IAC-TH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14508/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2016	**On 21 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

M C
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Avery, Home Office Presenting Officer
For the Respondent: Mr Claire, Counsel for Bernard Chill & Axtell Solicitors, Southampton

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.

2. The Appellant is a citizen of South Africa born on 30 July 1950. She appealed against the Respondent's decision of 2 October 2014 refusing to

grant her entry clearance to the United Kingdom as an adult dependent relative of her two sons who live in the United Kingdom, being [JsP] and [JeP]. Her appeal was heard by Judge of the First-tier Tribunal Suffield-Thompson on 25 August 2015. She allowed the appeal under Article 8 of ECHR in a decision promulgated on 27th August 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Colyer on 31 December 2015. The permission refers to the grounds which state that the judge made several misdirections in law in her assessment of Article 8. The Appellant was 64 years old when the application was made and so was unable to fulfil the entry clearance requirements as an adult dependent relative and her circumstances were that she did not require personal care and was not wholly or mainly dependent on her sons in the United Kingdom. The permission states that that being the case there were no good arguable reasons for considering Article 8 outside the Rules and the judge's assessment on the Appellant's removal from the United Kingdom is disproportionate as she is currently in the United Kingdom on a visit visa. The permission states that the decision appealed against was not a removal decision so the points put forward about her closeness to her sons in the United Kingdom are not relevant considerations. What the judge should have looked at was the situation at the date of the decision when it was found that the Appellant could not meet the terms of the Rules. The permission goes on to state that the Article 8 consideration should have been based on whether family life could continue to be enjoyed by visits as it is at the moment and the judge should not have made assessments under Section 117 of part 5A of the Nationality, Immigration & Asylum Act 2002 as there is no removal decision.

4. There is no Rule 24 response.

The Hearing

5. The Presenting Officer submitted that the judge approached this appeal as if it was a removal case, but it is not, it is a refusal of entry clearance. He submitted that there are serious errors in the decision because of this approach.

6. He submitted that it is not relevant whether this Appellant is close to her sons in the United Kingdom. She is presently in the United Kingdom as a visitor and her visit visa has expired. He submitted that the judge should have considered the situation under the Rules at the date of the application and if necessary under Article 8.

7. The Presenting Officer submitted that the judge accepts that the Appellant's application cannot satisfy the requirements of the Immigration Rules (Paragraph 23). He submitted that there are no exceptional or compelling circumstances in this case. He submitted that the judge bases her findings on the fact that the Appellant is living with one of her sons in the United Kingdom as a member of his household but the Appellant had not even been staying there for a year so based on this application, this

cannot be considered. He submitted that this part of the judge's decision is fundamentally flawed and is unsustainable.

8. The Presenting Officer submitted that the judge failed to look at Article 8 through the prism of the Rules. If the judge is going to consider the appeal outside the Rules she still has to refer back to them as the starting point. He submitted that the judge has not explained why she finds that this case is compelling or exceptional.

9. The Presenting Officer submitted that for the judge to allow the appeal she would have to consider the impact of the success of the Appellant's application on effective immigration control and public interest.

10. He submitted that there are material errors of law in the judge's decision.

11. Counsel for the Appellant submitted that the Respondent has not specified what misdirections the judge has made in law in her assessment of Article 8. He submitted that the Appellant's representative accepted that the application cannot succeed under the Immigration Rules and the grounds are merely a disagreement with the decision making process.

12. Counsel submitted that at paragraph 23 of the decision the judge states that the Appellant has been living with her son for one year and Counsel submitted that he accepts that that is not the case. She has been staying there for less than a year, but he submitted that that is not the only reason why the judge reached her decision.

13. I was referred to paragraph 35 of the decision and the oral evidence given by the Appellant's two sons. I was referred to the very strong bond that the Appellant has with her sons. The judge refers to the sons both being in the army and the Appellant being emotionally very dependent on them.

14. At paragraph 39 of the decision the judge refers to Sections 117A to B and the maintenance of effective immigration control. He submitted that a proper balancing exercise has been carried out and there is no misdirection of law. The judge has found that this Appellant's family life outweighs what is required by Section 117B.

15. Counsel then submitted that Section 117 was not referred to by the Presenting Officer in his oral submissions. He submitted that Section 117B refers to every immigration decision, not just a removal decision. He submitted that the judge recognises that public interest has to be taken into account and she has referred to the case of **Razgar [2004] UKHL 27** in connection with the balancing exercise. He submitted that the judge has applied the law, the correct statute and the correct case law. He submitted that the judge has discretion. He pointed out that the Respondent did not attend the hearing and submitted that it is clear from the decision that the judge finds that the rights of the Appellant outweigh public interest.

16. The Presenting Officer referred me to paragraph 41 onwards of the decision in which the judge states that the Respondent's decision was

unlawful. At paragraph 44 she refers to the case of **Singh [2015] EWCA Civ 74** and the approach to be taken by judges when making their decisions. He submitted that the judge should have considered whether the immigration decision was a justified interference with the Appellant's right to family and/or private life and that the provisions of the Rules or other relevant statements of policy may again re-enter the debate, but this time as part of the proportionality assessment. The judge should be asking whether the interference is a proportionate means of achieving the legitimate aim in question and whether there is a fair balance as to the competing interest.

17. Counsel submitted that the judge found that the Respondent did not make a fair assessment and so her decision was unlawful. He submitted that the judge applied the law equitably and came to a conclusion that is supported by the evidence which was before her.

18. Counsel submitted that there are compelling circumstances in this case and the appeal should be allowed.

19. The Presenting Officer submitted that there is a problem with the judge's findings as they are based on an error and this has to be addressed. The relevant date is the date of the application. He submitted that at the time of the application the Appellant was visiting her family members, not living with them as part of their family. He submitted, therefore, that the judge's assessment of her family life is undermined and in fact her whole assessment is undermined and Section 117B is not relevant. He submitted that an assessment cannot be sustainable when there has been a fundamental misunderstanding of the law.

20. The Presenting Officer submitted that if the judge found the Respondent's decision to be unlawful she should have referred the case back to the Secretary of State, but she did not do that. He submitted that no assessment was made as at the date of application and compelling circumstances were not considered based on the situation at that time.

21. The Presenting Officer submitted that the provisions in the Immigration Rules relating to people who require care are clear and the Appellant does not meet the terms of the Rules.

22. The Presenting Officer submitted that there is nothing exceptional or compelling in this claim and that the judge's assessment is flawed.

23. Counsel submitted that it is not fair to say that the judge focused on matters post-decision. I was referred to paragraph 31 of the decision in which the Appellant's evidence about her finances are narrated. At paragraph 32 the judge deals with the Appellant's problems if she has to return to South Africa as a single white female living alone. He submitted that there are clear concerns about the Appellant's safety.

24. At paragraph 34 of the decision the judge assessed the part the Appellant plays in her sons' lives in the United Kingdom. He submitted that all

matters have been taken into account and the First-tier Tribunal's decision should stand.

Decision

25. The Appellant applied for entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules. The refusal letter dated 2 October 2014 explains that the terms of the Rules cannot be satisfied and states that there are no exceptional circumstances for the claim to be considered under Article 8 of ECHR.

26. The Appellant's representative accepts that the terms of the Immigration Rules cannot be satisfied.

27. The Appellant is in the United Kingdom on a visit visa. This has now expired. Her main residence is her brother's house in South Africa in which she lives rent free.

28. In paragraph 20 of the decision the judge states that the terms of the Immigration Rules cannot be satisfied. The Appellant does not need daily care or long-term personal care for everyday tasks. At the date of application she was only 64 years old.

29. The judge has approached this case as a removal case. It is not a removal case. The Appellant has been refused entry clearance to the United Kingdom. Because of the way the judge has approached matters, there are errors in her decision.

30. The judge had to consider the situation at the date of the application. At paragraph 23 the judge states that the Appellant has been living with one of her sons for a year, which is not the case. She is a visitor. The judge has considered her bond with her sons but this cannot be considered as it is not a removal case. This is an error by the judge.

31. The judge should have considered the application under Article 8 within the Rules. The Appellant is here on a visit visa and the judge should have decided if by not granting her entry clearance, this would result in an interference with her family and private life sufficient to engage Article 8. The judge should then have considered proportionality and whether the Appellant's relationship with her sons could continue by means of visits as at present. At the date of application there were no exceptional circumstances.

32. It is clear from the wording of the decision that the judge's findings are based on an error. There is no removal decision. The judge erroneously stated that the Respondent's decision was unlawful but she did not refer it back to the Secretary of State for reconsideration. There are material errors of law in the decision.

Notice of Decision

33. There are material errors of law in the First-tier Tribunal's decision promulgated on 27 August 2015. This decision must be set aside.

34. No findings of the First-tier Tribunal can stand. Under Section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact-finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Suffield-Thompson.

35. Anonymity is directed

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 their 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.

Signed Date

Deputy Upper Tribunal Judge I A M Murray