IAC-AH-DP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02716/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th February 2016	**On 20th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR AHMED ROXY KEITA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Cook (Counsel)
For the Respondent: Mr S Staunton, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sierra Leone born on 1st January 1961. The Appellant entered the United Kingdom on 29th June 2012 on an entry clearance visa as a spouse valid until 2nd August 2014. Thereafter the Appellant's detailed immigration history is as set out at page 1 of the

reasons for refusal letter. On 28th July 2014 the Appellant applied for indefinite leave to remain as a spouse of a person present and settled in the UK. That application was refused by the Secretary of State by Notice of Refusal dated 6th January 2015.

2. The Appellant lodged Grounds of Appeal and the appeal came before Judge of the First-tier Tribunal Khawar sitting at Richmond on 11th June 2015. In a decisions and reasons promulgated on 1st September 2015 the Appellant's appeal was allowed under Article 8 of the European Convention of Human Rights.

3. On 11th September 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 19th January 2016 First-tier Tribunal Judge Saffer granted permission to appeal finding that it was arguable that the judge had erred by failing to apply *SS (Congo) EWCA Civ 387* and *AM (s.117B) Malawi [2015] UKUT 0260 (IAC)*.

4. There does not appear to be any Rule 24 response by the Appellant. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the sake of continuity Mr Keita is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by his instructed Counsel Miss Cook. Miss Cook is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Staunton.

Submissions/Discussions

5. Miss Cook accepts that it was conceded at the outset of the appeal before the First-tier Tribunal that there was no challenge made by the Appellant to the Respondent's findings under paragraph 322(1A) of the Immigration Rules that the Appellant had failed to disclose his previous identity and had failed to identify his previous presence in the United Kingdom and the fact that he had made previous applications. Further she acknowledges that during his oral testimony before the First-tier Tribunal the Appellant had been candid in accepting that his previous immigration history would have impacted negatively upon his application to enter as a spouse. However she points out that because the Appellant sought leave to remain prior to the rule change in 2012 it is necessary to look at the old Rules and that the Appellant met the requirements of paragraph 287. Further she points out that in making such application the Appellant had in fact used his birth name Ahmed Keita whereas previously he had used the name given to him by his stepfather.

6. Mr Staunton relies on the Grounds of Appeal contending that the judge's approach the Article 8 appeal had failed to identify that Appendix FM was in play and that it was not affected by the decision to refuse under Rule 322(1A). Further the judge had then failed, he contends, to follow the repeated dicta of the senior courts that Article 8 outside the Rules were not a freestanding assessment unencumbered by the failure to meet the

Rules and had erred by not assessing the strength of the public interest in this case partially by reference to the failure to meet the public interest described in the Rules. However he submits that the judge erred by applying no compelling or very compelling circumstances or even identifying which test was applicable as set out in *SS (Congo)*. This, he says, was an unlawful approach. He further contended the judge had failed to lawfully apply Section 117A to D of the NIAA 2002 asserting that the judge's engagement with the Act at paragraph 40 of his decision was an afterthought and that in any event it was not lawful. He contends it was not lawful because:

(a) the judge had appeared to give weight to the Appellant's private rights by reference to his ability to speak English and that this was wrong in law; and

(b) the judge seemed to reduce the public interest in this matter down to "economic wellbeing" when he submits it plainly also incorporates other matters such as the Appellant's failure to declare his false identity in application or to an Immigration Officer and his previous poor immigration history. It is his contention therefore that there are material errors of law in the decision of the First-tier Tribunal and he asked me to set aside the decision and remit it to the First-tier for re-hearing.

7. Miss Cook in response points out that firstly it is necessary to decide whether or not it was appropriate for the judge to merely consider the appeal outside of the Rules. She reminds me that the transitional provisions applied and that the old Rules are not a complete code and that there was no test of exceptionality. She emphasises this because under the old Rules the judge was in his right to look at exceptionality or the test as set out in *SS (Congo)* and therefore she submits there is no error of law in the manner in which the judge has considered the test in *SS (Congo)*.

8. Secondly she turns to the quality of the Article 8 assessment. She acknowledges that these apply but submits if I look at paragraphs 36 and 40 of the judge's decision I will see that he has taken these factors into account. She contends consequently there is no material error of law and that the Secretary of State's appeal should be dismissed.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. 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. Nor is it an error of law for an Immigration Judge to fail to deal with every

factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. I start by noting the basis on which this matter comes before me. I am not re-hearing the matter. I am merely determining whether there has been a material error of law in the decision of the First-tier Tribunal Judge. The decision is well constructed. Firstly the history of the matter is set out. Thereafter there is an analysis of the Respondent's reasons for refusal and findings and conclusions are drawn upon that taking into account the refusal under paragraph 322(1A). The Appellant concludes the Appellant cannot succeed under the Immigration Rules. Thereafter at paragraph 30 onwards he goes on to consider the Appellant's appeal under Article 8. It is wrong to state that the judge has not addressed factors to be found in Section 117B of the 2002 Act. At paragraph 36 the judge has considered the weight of the Secretary of State's duty to ensure immigration control and he has analysed this further in paragraph 37. He has at paragraph 39 assessed the present family position of the Appellant and the effect upon the Sponsor if she were to be required (as she feels she would as the Appellant's partner) to move to Sierra Leone if he had to do so and at paragraph 40 the judge has carefully gone on to consider, albeit in one paragraph, the provisions of Section 117B. It is consequently wrong of the Secretary of State in the Notice of Refusal to suggest that such considerations are an afterthought. They are set out in detail albeit that I acknowledge that there is little case law analysis within the decision.

12. The two authorities referred to *SS (Congo)* and *AM (Malawi)* are important decisions and have given the Tribunal considerable guidance. Both were published and available to the First-tier Tribunal Judge. Having accepted that he did not make reference to them the basic principles therein do not show that the Appellant has made a material error of law. The position with regard to the test of exceptionality is set out at paragraph 33 of *SS (Congo)* and I agree with the submission made by Miss Cook that because the case was considered under the old Rules the judge was entitled to make the findings that he did and his failure to rely on *SS (Congo)* does not constitute an error of law.

13. Further I am equally satisfied that there is no error of law in the judge's consideration of Section 117B. As is set out to consider the matters in Section 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant. This is further emphasised in *Dube (Section 117A-117D) [2015] UKUT 00090 (IAC)* which is authority for stating that Sections 117A-117D do not represent any kind of radical departure from or "override" previous case law on Article 8 so far as concerns the need for a structured approach. In particular they do not disturb the need for judges to ask themselves the five questions set out in *Razgar [2004] UKHL 27*. Sections 117A to 117D are essentially a further elaboration of *Razgar's* question 5 which is essentially about proportionality and justifiability. Further as indicated in *Forman (Section 117A to C considerations) [2015] UKUT 00412 (IAC)* in cases where the provisions of Section 117B to 117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect.

14. Albeit that the assessment by the judge is scant he has given due consideration to the Section 117B factors and has made findings thereon which he was entitled to. He has effectively, albeit in very short form, followed the basic principles set out in the above authorities and whilst it may have been better if he had conducted a more thorough approach submissions made on behalf of the Secretary of State amount to little more than disagreement with both the findings and analysis of the judge.

15. In such circumstances the judge has reached findings that he was entitled to and has given his reasons and the decision consequently discloses no material error of law. In such circumstances the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.

Decision

16. The appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal Judge made a fee award. The Secretary of State's appeal having been dismissed that award do stand.

Signed Date

Deputy Upper Tribunal Judge D N Harris