Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22970/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th October 2019	**On 16th October 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

FUSI MOTSAMAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Appiah of Counsel, instructed by Vine Court Chambers
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Froom promulgated on 19 June 2019, in which the Appellant's appeal against the decision to refuse his human rights claim dated 26 October 2019 was dismissed.

2. At the outset of the hearing, I drew to the parties' attention that I had heard and dismissed a previous appeal by the Appellant in 2014 as a First-tier Tribunal Judge. No objection was raised by either party to me hearing

this appeal and my earlier involvement at one point in the Appellant's immigration history no impact on the determination of this appeal.

3. The Appellant is a national of South Africa, born on 22 July 1982 who first arrived in the United Kingdom with entry clearance as a working holiday-maker to 1 January 2006, further to which he was granted leave to remain as a student to 31 August 2007. Thereafter, the Appellant's immigration history becomes more complicated and aspects of this will be set out in more detail when necessary and relevant to this stage of the appeal. For present purposes, the latest application made for leave to remain was on human rights grounds, which was refused by the Respondent on 26 October 2018.

4. The Respondent refused the application the basis that Appellant did not have a partner or any dependent children in the United Kingdom to meet any of the family life provisions in Appendix FM of the Immigration Rules and his claim was considered on private life grounds only. The Respondent noted that the Appellant had lived in South Africa to the age of 21, had family there, spoke four local languages and had remaining ties which would enable him to reintegrate there. There was no reason why the Appellant would not be able to find employment or support himself in South Africa. The Respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain, nor any health reasons to do so. There was separate consideration of compassionate factors which arise in the Appellant's case, but these were not considered to be sufficient to warrant a grant of leave to remain in the United Kingdom.

5. Judge Froom dismissed the appeal in a decision promulgated on 19 June 2019 on all grounds. He found that the Appellant could not satisfy the requirements of the Immigration Rules for a grant of leave to remain and further, that his removal would not be a disproportionate interference with his right to respect for private life established in the United Kingdom country to Article 8 of the European Convention on Human Rights. I return below to the detailed reasons given for that decision.

The appeal

6. The Appellant appeals on three grounds. First, that the First-tier Tribunal materially erred in law in failing to consider adequately the evidence in relation to children whom the Appellant had some form of relationship with in the United Kingdom, either children of friends whom he provided some care for, god children, and those he worked with his part of the Boy's Brigade. In particular, the First-tier Tribunal failed to undertake an assessment of those children's best interests in accordance with section 55 of the Borders's citizenship and Immigration Act 2009. Secondly, that the First-tier Tribunal's decision on the proportionality exercise was, in effect, perverse, with too much weight being attached to the public interest in the maintenance of immigration control and too little weight being attached to what was recognised as a significant private life in the

United Kingdom. Finally, the First-tier Tribunal erred in failing to consider the legality or otherwise of the refusal of the Appellant's application for further leave to remain as a student in 2007, which he claims to have never received.

7. At the oral hearing, Ms Appiah relied on the written grounds of appeal, expanding in particular on grounds two and three orally. In relation to the first ground of appeal, it was accepted by Ms Appiah that there were no specific or written submissions made to the First-tier Tribunal about the best interests of the children, however there was evidence about them and from them within the Appellant's bundle which was at least in part recognised in paragraph 59 of the decision, but not considered extensively. There was no real dispute on the facts as to the Appellant's involvement with different children in the United Kingdom and it was submitted that their lives were clearly enhanced by the role that the Appellant played for each of them. On this basis it was submitted the error of law in failing to conduct a best interests assessment was a material one given the nature of the holistic balancing exercise required for the purposes of Article 8 and that this factor may tip the balance in the Appellant's favour.

8. As to the second ground, the Appellant's focus is on paragraph 96 of the decision and that in effect, the First-tier Tribunal reached a conclusion that was perverse on the facts where it had been found that the Appellant had a significant private life in the United Kingdom and that the Appellant's value to the community should have been given greater weight. Ms Appiah submitted that an example of how the First-tier Tribunal erred in the balancing exercise was by reference to the Appellant's status in the United Kingdom being precarious. Although it was accepted in accordance with the Supreme Court's decision in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 the Appellant's status in the United Kingdom was precarious because he did not have indefinite leave to remain here, it was in any event submitted that there should be a more nuanced approach to how precarious the Appellant's status was. Specifically, it was suggested that there should be some recognition of the fact that the Appellant had spent time lawfully in the United Kingdom and whilst here unlawfully, had made regular and repeated efforts to regularise his stay. Ms Appiah submitted that this should put him in a better position for the purposes of assessing precariousness than a person who had simply been in the United Kingdom unlawfully without making any attempt to obtain leave to remain.

9. In relation to the third ground of appeal, it was submitted that the First-tier Tribunal erred in making an adverse finding against the Appellant in paragraph 88 of the decision, because there was no meaningful assessment of the legality of the refusal of the Appellant's application for further leave to remain as a student in 2007, which he never received and which should not therefore be an adverse factor against him.

10. On behalf of the Respondent, Mr Lindsay made three points in relation to ground one. First, it was submitted that the point was not expressly relied upon or raised before the First-tier Tribunal either in the skeleton argument, oral submissions or oral evidence and no mention at all was made of section 55. In these circumstances, the point was not Robinson obvious and the Judge was not required to deal with it. Secondly, in any event the First-tier Tribunal properly and fully considered all the evidence before it, including the Appellant's strength of connections in the United Kingdom, with a decision being taken in the round on all of the evidence and for which detailed reasons were given. Finally, also in any event, the appeal was dismissed on the basis that the refusal of leave to remain would not lead to unjustifiably harsh consequences on the Appellant, following the test set out by the Supreme Court in Agyarko v Secretary of State for the Home Department [2017] UKSC 11. Even if an assessment of the children's best interests had been more expressly undertaken by First-tier Tribunal in this case, it would still not, in all the circumstances, establish that there would be any unjustifiably harsh consequences on the Appellant or any of those persons in the United Kingdom who he has undeniably strong ties with.

11. In relation to the second ground of appeal, Mr Lindsay reiterated the Appellant's acceptance that to succeed on this ground he would have to show that the decision of the First-tier Tribunal was perverse, which is a very high threshold which cannot be met on the facts of this case. The weight to be attached to evidence is primarily a matter for the First-tier Tribunal, provided that all of the evidence has been considered and taken into account.

12. The Judge correctly identified the meaning of precarious in paragraphs 81 and 82, reminding himself that the public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002 were not a straitjacket and that all of the circumstances, including the particularly valuable private life ties which the Appellant has established in the United Kingdom were to be taken into account.

13. Further, at paragraph 97, the Judge noted that the case law relied upon by the Appellant in relation to public interest and a person's contribution to the community, predated the introduction of section 117B, which now provides a statutory framework for the assessment of public interest and therefore to some extent supersedes cases such as UE (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 975.

14. Finally, in relation to the third ground of challenge, Mr Lindsay submitted that the Judge was entitled to find in paragraph 88 of the decision that it was not possible for him to make a clear finding on the merits of the Appellant's application for leave to remain as a student in 2007 and that in any event there has been no challenge to the finding that the Appellant had not established that the requirements of the Immigration Rules had been met at this time, which is fatal to this ground of challenge.

Findings and reasons

15. The decision of the First-tier Tribunal is well structured with clear findings made between paragraphs 34 and 60 as to the Appellant's circumstances and immigration history in the United Kingdom, to which the law is applied in paragraphs 61 and onwards in accordance with the five step approach in Razgar v Secretary of State for the Home Department [2004] UKHL 27.

16. The first ground of challenge relates to the factual findings made in relation to the children with whom the Appellant has established relationships, including as a god parent, carer or volunteer within the Boys Brigade, which are expressly recognised in the findings in paragraphs 51, 52 and 59 of the decision. It is however said that the First-tier Tribunal erred in failing to consider the best interests of those children in accordance with section 55 of the Borders Citizenship and Immigration Act 2009, which would be a necessary part of the proportionality balancing exercise.

17. Ms Appiah accepted at the oral hearing before me that there was no express reliance by the Appellant on section 55 or the best interests of any of the children involved, either in written or oral submissions before the First-tier Tribunal law or in any of the oral evidence. That is recognised in paragraph 59 of the decision, which stated as follows:

> *"Ms Appiah did not dwell on the interests of the various children with whom the appellant is involved. I did not understand has been making arguments based on the best interests of any child or children and she did not identify any particular child or children for this purpose. I accept the appellant is a much-loved youth leader and that he plays a very positive role in lives of his godchildren and his friend's children. However, as the decision notice points out, there is no evidence that his presence in the UK is necessary to meet those children's essential needs. They have their own parents and carers. The appellant's presence is desirable but the children's best interests are not significantly affected."*

18. I find that in effect, without any express reference to section 55 of the Borders, Citizenship and Immigration Act 2009, the paragraph quoted above contains a sufficiently detailed assessment of the children's best interests, commensurate with the submissions made to the First-tier Tribunal and the evidence before it in relation to specific children and more generally. Although it varies between the different groups of children, their relationships with the Appellant can at best be described as peripheral to their best interests, given that they have their own parents and carers, their essential needs are met, and there is nothing to suggest that there is any lack of access to education, healthcare or any adverse impact on any of the main areas of a child's life which are central to their best interests. As recognised in the final sentence of paragraph 59 of the decision, the Appellant's presence is undoubtedly desirable for those

children, but his removal would not significantly affect their best interests. There is no challenge to this final finding by the Appellant.

19. In these circumstances, I do not find any error of law by the First-tier Tribunal in failing to go further in an assessment of best interests than what is contained in paragraph 59 of the decision. Adequate and reasoned findings are made on the evidence before it which are sufficiently detailed in light of the lack of any express reliance on this factor by the Appellant in his appeal. In any event, although assessments for the purposes of Article 8 in the proportionality exercise are fact sensitive and a holistic approach is necessary, it is difficult to see how any more detailed best interest's assessment could have strengthened the weight attached to the Appellant's private life in the United Kingdom or materially affected the outcome of the appeal. Any such assessment could not on the evidence have legitimately led to a conclusion, even taking into account all of the other factors, that there would be unjustifiably harsh consequences on either the Appellant any of the other persons in the United Kingdom with whom he has ties.

20. The second ground of appeal although not phrased initially in this way in the written application for permission, is essentially a challenge to the findings of the First-tier Tribunal as perverse, by attaching too much weight to the public interest and insufficient weight to the Appellant's established private life in the United Kingdom. However, the decision of the First-tier Tribunal contains a detailed and lawful self-direction as to the law to be applied, detailed findings with detailed and cogent reasons being given for them, which were open to the First-tier Tribunal to make on the evidence before it. The weight to be attached to each factor in the balancing exercise is a matter for the First-tier Tribunal, who had the benefit of oral evidence and submissions as well as the documentary evidence from both parties. There is nothing to suggest that the Judge failed to take into account relevant evidence, took into account irrelevant matters, nor that any conclusions were reached which were not legitimately open to him on the basis of that evidence. The high threshold to establish perversity in the decision is nowhere near being met in this case.

21. The Appellant has more specifically challenged paragraph 96 of the decision and the failure by the First-tier Tribunal to consider in a more nuanced way the level of precariousness of his status for the purposes of the balancing exercise. Paragraph 96 of the decision is as follows:

> *"As for the good work the appellant has been doing here, the Tribunal has long held that sympathy for and admiration of an individual do not enhance or otherwise affect that person's rights (see MG (Assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113). Ms Appiah cited the case of UE (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 975 is authority for the proposition that a person's value to the community could be a factor diminishing*

> *the public interest in removal. However, even the judgement of the David Keene, on which Ms Appiah specifically relied, stated that this factor would only make a difference in relatively few cases because "the main element to the public interest will normally consist of the need to maintain a firm policy of immigration control" see [36]).*"

22. Although this paragraph is specifically referred to by the Appellant in the grounds of appeal and oral submissions, there was in fact no specific challenge to what is set out therein and more importantly no challenge to what followed in paragraph 97 that these cases predated the introduction of section 117B of the Nationality, Immigration and Asylum Act 2002, which provide a statutory framework for the assessment of the public interest, or the findings at the end of that paragraph.

23. The decision of the First-tier Tribunal emphasises throughout the unusually strong private life ties that the Appellant has established in the United Kingdom, his good character and conduct, as well as his sense of injustice in relation to treatment by the Respondent at a number of points throughout his immigration history. All of these matters are taken into account and given appropriate weight. In conclusion, it was found in paragraph 97 that, "*The appellant is undoubtedly a helpful, hard-working and well-thought of member of his community. His departure would leave a large hole in the lives of his friends. Aspects of his treatment by the respondent make for uncomfortable reading. However, even taken cumulatively these are not matters capable, in my judgement, of tipping the scales in his favour."* That finding does not indicate any perversity or error of law.

24. Ms Appiah's submission that the First-tier Tribunal erred in law by not applying a more nuanced approach to the level of precariousness of the Appellant's status in the United Kingdom is wholly contrary to the findings of the Supreme Court in Rhuppiah, that for the purposes of section 117B(5) of the Nationality, Immigration and Asylum Act, precarious means any grant of leave to remain short of indefinite leave to remain. On any view, the Appellant's status throughout his time in the United Kingdom has always been precarious.

25. Finally, the Appellant challenges what he says is an adverse finding against him in paragraph 88 of the decision without any meaningful assessment of the legality of the Respondent's refusal of his application for further leave to remain as a student in 2007. Paragraph 88 states as follows:

> *"Looking at the available evidence I note the following. The respondent says the student application was refused, although the reasons are not stated. The appellant denies receiving the decision. Ms Appiah says a copy has never been provided. Judge Grant said that the removal should not have taken place while the application was pending. Judge Jackson also recited*

> *that the application was outstanding. I have nothing else. It is simply not possible to make a clear finding on the likely merits of the application given the obscurity over this matter. Even if the appellant is correct that he did not receive the refusal decision, this does not mean that one was not made and, if a negative decision was made, it suggests the application did not meet the requirements of the rules."*

26. Paragraph 88 must be read in the context of what precedes and follows it. As identified in paragraph 87 of the decision, it is dealing with one part of the submission behalf of the Appellant raising a 'but for' argument that but for the Respondent's errors in the past, the Appellant may have accrued ten years' lawful residence to qualify for indefinite leave to remain at some point after July 2014. That argument relied on (1) overlooking a gap in continuous lawful residence in 2007, (2) the Appellant not receiving a refusal decision in 2007, (3) the Appellant being unlawfully removed in 2008 (with no such finding being made earlier in paragraph 42), and (4) that the Appellant's application in 2007 would have or should have succeeded. The findings in paragraph 88 refer only to the last of these issues and the argument was in any event bound to fail because the other matters could not be resolved in the Appellant's favour either.

27. As paragraph 89 makes clear, the but for argument was not made out on the facts and therefore the weight to be attached to the public interest was not reduced because of this. There is no freestanding adverse finding against the Appellant in paragraph 88 of the decision that is taken into account as part of the balancing exercise, it is simply a rejection of one part of the but for argument, which if successful, may have reduced the weight to be attached to the public interest. In any event, the findings in paragraph 88 were open to the First-tier Tribunal who could not practically go any further in the absence of any further information or evidence from either party in relation to the 2007 application. For these reasons, there is no error of law on the third ground of challenge either.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed  Date 14th October 2019

Upper Tribunal Judge Jackson