Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00402/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2018	**On 19 March 2018**

Before

THE HONOURABLE MR JUSTICE SWEENEY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FDS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Miss M Chowdhury, Counsel, instructed by Harding Mitchell Solicitors

DECISION AND REASONS

Introduction

1. In accordance with the order of Upper Tribunal Judge Jordan dated 26 September 2017, and for the sake of continuity, we shall refer to the now appellant as the SSHD, and we shall refer to the now respondent, Mr Dos

Santos, as the appellant. He was granted anonymity in the First-tier Tribunal, and that order is maintained.

2. By permission of First-tier Tribunal Judge Chohan, granted on 21 June 2017, the SSHD appeals against the decision of First-tier Tribunal Judge Keane, promulgated on 12 May 2017, allowing the appellant's appeal brought under the provisions of Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended ("the 2002 Act") against the decision of the SSHD, made on 10 May 2015, to refuse the appellant's Article 8 ECHR human rights claim, treated as having been made by the appellant in February 2015, upon the basis that the SSHD's decision to give directions under Section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") was not in accordance with the law, and that in those circumstances it was not necessary to consider Article 8 or to make findings of fact in relation to it.

3. Ultimately, four grounds of appeal have been relied upon, namely that:

   (1) In view of the amendment of Section 86, and other aspects, of the 2002 Act by the Immigration Act 2014 ("the 2014 Act"), operative from 20 October 2014, the judge had no jurisdiction to decide whether the decision to give directions under Section 10 of the 1999 Act was unlawful.

   (2) In any event, the SSHD had neither decided to, nor ever given, a direction under Section 10 of the 1999 Act.

   (3) As the appeal was against the refusal of a human rights claim, and by the combined effect of Sections 82(1)(b) and 84(2) of the 2002 Act as then in force, the ultimate issue that the judge had to decide was whether the refusal was unlawful under Section 6 of the Human Rights Act 1998 ("the 1998 Act"), but he never engaged with that issue.

   (4) In any event, a number of the judge's findings of fact in relation to the Operation Nexus material that was put before him were **Wednesbury** unreasonable or irrational.

4. It is, in our view, self-evident that this appeal must be allowed on grounds 1 to 3, and that the case must be remitted to the First-tier Tribunal for the appellant's appeal to be heard afresh by a different judge. The parties agree. We shall, nevertheless, set out the background and then summarise our reasons.

Background

5. The appellant, a citizen of Angola, is now aged 26. On 30 October 2005, aged 14, he entered this country on a family reunion visa and was granted indefinite leave to enter.

6. In the period between July 2009 and February 2015 the appellant was suspected by the Metropolitan Police of being involved in various serious

crimes. The underlying materials in relation to those suspicions were gathered together as part of the Metropolitan Police Operation called Nexus. One incident, in January 2015, involved the appellant allegedly throwing a bottle at a female and knocking her out and then kicking another female (who had gone to help the first female) three times in the head. That led, in June 2012, to a conviction for using threatening behaviour with intent to use fear or provocation of violence, and subsequently to the imposition of a community order with various requirements.

7. On 9 February 2015 the SSHD wrote to the appellant, pursuant to Section 5(1) of the Immigration Act 1971 ("the 1971 Act"), informing him that in the light of his conviction, and looking at his life in the round, consideration was being given (pursuant to section 3(5) of the 1971 Act) as to whether his continued presence in the UK was no longer conducive to the public good.

8. The appellant replied by letter on 16 February 2015, asserting that he had lived in the UK since 30 October 2005; that he had an established family with his girlfriend Shannon Douglas and their young daughter; that he had established personal friendship with Ms Shenequa Hibbert and Mr Luke Francis; that he attended Church of Jesus on a regular basis; and that he had deep roots within his community.

9. The appellant's representations were treated as being a human rights claim, and on 19 May 2015 the SSHD wrote to him refusing that claim. In the attached Notice of Decision, the SSHD set out the potential reasons for deportation; the appellant's immigration and criminal history; the evidence from police systems; the other evidence and representations; and, at some length, the reasons for her decision.

10. The appellant appealed. There were four hearings before Judge Keane in the First-tier Tribunal - on 9 March 2016, 6 July 2016, 29 September 2016 and 3 April 2017. There was an appeal bundle of relevant materials, including voluminous documentation from Operation Nexus, which ran to more than 1,000 pages. The appellant called a Police Constable Dady and the respondent also gave evidence.

11. In setting out the background in his subsequent judgment the judge said this:

> "… On 10 May 2015 the respondent made a decision to refuse the appellant's application on the grounds that his removal from the United Kingdom would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998 and the respondent gave directions for the removal of the appellant from the United Kingdom pursuant to Section 10 of the Immigration and Asylum Act 1999. … It is convenient here to record concisely the issue which the appeal raised. The respondent was to establish to the balance of probabilities the factual basis for the power to give directions under Section 10 of the Immigration and Asylum Act 1999. …"

12. The judge then set out the then rival contentions of the parties and summarised what had happened during each of the four hearings. Under the heading "Conclusion" the judge began by saying that:

> "The issue which went to the heart of the appeal concerned the respondent's contention that the appellant had manifested that conduct, and had been party to those associations, to which PC Dady referred in his witness statement, and having recourse to his succinct summaries and supplemented by the 'Nexus style' documentary evidence. It was common ground between the parties to the appeal that it was for the respondent to discharge the burden of proving to the balance of probabilities the evidential foundation for the exercise of the power to make directions for the removal of the appellant from the United Kingdom. I was to arrive at findings of fact."

13. The judge then went on to make findings of fact, on the balance of probabilities, in relation to each of the incidents relied upon by the SSHD, and ultimately said this at paragraph 28 of his judgment:

> "Save in limited respects the respondent did not establish to the balance of probabilities the evidential foundation or factual basis for her exercise of the power in making the decision under appeal. Indeed, the respondent very largely did not establish to the balance of probabilities that conduct which she alleged against the appellant. I most certainly do not condone those aspects of the appellant's conduct as to which I have found the respondent's contentions well-founded contentions. Nevertheless, as a generality the appellant has been responsible for very few incidences of misconduct, upon a careful application of the requisite standard of proof. The respondent's decision to give directions under Section 10 of the Immigration and Asylum Act 1999 for the removal of the appellant from the United Kingdom was not in accordance with the law. In these circumstances I do not consider Article 8 of the Human Rights Convention or make findings of fact in respect of the appellant's claims to have established family and private life in the United Kingdom. The appeal is allowed on the ground that the respondent's decision was not in accordance with the law."

Our Reasons

14. Prior to its amendment by the 2014 Act Section 86 of the 2002 Act provided that:

> "(1) This Section applies on an appeal under Section 82(1)
>
> …
>
> (3) The Tribunal must allow the appeal insofar as it thinks that –
>
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules), or
>
> …"

15. After amendment by the 2014 Act, and in relation to human rights claims (defined in Section 113(1) of the 2002 Act as those involving the making of a claim by a person that to remove him or her from, or to require him or her to leave, the United Kingdom would be unlawful under Section 6 of the 1998 Act) Section 82 provides:

> "(1) A person ('P') may appeal to the Tribunal where –
>
> ...
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P."

16. Insofar as relevant, Section 84 now provides:

> "(2) An appeal under Section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under Section 6 of the Human Rights Act 1998."

17. Section 86 now provides that:

> "(1) This Section applies to an appeal under Section 82(1).
>
> (2) The Tribunal must determine -
>
> (a) any matter raised as a ground of appeal and
>
> (b) any matter which Section 85 requires it to consider."

18. Insofar as relevant, Section 85 now provides that:

> "(1) An appeal under Section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under Section 82(1).
>
> ...
>
> (4) On an appeal under Section 82(1) ... against a decision, the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

19. The Sections as amended by the 2014 Act, as set out immediately above, were all in force at the time that this case was before the First-tier Tribunal. It follows that the pre-amendment version of Section 86, under which the Tribunal was required to allow an appeal insofar as it thought that a decision against which the appeal was brought, or was treated as being brought, was not in accordance with the law (including Immigration Rules), no longer existed. It had been removed from the legislation by the 2014 amendments.

20. This case plainly involved the refusal of a human rights claim (as defined), and therefore, as we have indicated, the ultimate issue in accordance with the legislation as then in force should have been whether that refusal was unlawful under Section 6 of the 1998 Act.

21. Whilst we have some sympathy with the judge, who was clearly not assisted by the parties to the extent that he should have been, it is therefore, self-evident that:

    (5) He decided the appeal on foot of a provision in the 2002 Act that had been repealed.

    (6) In so doing, as is clear from the background that we have set out, he proceeded upon the erroneous basis that the SSHD had decided to, and had given directions for, the removal of the appellant when she had not. Indeed, s.10 of the 1999 Act was of no application in this case at all, as it is concerned with persons who are in this country unlawfully which the appellant was not – he had indefinite leave.

    (7) In any event, the judge never engaged with the real ultimate issue in the appeal as delineated in the combined effect of the amended Section 82(1)(b) and 84(2), namely whether the Article 8 refusal was unlawful under Section 6 of the 1998 Act.

22. That is why, as we have said, this appeal must be allowed on grounds 1 to 3 (above) and the case must be remitted to the First-tier Tribunal for the appeal to be heard afresh by a different judge.

23. It follows, and again the parties agree, that it is not necessary to reach any conclusions in relation to ground 4 - although we observe that there is obvious force in the some of the criticisms made.

24. The extent, if any, of consideration and evaluation of the Nexus material in the new appeal hearing will be a matter for the First-tier Tribunal. Hence, we must not be taken to be expressing any concluded view on that issue.

25. That said, we venture to suggest that the approach to that issue will necessarily be against the background that:

    (8) In **Ahsan v The Secretary of State for the Home Department [2017] EWCA Civ 2009** the Court of Appeal recognised that a human rights appeal can provide a suitable forum for the adjudication of a factual matter which, if decided in favour of the appellant, will necessitate the finding that the appellant's Article 8 rights would be violated by hypothetical removal.

    (9) Although Section 85 of the 2002 Act makes provision for certain matters to be considered on an appeal under Section 82(1)(b), it does not expand the scope of a human rights appeal. Rather, the wording of Section 85(1) makes it clear that the appeal can include only "an appeal against any decision in respect of which the appellant has a right of appeal under Section 82(1)" – i.e. in this case a human rights claim.

    (10) Section 85(4) permits the Tribunal to consider any matter which it thinks is relevant to the substance of the decision. Therefore, in a human rights appeal, a matter will be relevant if, and only if, it goes

to the question of whether the decision was unlawful under Section 6 of the 1998 Act.

(11) As this is an Article 8 case, it will require consideration of the five questions posed by Lord Bingham at paragraph 17 of the opinions in **R (Razgar) v SSHD No 2 [2004] 2 AC 368**, and it will only be if the fourth and/or fifth questions are reached that it may be necessary to consider and evaluate the Nexus material.

Conclusion

26. For the reasons that we have given, the appeal is allowed. The case will be remitted to the First-tier Tribunal for the appellant's appeal to be heard afresh by a different judge.

27. In addition, and to avoid any repeat of the mishaps that resulted in four hearings first time around, we order that a case management hearing be listed before a Judge of the First-tier Tribunal within four weeks of today.

Notice of Decision

(12) The decision of the First-tier Tribunal contains an error of law and is set aside.

(13) The matter is remitted to the First-tier Tribunal de novo.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Directions

(1) There shall be a case management hearing listed before a Judge of the First-tier Tribunal within four weeks of the date this decision is sent.

Signed Date 16 March 2018

Mr Justice Sweeney