment in SS (Congo), including Singh [2015] EWCA Civ 74.

18. The core challenge made by the Secretary of State is that the judge erred in the way he moved from a clear finding that the requirements of the rules were not met, to an Article 8 assessment outside the rules, in which he weighed the competing interests in accordance with guidance given by the House of Lords in Razgar. It has been plain since Nagre that some care is required here. First, there is a need to identify compelling circumstances and to consider whether the rules properly cater for the circumstances of the particular case. If they do not, and if there is a justification for doing so, an Article 8 assessment outside the rules may be required. Secondly, even if such an assessment is required, the rules do not simply lose all relevance, leaving a court or Tribunal to weigh the competing interests without regard to them. They continue to have a role as identifying the pubic interest, and an appellant's failure to meet the requirements of the rules continues to be material as some indication of the proper weight to be given to the public interest.

19. With great respect to the judge, the decision does not reveal an analysis of this sort.

20. I also accept Ms Fijiwala's submission that the public interest was not properly weighed as the decision contains no mention of section 117B of the 2002 Act. Ms Masih is right to submit that what is required in the light of Dube is substance rather than form. However, as Ms Fijiwala submitted, if the appellant's precarious immigration status and the lack of financial self-sufficiency were not in issue and were plainly before the Tribunal, the judge was required to take them into account as adverse factors, when weighing the competing interests. And, of course, section 117B(6), which might bear favourably on the appellant's case, forms part of the overall picture but there is no mention of it in the decision.

21. For these reasons, I conclude that the decision contains material errors of law which undermine the overall proportionality assessment. The decision must be set aside and remade.

22. In a discussion with the representatives regarding the appropriate venue, Ms Masih suggested that the appropriate forum would be the First-tier Tribunal. The appellant's solicitors had prepared a bundle which included a fairly recent letter from a probation officer, regarding the low risk the appellant posed. Further evidence might be required in this context, in the light of the appellant's convictions. The findings on the relationships the appellant had with his partner and son were not challenged by the Secretary of State.

23. Ms Fijiwala said that the case might stay in the Upper Tribunal, the relationships not being challenged. The Upper Tribunal could then simply weigh the competing interests.

24. After careful reflection, I conclude that the appropriate forum is the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 2012. I give permission for the bundle prepared by the appellant's solicitors to be adduced in evidence and I give permission to both parties to adduce such further evidence as they wished to rely upon when the decision is remade. The judge's findings of fact in paragraphs 29 and 30 of the decision, that the appellant plays a considerable part in the upbringing of his child and that the relationship with his partner is genuine and subsisting (although they do not live together), are preserved.

NOTICE OF DECISION

The decision of the First-tier Tribunal is set aside and it will be remade in the First-tier Tribunal, at Birmingham, before a judge other than First-tier Tribunal Judge Lodge. If further case management is required, it may be made at the Birmingham hearing centre.

ANONYMITY

There has been no application for anonymity and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell