



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01326/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 June 2018

Decision & Reasons Promulgated
On 2 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

MARIO ALBERTO RAMIREZ CARDENAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Rene, Counsel, instructed by Thoree & Co Solicitors
For the Respondent: Mr Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Colombia who was born on 6 October 1975. On 11 February 2016 the Respondent refused his human rights application for leave to remain in the United Kingdom on the basis of his family life with his wife and his private life. The Appellant appealed against that decision and his appeal was dismissed by First-tier Tribunal Judge I D Boyes in a decision and reasons promulgated on 7 July 2017.
2. The Appellant sought permission to appeal against the decision of Judge I D Boyes and permission was granted on renewal to the Upper Tribunal by Upper Tribunal

Judge Finch, who concluded that it was arguable that the failure to refer to the elements contained in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) meant that 'anxious scrutiny' had not been applied of the situation of the Appellant and his wife.

3. The appeal therefore comes before the Upper Tribunal in order to determine whether there was an error of law in the decision of Judge Boyes and if so whether to set that decision aside.
4. The Appellant relies on both sets of grounds seeking permission to appeal. In his grounds to the First-tier Tribunal he argues that the First-tier Tribunal erred in failing to consider the nature of the Appellant's previous grant of leave in 2012; failed to make reference to or analyse section 117 of the 2002 Act and in particular failed to consider that the Appellant had formed his relationship with his wife when he had leave to remain; failed to take into account that the Appellant's last offence had been committed 4 years previously; failed to give any weight to the fact that his last grant of leave in February 2012 was made in the knowledge of his previous offending; failed to give weight to factors in the Appellant's favour in the balancing exercise; failed to take account of the factual matrix of his life and failed to take his wife's private life into account.
5. In his grounds seeking permission to the Upper Tribunal, the Appellant relies on his previous grounds and emphasised the argument that section 117 B was not dealt with at all.
6. I heard representations from Mr Rene and Mr Walker. Mr Rene relied on his grounds and took me to the relevant parts of Judge Boyes decision. Mr Rene added that it was unclear on what basis the Appellant had been granted discretionary leave in 2012. I referred him to paragraph 22 of the reasons for refusal letter (RFRL) which stated that the Appellant had supplied evidence that he was married to a British Citizen who had a child from another relationship with whom a civil court had stated she must have weekly access and this was the basis of the grant. Mr Rene argued that the Judge had erred in failing to give sufficient weight in the balancing exercise to the fact that the Appellant had established his relationship whilst he was here with leave.
7. Mr Walker relied on the Rule 24 Response. Whilst the decision was short, all material factors were considered. The Judge gave adequate consideration to Article 8 outside the Rules.

Discussion

8. The First-tier Tribunal found that the Appellant did not qualify for limited leave to remain as a partner because he did not meet the suitability requirements of the Immigration Rules (S-LTR). The Appellant had been convicted on 17 June 2013 of outraging public decency for which he was sentenced to imprisonment of 4 months wholly suspended for 18 months. The grounds seeking permission to appeal do not allege in terms that the First-tier Tribunal's decision under the Immigration Rules

contained a material error of law. What is said in relation to the previous offences is that the Appellant was granted leave in 2012 when the Respondent was aware of his offending behaviour and that this was a relevant matter for the Judge in the balancing exercise.

9. This point is not arguable. The Appellant was granted further leave in 2012 prior to the commission of this offence. The Judge did not err in taking that conviction into account and consequently finding that the Appellant did not meet the suitability requirements of the Rules and the Judge was correct to direct himself that in order to succeed outside the Rules, given that the Appellant's family life was precarious, that he was required to show something exceptional about his case (**R (on the application of Agyarko) v SSHD** [2017] UKSC 11). He proceeded correctly on the basis that something very compelling was required to outweigh the public interest, applying a proportionality test.
10. The grounds are correct that the Judge did not refer to section 117 B of the 2002 Act. According to **Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)** it is not an error of law not to refer to s117 considerations if the Judge has applied the test he or she was supposed to apply according to its terms; what matters is substance and not form.
11. Section 117 B contains the public interest considerations which are applicable in all cases where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for his private and family life under Article 8 ECHR.
12. The Appellant's relationship with his wife was established at a time when he had discretionary leave to remain. Section 117B (4) provides that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the UK unlawfully. Because the Appellant's relationship with his wife had been established whilst he was here lawfully, the little weight provisions in this section did not apply to him. There cannot therefore be an error of law in failing to apply this provision. In fact, had the Judge applied this provision to the Appellant's relationship it would have been an error of law. As stated in paragraph 9 above, the Judge directly himself appropriately in relation to the Appellant's family life with his wife in applying the test approved in **Agyarko**.
13. Nor can it be said that the fact that the Judge did not refer to the other factors in section 117 B meant that material factors were not taken into account. The ability to speak English and financial independence are neutral factors and it does not follow that that the presence of those factors means that an applicant should be given leave to enter or remain (**Rhuppiah v SSHD** [2016] EWCA Civ 803).
14. Having directed himself appropriately, I find that the conclusion that the decision to remove was a proportionate one was not irrational. The Judge took all material matters into account and came to a conclusion that was open to him on the facts of the case. He gave adequate reasons for concluding that there were no significant

hurdles to the Appellant's wife joining him in Colombia. He took account of her age, her health, the Appellant's ability to find work and accommodation and his ability to work. It cannot be argued that he erred in his treatment of the Appellant's previous convictions as these were not mentioned in the balancing exercise at paragraphs 23 to 31. Whilst it is argued that the Judge failed to have regard to the Appellant's wife's private life in the UK it is clear that he took all the factors that she advanced in her witness statement into account.

15. There is therefore no error of law in the decision of the First-tier Tribunal and I do not set it aside.

Notice of Decision

The decision of the First-tier Tribunal did not contain a material error of law and I do not set it aside.

There is no direction for anonymity.

Signed

Date 8 June 2018

A handwritten signature in black ink, appearing to be 'L J Murray', written in a cursive style.

Deputy Upper Tribunal Judge L J Murray