Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06568/2014

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 17 June 2015	On 2 July 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL M ROBERTSON

Between

ENTRY CLEARANCE OFFICER, ACCRA

Appellant

And

ALHASSAN KUYATEH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Presenting Officer
For the Respondent: Miss Bakshi, Counsel, instructed by Samuel Ross, Solicitors.

DETERMINATION AND REASONS

Introduction

1. Although the Entry Clearance Officer is the Appellant before me I will for ease of reference refer to him as the Respondent as he was the Respondent before the First-tier Tribunal at the hearing on 9 January 2015. Similarly I will refer to Mr Kuyateh as the Appellant as he was the Appellant before the First-tier Judge.

2. The Respondent was granted permission to appeal against the decision of First-tier Tribunal Judge V A Cox, who dismissed the Appellant's appeal under the Immigration Rules and allowed it under Article 8 ECHR.

3. In the grounds of application, the Respondent submits that:

    a. In finding that the Appellant does not meet the suitability requirements of Appendix FM but allowing the appeal under Article 8 ECHR the Judge gave insufficient weight to material matters (these being that the Appellant does not meet the Rules, the public interest in immigration control, the Appellant's poor immigration history, past deception and poor conduct whilst in the UK); and

    b. He failed to give adequate reasons for his decision to allow the appeal under Article 8 ECHR. The only reason that the Appellant was not granted entry clearance was because of the suitability requirements and if these requirements can simply be sidestepped there is a danger that these requirements will rendered redundant. Therefore the Judge should have given more detailed reasons for why the suitability requirement should not apply equally under the Article 8 assessment.

4. Permission was granted on the basis that "The grounds do not refer to **Nagre** or **Gulshan** but they are relevant as the Judge does not appear to identify what features of the Appellant's case are not adequately considered by the Immigration Rules."

5. As taken from the documentary evidence before me, by way of background, the Appellant made his application on 2 October 2012 and this was initially refused on 30 January 2013 and the appeal listed for 10 December 2013. This was adjourned to 28 March 2014, with the Judge directing the Respondent to provide the previous notice of refusal, which was issued on a previous application made on 26 April 2012, and supporting documents. On 28 March 2014, the Respondent was not represented and the previous notice of refusal and supporting documents were not provided. Furthermore, the Notice of decision dated 30 January 2013 was withdrawn and a further notice of decision, relying on the same grounds, was issued on 23 April 2014 (the Notice). A supplementary notice of decision was issued on 8 October 2014 (the Supplementary Notice), in which the ECO accepted that it was established that the Appellant and the Sponsor were in a genuine and subsisting relationship and that they intended to live together permanently. The refusal of entry clearance was based solely on the suitability criteria, at paragraph EC-P.1.1(c) of Appendix FM, with reference to paragraph S-EC.1.5 and S-EC.2.5(b), These provide as follows:

    'S-EC1.1 The applicant will be refused entry clearance on grounds of suitability if any of the paragraphs S-EC.1.2. to 1.8. apply

    .....

    .....

> S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good or because, for example, the applicant's conduct (including convictions which do not fall with paragraph E-EC.1.4.), character, associations or other reasons, make it undesirable to grant them entry clearance.
>
> S-EC.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-EC.2.2 to 2.5 apply
>
> .....
>
> .....
>
> S-EC.2.5. The exclusion of the applicant from the UK is conducive to the public good because:
>
> (a)....
>
> (b)(i)...
>
> (b)(ii) the person is a persistent offender who shows a particular disregard for the law.

6. The Judge found as fact that exclusion of the Appellant was conducive to the public good because it was established that the Appellant was a persistent offender pursuant to paragraph S-EC.2.5 (b)(ii). He then went onto consider the Appellant's appeal under Article 8 at [38 – 53] and allowed the appeal.

7. In submissions, Mr Mills essentially relied on the grounds of application. He submitted that having found that the Rules could not be met, the Judge went straight on to an Article 8 assessment without first establishing compelling circumstances as for doing so. **Gulshan (Article 8 – new Rules – correct approach) [201] UKUT 640 (IAC)** and **R (Nagre) SSHD [2013] EWHC 720 (Admin)** were referred to in **SS (Congo) [2015] EWCA Civ 387** and it was accepted that Article 8 was not a complete code but that the Immigration Rules in Appendix FM were the Respondent's attempt to ensure that the Rules dealt with most issues that could be raised under Article 8 and where there was a failure to meet the Immigration Rules, compelling circumstances would need to be established. The Judge had not identified which issues could not adequately be considered under the Immigration rules.

8. Mr Mills further submitted that in the Notice, the ECO relied on the suitability requirements set out in paragraph S-EC.2.2(b), which provided that a failure to disclose facts which were material to his application was a discretionary ground for refusal. However, when the Supplementary Notice was issued, the ECO was also relying on S-EC1.5, that is that exclusion of the Appellant from the UK was conducive to the public good because his conduct, character and associations made it undesirable to grant them entry clearance, which was a mandatory ground for refusal. The Judge found, at [34], that the Appellant was a persistent offender who had shown a particular disregard for the law. He stated that because of this finding, the Judge must have had the Supplementary Notice before him.

9. Mr Mills submitted that in terms of Article 8, he could not in fact take the grounds any further than as drafted. The fact remained that the Appellant's immigration history was poor and it was accepted that he had practised deception. The Judge then went on to deal with Article 8 and family life without properly considering what weight should be given to the public interest. If the Judge was right, the suitability requirements could simply be sidestepped. The Judge mentioned that this matter had in fact been on-going as the Appellant had only left the UK in 2012, and his conduct was therefore no more than two to three years ago.

10. Miss Bakshi submitted that there was no error of law when the decision was read as a whole because whilst it was accepted that the Judge did not specifically mention 'compelling circumstances', he was aware of the case law as stated at [35], and that the Immigration Rules were not a complete code. At [29-34] he identified factors which could not be considered under the Immigration Rules. She stated that the compelling factors were set out at paragraph 7 of her skeleton argument, these being that the Sponsor and the child of the Appellant and the Sponsor were British citizens, the marriage was genuine and subsisting, the Sponsor had a successful career in the UK and was able to financially support the Appellant, the Appellant's child would lose educational opportunities in the UK to which he was entitled if he had to leave the UK, and the Judge considered the best interests of the children. In all this he took into account that the weight that could be given to the relationship between the Appellant and the Sponsor had to be reduced because of the provisions of S117B of the 2002 Act at [40] but that he could not come to a conclusion which unfairly punishes the child at [46].

11. She submitted that the Judge did give sufficient weight to material matters and sufficient reasons for his decision to allow the appeal under Article 8 and these issues could not be considered under the Immigration Rules.

12. In reply, Mr Mills submitted that the Judge makes reference to s 117B (4) of the Nationality, Asylum and Immigration Act 2002 at [40] but he misapplies it. He states that the weight to be given to a relationship between the Appellant and the Sponsor had to be reduced where it was formed when the Appellant was in the UK unlawfully but s 117B (4) provides that little weight should be attached to a relationship with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully. He submitted that it was clear from his decision that he goes on to give the relationship significant weight.

Decision and Reasons

13. It was not argued that the Judge's findings were perverse or irrational; the submissions on behalf of the Respondent were based on weight that was attributed to the evidence and lack of adequate reasons.

14. It was not in issue before me that the Judge had before him the Supplementary Notice or that he made insufficient findings in relation to the provisions of S-EC.1.5. Whilst the Judge does not refer specifically to S-

EC.1.5, it appears to be accepted by both representatives (as neither made submissions to the contrary) that his findings were sufficient to establish that he had considered both provisions. This must be right because if he had only considered the provisions of paragraph S-EC.2.5(b)(ii), he would also have had to consider whether discretion should have been exercised differently and he does not do so. It can be inferred that he did not consider this aspect of the appeal under S-EC.2.5(b)(ii) because there was a mandatory refusal of the Appellant's application under S-EC.1.5.

15. This inference is supported by [34] in which the Judge finds

> "…the appellant is a person who has shown particular disregard for the law and he has a caution and has entered United Kingdom under a false visa. He did not immediately draw attention to the error he says was made on the use of his brother's name. He has worked illegally, he has produced his twin brother's identity documents on a number of occasions. He must have done so to work and has disregarded the law and used a false identity for a period of years on his own account. There is no numerical definition of persistence and I find that his conduct is that of a persistent offender and he has shown a particular disregard for the law";
>
> And at [53] he found that the conduct of the Appellant was "reprehensible".

16. It is also clear that the provisions of paragraph EX.1 were not available to the Appellant because these provisions are not freestanding (**Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)**). As the Appellant had in fact met all the other provisions of the Immigration Rules, the provisions of EX.1 were not available to him and there was therefore the need to consider elements of the appeal that could not be adequately considered under the Immigration Rules by applying Article 8 directly.

17. Within the Article 8 assessment, it is difficult to argue that the Judge gave insufficient weight to material matters; the matter of weight is for the Judge (**FK (Kenya) [2010] EWCA Civ 1302**, at para 23). It is clear that the factors that weighed heavily against the Appellant were that he was a persistent offender, with a poor immigration history and a reprehensible character. I cannot find, as submitted by Mr Mills, that the Judge misapplied the provisions of s 117B(4) because that section provided for *little* weight to be given to the relationship because the Judge stated that the weight that could be given to it was '*reduced*'. This is merely a difference in terminology.

18. Again, contrary to the submissions of Mr Mills, there is nothing within the decision from which it can be inferred that the Judge went on to give the relationship between the Appellant and the Sponsor considerable weight. In line with EU jurisprudence, the Judge took into account that the Sponsor did not know of the Appellant's status when the relationship was formed but did know of it before they were married and their child was born. When the Judge thereafter refers to the Sponsor, he is evaluating the character of the Sponsor in her own right, for example, he states that she

has lived in the UK all her life, has a successful career and is a lecturer at a university [45] and that her character is impeccable [47]. Any reference to their relationship thereafter is a reference to what will occur in the future, not what has occurred in the past; for example, he refers to the choice the Sponsor has made to remain in the UK having considered a move to Sierra Leone because of education and employment prospects and the need to attach weight to it [44], that the Sponsor has made considerable efforts to ensure that the child met his father outside the UK [43], that both the child and the Sponsor were British citizens and that the child should not be punished for the faults of the father [46]. The Judge also took into account that there had been a consistent and genuine attempt by the Appellant to gain entry to the UK lawfully and that this has taken many years [49] and gave weight to the fact that the relationship had endured, whilst the Appellant was **out** of the UK, not during his period of unlawful residence. Although Mr Mills submitted that the Judge found that the Appellant's conduct was 'some time ago' but it was in fact no more than two or three years, the fact remains that the Appellant's first application was made in May 2012 and refused in June 2012. His next application was made on 2 October 2012, and has been ongoing since then, the Supplementary Notice not having been issued until 8 October 2014, some two years later. On the evidence before him, the Judge was entitled to find that the Appellant's conduct in the UK was some time ago [53].

19. It is clear that the compelling factors in this case were that there had been a genuine and prolonged attempt to gain lawful entry clearance, that weight was given to the relationship subsisting whilst the Appellant was out of the UK (and therefore not on the basis of the relationship whilst he was in the UK unlawfully), that the Sponsor had decided to stay in the UK having considered a move to Sierra Leone which is unsurprising in the context of the Ebola crisis (see [14]), and still had gone to great lengths to ensure that their child met his father but it was likely that the decision to refuse the application would result in long term separation of the child from his father, and particularly during the child's early years when bonding occurs. He made sufficient findings for his decision to allow the appeal under the Immigration Rules and he did not merely side-step the requirements of the Immigration Rules. The Judge's findings of fact were sufficient for him to find that there were compelling reasons to consider the application outside the Immigration Rules [35]; his findings are not irrational or perverse. Whilst another Judge may have reached a different conclusion on the facts, the Judge's conclusion was open to him on the evidence before him and no arguable material errors of law are disclosed.

20. The Respondent's grounds are no more than a disagreement with the findings of the Judge and his decision must therefore stand.

Decision

21. There are no material errors of law in the determination of Judge Cox such that the determination falls to be set aside. This appeal is dismissed.

Anonymity

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In light of my decision, I have considered whether to make a fee award under Rule 23A (costs) of the Asylum and Immigration Tribunal (procedure Rules 2005 and section 12(4) (a) of the Tribunals courts and enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the appeal has been dismissed, the fee award of Judge Cox is confirmed.

Signed Dated

M Robertson
Sitting as Deputy Judge of the Upper Tribunal