



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05753/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2018

Decision & Reasons Promulgated
On 14 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANTHONY DAVID MAKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr G. O'Ceallaigh of Counsel instructed by Pepperells

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Hindson promulgated on 23 November 2017 in which the appeal of Mr Anthony David Maka, against a decision of the Respondent dated 30 March 2017 to refuse leave to remain in the UK, was allowed on human rights grounds.
2. Although before me the Secretary of State for the Home Department is the appellant and Mr Maka is the respondent, for the sake of consistency with the proceedings before

the First-tier Tribunal I shall hereafter refer to Mr Maka as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Tonga born on 1 November 1990. He entered the United Kingdom on 27 November 2006 as a student with leave until 2 November 2007. Thus, he was 16 years old when he entered the UK. He was granted further periods of leave until 31 October 2009. On 28 October 2009 he made an application for further leave to remain as a Tier 4 migrant, which was refused on 30 November 2009. A further application made on 13 January 2010 was refused on 10 February 2010. The Appellant applied again on 17 February 2010; he was granted leave to remain until 9 November 2010. A further application made 'in time' resulted in a grant of discretionary leave to remain until 4 July 2013. The Appellant left the United Kingdom towards the end of this period of leave; he then re-entered, with new leave as a Tier 4 Migrant on 16 October 2013 valid until 30 November 2015.
4. This latter period of leave was then curtailed, such that it was due to expire on 13 November 2015. On 13 November 2015 the Appellant made an application for leave to remain relying upon Article 8 of the ECHR. The application was refused on 9 June 2016.
5. The Appellant initially challenged the decision of 9 June 2016 by way of judicial review proceedings. In consequence, in due course, on 30 March 2017, the Respondent made a new decision on the Appellant's application; the application was again refused and it is this decision that is the subject of the instant appeal.
6. The First-tier Tribunal allowed the Appellant's appeal on human rights grounds for reasons set out in the decision of Judge Hindson promulgated on 23 November 2017.
7. The Respondent now challenges the decision Of Judge Hindson pursuant to permission to appeal granted on 18 April 2018.
8. Before rehearsing the essential bases upon which the appeal was allowed, I note that it was common ground before the First-tier Tribunal Judge that the Appellant could not succeed under the Immigration Rules: e.g. see paragraph 3; and also note paragraph 23 where the Judge states in terms that the Appellant "*does not meet the Rules*". I highlight this matter because the Respondent's challenge in part seems to suggest that the Judge failed to have regard to the fact that the Appellant did not meet the requirements of the Rules (Ground 2). Mr Bramble has very properly brought this matter to my attention, and does not pursue this aspect of the Grounds.

9. The Judge had regard to the evidence presented on behalf of the Appellant: see paragraphs 11-15. In essence the Appellant had entered the UK at the age of 16 on a scholarship to study and play rugby, and had been in the UK continuously since then save for two months in 2013 when he returned to Tonga. The only period of time for which he was present in the UK without leave was when he made two successive applications for further leave to remain which were rejected on the basis of technicalities: the first application made on 28 October 2009 was refused because the Appellant had failed to include the appropriate fee; the 'follow-up' application made on 13 January 2010 was rejected because a single page had been missing. These mistakes were made at a time when the Appellant was 18 years and 19 years old.
10. The Appellant's leave would have been statutorily extended by reason of his first application until he became 'appeal rights exhausted' shortly after the refusal of 30 November 2009. Notwithstanding the lapse in his leave he was successful in re-regularising his status and was granted further leave pursuant to the application made on 17 February 2010.
11. Whilst in the UK in addition to his school education the Appellant has obtained qualifications in coaching and sports science to degree level, and has completed the PGCE. He has worked extensively on a voluntary basis coaching and mentoring children, including work for the English Rugby Football Union. He has had to decline a number of offers of professional playing contracts because of his immigration status. He has also formed a relationship with a British citizen whilst in the UK and plans to marry. He does not cohabit with his girlfriend because they both consider to do so would be contrary to their Christian values and faith.
12. There does not appear to have been any controversy over primary facts before the First-tier Tribunal: see paragraph 18.
13. Under the sub-heading 'Findings' the Judge noted in particular the following matters in evaluating the Appellant's claim:
 - (i) He characterised the Appellant as a young man who has been in the UK during an important part of his life from mid-teens to mid-20s. He noted that he had secured a good education and had "*made a positive contribution by his voluntary work with children who aspired to play rugby*". The Judge stated "*I have no doubt that if was allowed to stay in the UK he would continue to make a positive contribution to sport and to the development of young sports men and women.*" (See paragraph 19.)
 - (ii) The Judge noted that the Appellant remained in contact with his family in Tonga, but also considered that he would face some difficulties in re-establishing himself in

Tonga. Although there would be opportunities for him to play rugby there, he would unlikely be able to make a living from the sport - as seems to have been the prospect in the UK. (I note that the only reason the Appellant was not playing professionally in the UK was because of his immigration status.)

(iii) The Appellant had a close relationship with family members in the UK, in particular two rugby playing cousins with whom he had lived but also other members of his wider family.

14. The Judge then concluded in the following terms:

“22. But for the seven month gap when the Appellant did not have leave, he would satisfy the 10 year long-residence rule. His explanation for how that came about, which was not challenged, is in terms, that as a young man, a teenager in fact, he made two errors in the application process. Once he had made the application properly, it was granted. He now faces major consequences for his personal and professional life as a result of two minor errors.

23. The Appellant does not meet the Rules. In considering the appeal outside the Rules I have weighed the various factors I have described above. I accept the need for sensible immigration control is in the public interest. I can see nothing else about this man that adds to the public interest in him being removed from the UK. The factors that weigh in favour of him being allowed to stay do, in my view, outweigh the needs of immigration control I am satisfied that the Respondent’s decision is disproportionate in all the circumstances.”

(I pause to note that the “seven month gap” referred to in paragraph 22 comprises both the period without leave in the UK and the brief absence from the UK during which extant leave expired with the Appellant returning pursuant to a new period of leave.)

15. ‘Ground 1’ of the Respondent’s challenge pleads that the Judge failed to have due and proper regard to the public interest considerations under section 117B of the Nationality, Immigration and Asylum Act 2002.
16. In my judgement careful scrutiny reveals that in substance the Judge did traverse most of the statutory public interest considerations, so far as they arose. Although the Judge did not mention section 117B(1) by name, he did state in *“that the need for sensible immigration control is in the public interest”* (paragraph 23). There is no dispute that the Appellant is fluent in English (section 117B(2)). There is no suggestion that the Appellant would not be economically self-sufficient (section 117B(3)): it is implicit in the Judge’s decision that the only reason that the Appellant has not signed up for a professional rugby playing contract was because of his immigration status; were he to be granted leave to remain he would be able to take employment as a professional rugby player. It is also to be noted that he has a PGCE qualification and coaching experience, so there are other avenues to gainful employment. As such there is nothing to suggest anything other than that the Appellant would be able to avoid being a

burden on tax payers. Nor was there anything to suggest that he would face any difficulty integrating into society; indeed bearing in mind the length of time in the UK through significant formative years, the evidence suggest he is in any event already well integrated.

17. Save for a short period of about 3-4 months the Appellant has not been present in the UK unlawfully (section 117B(4)). For the main part the private life that he has established in the UK was during successive grants of leave to remain: accordingly it is section 117B(5) that is more pertinent: *"Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious"*.
18. In this latter regard, in my judgement it cannot sustainably be maintained that the Judge did not have full regard to the nature of the Appellant's immigration history. Nor, that in failing expressly to cite section 117B(5) he fell into material error of law. What seems particularly germane in this context is the Judge's observation that but for two procedural errors made as a very young man - at the ages of 18 and 19 - the Appellant would have achieved ten years' continuous residence in the United Kingdom, which in turn would have resulted under the Rules in the grant of indefinite leave to remain. The weight to be accorded to the Appellant's private life was appropriately considered from this perspective. 'Little weight' does not mean 'no weight'; nor, as a matter of principle, does the fact private life was established during a period of 'precariousness' inevitably defeat an Article 8 application or appeal. Weight is a matter for evaluation by the Judge: I am not persuaded that there has been any material error in the Judge's approach here.
19. 'Ground 2' of the Respondent's challenge is based on the submission that the Judge disregarded the Appellant's failure to meet the requirements of the Immigration Rules. As I have noted above Mr Bramble does not seek to prosecute this argument any further.
20. In my judgement, with due respect to the drafter, Ground 3 of the Respondent's challenge essentially constitutes a general disagreement with the outcome of the appeal which has been 'dressed' as a point of law by citation of case law.
21. Ground 3 submits that the errors pleaded in the first two grounds - which I have in any event rejected - are *"compounded by the fact that the Judge appears to make findings based on an incorrect premise of the position of jurisprudence and has failed to apply such jurisprudence"*. What follows appears to be a submission that the Judge failed to identify unjustifiably harsh consequences that rendered the Respondent's decision disproportionate. However, it seems to me that in substance what is advanced is a challenge to the Judge's evaluation of proportionality based on disagreement with

outcome rather than any clear error of principle. It is adequately clear that the First-tier Tribunal Judge was satisfied that the Appellant had established a private life in the United Kingdom - including establishing a very solid foundation for a future in the United Kingdom both professionally and in domestic terms by reason of his relationship with his girlfriend. It is also adequately clear that the Judge identified that the only reason that the Appellant's future prospects were in any sort of jeopardy in this regard was the relatively minor circumstance of the procedural errors made at the end of 2009 and the beginning of 2010 when he was still little more than a schoolboy. I find it was open to the Judge to conclude that those matters were of relatively little adverse significance and should not in substance now result in the Appellant being unable to secure his future in the United Kingdom. It is difficult to see how not being able to pursue his career and continue his private life in the UK might not constitute a harsh consequence - or that the Judge was in error in considering it was a disproportionate - i.e. unjustifiable - outcome.

22. In all of the circumstances I reject each aspect of the Respondent's challenge.

23. I make the following final observations. The Appellant's case was expressed with articulate clarity in Mr O'Ceallaigh's Skeleton Argument before the First-tier Tribunal. The Judge in substance rejected no element of the essential primary facts, and for the main part offered reasons and reached a decision in keeping with the case advanced. If any criticism is to be made of the Judge it is that the reasoning in the Decision is comparatively slight, and/or brief. Be that as it may, it is clear enough why the Judge found in the Appellant's favour; the outcome decision is not perverse; and I can otherwise identify no material error of approach to justify interfering with the decision.

Notice of Decision

24. The decision of the first-tier Tribunal contained no material error of law and stands.

25. The appeal remains allowed on human rights grounds.

26. No anonymity direction is sought or made.

Signed:

Date: **1 August 2018**

Deputy Upper Tribunal Judge I A Lewis