UPPER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: HU/06568/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 15 November 2018

Decision and Reasons Promulgated
On: 04 December 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANTON SHEVON ABEYSINGHE
ANONYMITY DIRECTION NOT MADE

Respondent

Representation
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr A Berry, counsel, instructed by MT UK Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the Secretary of State and to the respondent as the claimant.

2. The Secretary of State appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 4 July 2018, allowing the claimant's appeal against the Secretary of State's decision to refuse his application for leave to remain in the UK.

3. In granting permission, the First-tier Tribunal Judge Sutherland Williams stated that although the Judge had correctly applied the law and made sufficient findings of fact, he

had concerns in relation to her finding that the claimant had previously met the requirements of the Immigration Rules. That had a significant impact on the Judge's finding in terms of proportionality.

The background to the appeal

4. The Judge set out the claimant's immigration history. He is a national of Sri Lanka, born on 17 December 1991. His father arrived in the UK in 2002. The claimant asserted that he entered the UK aged 11 with his mother and two sisters.

5. He started to make applications for further leave to remain from 2010. His most recent application, submitted on 12 August 2016 was refused without a right of appeal. That decision was then withdrawn and remade on 17 May 2017 with an in-country right of appeal [4].

6. The Secretary of State refused the application under paragraph 276ADE of the Immigration Rules as the claimant did not meet the eligibility requirements under S-LTR1.6 of Appendix FM, because of his criminal conviction. This led the Secretary of State to conclude that his conduct, character, associations or other reasons made it undesirable for him to remain in the UK [5]. The claimant had been convicted of possessing/control of an identity document with intent. That conviction took effect on 16 July 2014 - [5].

7. The Secretary of State was moreover not satisfied that he would face very significant obstacles to hid integration in Sri Lanka because he had lived there for 11 years. He would be returning with his parents and would have extended family and friends there who would assist him with settling in.

8. The First-tier Tribunal Judge was not satisfied that his one offence, or his conduct generally, led her to conclude that he was a person whom it is undesirable to allow to remain in the UK [14].

9. She found that although the claimant will face initial challenges on return to Sri Lanka, these did not amount to very significant obstacles to integration.

10. With respect to his claim under Article 8 of the Human Rights Convention, she found that it was not disputed that the claimant has established family life in the UK, most importantly with his fiancée who is British, although she stated that in her proportionality assessment, she can place little weight on this relationship in accordance with s.117B(iv) of the 2002 Act. She found that the first four Razgar questions can be answered positively [24].

11. On the issue of proportionality, she acknowledged that the claimant has lived unlawfully in the UK for many years. However, he should not be blamed for his parents' actions and the evidence before her was that from the age of 19, when he became aware of his lack of status, he has sought to resolve this. His conviction did not render his presence in the UK undesirable. He has established a life in the UK which is self-sufficient, and he has a

prospect of a good career if he is able to return to university to complete his studies [25].

12. She stated that what weighed significantly in his favour in the assessment of proportionality is the fact that he has met the requirements of the Immigration Rules (albeit prior to the date of the appeal hearing). The public interest in those circumstances was significantly diminished. Accordingly, his removal would be disproportionate.

13. In his submissions before the Upper Tribunal, Mr Lindsay adopted the Secretary of State's grounds. He referred to LT (Kosovo) v SSHD [2016] EWCA Civ 1246, where the Court of Appeal held that '... the Secretary of State is the primary decision maker. She has a constitutional responsibility to make judgments as to the force of the public interest in deportation cases. That circumstance has to be balanced against the appellant's right to a merits appeal. In such a case, the Tribunal has to consider all the facts put before them and to accord significant weight to the Secretary of State's view'. Although that appeal related to a deportation context, the decision informs the approach to be adopted in this case.

14. Mr Lindsay submitted that this is particularly so having regard to the Judge's findings at [25]. It is not clear what the Judge was referring to at [26] when she stated that weighing significantly in the claimant's favour in her assessment of proportionality, is the fact that he has met the requirements of the Immigration Rules, albeit prior to the date of the appeal hearing. He submitted that the Rules had not in fact been met.

15. He submitted that the no weight was given to the Secretary of State's view relating to suitability, a substantial requirement under the Rules. The Judge had to have regard to all the relevant requirements of the Rules as part of the assessment. The claimant's conviction pre-dated his claim.

16. In reply, Mr Berry referred to the claimant's Rule 24 response. He submitted that while different Tribunals may assess the balance in different ways and reach different results in doing so, the approach by the First-tier Tribunal Judge did not contain any material error of law.

17. She found as part of the assessment regarding proportionality under Article 8, that the claimant would have satisfied the Rules, namely that he was under 25 and had spent half his life in the UK, when an earlier application was made and that, having been brought to the UK by his parents aged 11, this was a factor of significance in the assessment of proportionality even though he no longer met the requirements of the Rules. He now had to show that there were very significant obstacles to return as he was over 25 years old at the time he secured an appeal to the First-tier Tribunal.

18. He submitted that although it is correct that the Tribunal focused on an earlier "application" said to be made when the claimant was 24 in August 2016 [15], these were in fact "fresh representations". The litigation history thereafter showed that while under 25 he had made representations as part of a fresh human rights application which led ultimately and belatedly to the concession of a fresh claim and a right of appeal.

19. He accordingly submitted that the Tribunal's decision was not wrong in substance. Further, in the assessment of proportionality for Article 8 purposes, it is not unlawful to consider the degree of integration that a young person brought to the UK as a child has had, and to reflect that had earlier representations been treated as a fresh claim as they should have been, he would have satisfied the substantive criteria for those under 25 years old.

20. He also submitted that the suitability provisions are concerned with character, conduct and associations. The judicial task is accordingly evaluative and is not concerned with identifying rigid Rules so as to fall in or outside its scope.

21. The Judge properly took into account the present remorse. He referred to the suitability provisions at S-LTR.1.6.

Assessment

22. The First-tier Tribunal Judge at [15-17] and [22-26] found that had the Secretary of State granted a right of appeal in the August 2016 application, the claimant would have succeeded under paragraph 276ADE(v). She gave significant weight to that "fact" in the assessment of proportionality.

23. However, as contended in the Secretary of State's grounds, the history of his applications show that the claimant became appeal rights exhausted in April 2016. The Secretary of State rejected further submissions in October and December 2016. It was only as a result of judicial review proceedings that the Secretary of State made a new decision granting a right of appeal. As the claimant was appeal rights exhausted in April 2016, he was not entitled to a right of appeal and he would not have been able to succeed under paragraph 276DE(v) of the Rules. The Judge found that the appellant had met the requirements of the Rules, albeit prior to the date of the appeal hearing.

24. Further, no evidence was produced to show that the claimant's conviction was in any way incorrect. Moreover, the fact that he may be sorry for his actions did not show him to have "rebutted" the decision on suitability.

25. The Judge found that the claimant would not face very significant obstacles to re-integration in Sri Lanka.

26. She did not explain why the suitability findings with regard to paragraph 276ADE were not relevant and germane to the proportionality of the assessment under Article 8. She has not undertaken a proper assessment or given reasons as to why she paid no regard to the Secretary of State's assertion that his conduct made it undesirable for him to remain in the UK. The facts behind his conviction were not shown to be wrong. As contended by Mr Lindsay, the fact that the claimant may have been sorry for his actions was not a factor to be used by the Judge to rebut the decision on suitability.

27. In the circumstances I find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I accordingly set it aside. The parties agreed that in that event, a fresh decision would have to be made.

28. I have had regard to the Senior President's Practice Statement regarding the remitting of appeals to the First-tier Tribunal for a fresh decision. I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made will be extensive. There will be a complete re-hearing with no findings preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. It is set aside. The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed

Deputy Upper Tribunal Judge Mailer

Date 30 November 2018