Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/53681/2013**

THE IMMIGRATION ACTS

Heard at Birmingham
On 19 January 2016

Decision & Reasons Promulgated
On 27 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HORACE ALOYSIUS WILLIAMS
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms C Johnstone, Senior Home Office Presenting Officer
For the Respondent: Ms E Norman (counsel) instructed by J M Wilsons, solicitors, LLP

DECISION AND REASONS

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 Somal, promulgated on19 August 2014 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 17 December 1979 and is a national of Jamaica.

4. On 24 October 2013 the Secretary of State refused the Appellant's application for leave to remain in the UK and made directions for the appellant's removal under s.47 of the Immigration and Asylum Act 2006. The refusal letter gave a number of reasons.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Somal ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR grounds.

6. Grounds of appeal were lodged and on 2 February 2015 Upper Tribunal Judge Lane gave permission to appeal stating

> "Whilst I agree with the observations of Judge Nicholson, who refused permission in the First-tier Tribunal, regarding MM [2014] EWCA Civ 985 and Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC) [4-5], it is arguable that, by making no findings on the appeal under the immigration rules, the Judge did not establish a starting point for his analysis of article 8 ECHR outside the rules."

The Hearing

7. Ms Johnstone, for the respondent, adopted the terms of the grounds of appeal, and acknowledged that, because of the passage of time, the case-law in relation to the approach to be taken to article 8 assessment has moved on. She told me, however, that section 117 of the 2002 Act was in force at the date of decision, and argued that the Judge had not properly addressed section 117B considerations. She referred me to the cases of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) and Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC)**.** She told me that an incorrect approach to section 117 of the 2002 Act had taken by the Judge. She argued that the Judge was incorrect to find that the presence in the UK of qualifying child was sufficient to tip the balance in the appellant's favour. Ms Johnstone told me that it was a material error of law for the Judge to omit consideration of the immigration rules (in detail) before moving on to an overall article 8 assessment. She asked me to set the decision aside and substitute my own decision on the basis of the facts as the First-tier Judge found them to be.

8. Ms Norman, for the appellant, told me that the decision does not contain any errors, material or otherwise. She told me that the Judge was correct not to dwell on the immigration rules because it had never been the appellant's case that he could fulfil the requirements of either appendix FM or paragraph 276 ADE. She explained that the appellant was granted discretionary leave to

remain in the UK in July 2009, and argued that, notwithstanding the date of decision, this is a case which fell to be dealt with under the transitional provisions, so that this case should have been considered under the rules as they were before the amendment in July 2012. She reminded me that First-tier Judge Nicholson initially refused permission to appeal, and referred me to the reasons for refusal set out in his decision dated 10 October 2014, which she adopted as part of her argument. She took me to [22] of the Judge's decision, where the Judge clearly refers to section 117 of the 2002 Act, and told me that an holistic reading of the decision discloses that the Judge found that there were compelling reasons to consider this case outside the immigration rules. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

9. Permission to appeal was granted in this case so on the basis that it was arguable that the decision contains a material error of law because the Judge made *"... no findings on the appeal under the immigration rules*." The grounds of appeal do not advance an argument that an incorrect approach to section 117B of the 2002 Act was taken, yet a significant part of the presenting officer's submission dwelt on section 117B of the 2002 Act.

10. In so far as it is competent to consider that submission, I find that it is without merit. At [22] the Judge says "*I have had regard to section 117 of the 2002 Act in assessing the public interest in the proportionality assessment*." And at [19] the Judge says "*there is no doubt that the interests of private or family life would not normally prevail over the interest of immigration control."*

11. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that the statutory duty to consider the matters set out in s 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.

12. Between [15] and [22] the Judge carries out a balancing exercise, weighing the facts and circumstances of the appellant's case against the fact that immigration control is in the public interest. The Judge carries out a full, detailed and careful analysis before concluding that the public interest is outweighed by the quality of the relationship between the appellant and his two daughters. That was a conclusion which was reasonably open to the Judge to reach. It is for the Judge to assess proportionality and accord weight to the various component parts of article 8 family life brought out by the evidence before the Judge. That is exactly what the Judge in this case did. The Judge's conclusion may be one that the respondent does not like; but that does not amount to a material error of law. In reality the respondent is doing no more than quibble about a conclusion which was well within the range of conclusions open to the Judge.

13. In this case the Judge finds that the appellant's two daughters are qualifying children because of the provisions of section 117B(6) of the 2002 Act. The respondent argues that the Judge placed undue weight on the existence of two qualifying children. There is no merit in that submission. The

Judge was correct to take account of the fact that this case involves two qualifying children. That finding was one of the factors which the Judge found weighs in the appellant's favour in assessing proportionality. For the reasons already given, that was a finding of fact which was open to the Judge to make.

14. What this appeal is really about is the perceived failure of the Judge to consider whether or not the appellant can succeed under the immigration rules, before moving on to consider article 8 ECHR out-with the immigration rules. It is true that the Judge makes no findings of fact in relation to the immigration rules, but in the particular circumstances of this case there was no need to do so.

15. At [5] the judge records "*the appellant's representative confirmed the appeal was under article 8 ECHR and she relied upon section 55*." That sentence clearly sets the scene in this case. The reasons for refusal letter narrates that the respondent considered both appendix FM and paragraph 296 ADE of the rules, and finds that the appellant cannot meet them. At appeal the appellant candidly concedes that his inability to meet the requirements of the immigration rules is not in dispute.

16. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at 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*".

17. At [22] the Judge reaches the conclusion of her proportionality assessment and says: *"... I find that there are exceptional circumstances in this case that leave should be granted outside the Rules."*

18. A fair reading of the Judge's decision indicates that it is acknowledged by the Judge and the parties to this case that the purpose of the appeal was not to carry out an analysis of the immigration rules, it was to determine whether or not the appellant's argument that article 8 ECHR was engaged out-with the scope of the rules could succeed. It is not argued that the Judge's article 8 assessment out-with the rules is flawed. What is argued for the respondent is that a procedural step was omitted in the proportionality assessment. If the Judge had included one sentence to say that this appeal cannot succeed under the immigration rules, that would remove the respondent's argument.

19. That one sentence is effectively found at [5] of the decision. In any event any error would only be material if there was a possibility that it could lead to a different result. In this case a specific finding that the appellant cannot meet the requirements of appendix FM nor can you meet the requirements of paragraph 276 ADE of the rules would not change the decision in the case because the Judge's article 8 proportionality assessment cannot be faulted, and because the Judge makes a specific finding at [22] that *".... There are exceptional circumstances in this case that leave should be granted outside the rules.*

20. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

21. The Judge carefully considered each strand of evidence placed before her. She carefully records the submissions that were made and then, after correctly directing herself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to the Judge to reach.

22. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

23. No errors of law have been established. The Judge's decision stands.

DECISION

24. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 22 January 2016

Deputy Upper Tribunal Judge Doyle