



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/43675/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 6th May 2014

Determination

Promulgated

On 19th May 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

NKOSILATHI DLAMINI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Z Preston, Immigration Legal Advice Centre

For the Respondent: Mr M Diwnycz, HOPO

DETERMINATION AND REASONS

1. These are cross appeals against the decision of Judge Hindson made following a hearing at Bradford on 21st February 2013.

Background

2. The Appellant is a citizen of Zimbabwe born on 25th June 1979. He made an application for leave to remain on the basis of his UK ancestry which was refused on 7th October 2013. He had provided a Zimbabwean birth certificate as evidence that he had a grandparent who was born in the UK but enquiries by the Respondent revealed that it was a forged document. The application was refused under paragraph 192(i) and (iv) because he had failed to show the necessary family history and under paragraph 322(1A) because he had submitted a false document.
3. At the hearing the Appellant accepted that the document was false. He came here initially as a student in 2002 and when his leave was about to expire he sought the assistance of an agency in order to secure further leave. He said that he did not appreciate that they had done anything dishonest. When that leave was about to expire he asked them to seek a renewal and he was advised that he could do so himself. They sent him the documents which they had used in his previous application and only then did he discover that they had used the false document. Notwithstanding that discovery he went on to apply for an extension of his leave using it.
4. When that leave was about to expire he made the application which was the subject of the appeal before the judge again knowingly relying on the false instrument.
5. The judge said that the Appellant was a dishonest man and he found the account of how he got his first ancestry visa to be inherently implausible. Even if he was telling the truth he accepted knowingly using the false birth certificate on two occasions. He dismissed the appeal under the Rules cited in the refusal.
6. The Appellant met his partner in 2008 and they married in 2011. Their daughter was born in 2012. His wife is a British citizen and she has never been to Zimbabwe.
7. The judge accepted that the Appellant was well thought of by his family and friends and had letters of support to that effect. He works as a care assistant and has undertaken a number of courses in the UK to improve his prospects. He also undertakes caretaker duties at a church hall which is a condition of his being able to rent a cottage from them. If the Appellant was to be removed, it was likely that his wife and daughter would not be allowed to continue to rent the property as she would be unable to manage the obligatory caretaking work.
8. He noted that the Appellant's wife had some health difficulties. She has joint problems which require special insoles to help her walk, and chronic nephritis which periodically causes her to have blood in her urine. She complains of chronic tiredness and her ability to work is limited, although she is not currently having any treatment but takes over-the-counter supplements.

9. The judge accepted that if the Appellant was removed his wife will lose the main source of income into the family and would have to turn to the State for support. He found that as a white British woman his wife would be at risk of harm in Zimbabwe as would his daughter as a mixed race British child.

10. He wrote as follows:

“I have considered the position of the Appellant with respect to leave to remain as a partner and as a parent. I am satisfied that he cannot meet the Rules for either because both require that he has made a valid application for the relevant leave which he has not.

He also falls foul of S-LTR2.2 which provides that leave will normally be refused if the applicant has relied on a false document though I accept that refusal on this ground is discretionary.”

11. The judge concluded that the Appellant could not succeed under the Rules but, so far as Article 8 was concerned, he stated:

“I have considered the five questions posed in Razgar and I am satisfied that the first four can be answered in the affirmative. So far as proportionality is concerned I have weighed the not insignificant consequences to the family, in particular the Appellant’s wife and daughter, of the interference against the interests of the wider community. They would lose their husband/father, their home and their financial independence from the state. I note that it is likely that the economic wellbeing of the country will in fact be maintained by the Appellant remaining and working legally to support his family. If he was returned to Zimbabwe his family would inevitably have to turn to the state for support. I do not consider it reasonable to expect the family to go to live with him in Zimbabwe.”

The Grounds of Application

12. Both the Appellant and the Respondent sought permission to appeal against the decision.

The Appellant’s grounds

13. The Appellant sought permission to appeal on the grounds that the judge had erred in law in stating that he could not meet the Rules for leave to remain as a partner or as a parent on the grounds that both require a valid application for the relevant leave which the Appellant had not made. Paragraph GEN 1.9 of Appendix FM states that the requirement to make a valid application will not apply when, inter alia, an Article 8 claim is raised in an appeal or in response to a One-Stop Notice issued under Section 120 of the Nationality, Immigration and Asylum Act 2002. The Appellant relied on the Supreme Court judgment of Patel, Alam and Anwar v SSHD [2013] UKSC 77 for the proposition that the Section 120 statement and instead of relying on the Immigration Rules to justify leave to remain an Appellant

can rely on a human rights ground. The majority in the case of AS Afghanistan was correct to hold that an Appellant could invoke a different Immigration Rule to justify leave to remain.

14. The judge therefore failed to take into account Section 85 of the Nationality, Immigration and Asylum Act 2002 in that he failed to take into account the additional ground submitted under Section 120 of the 2002 Act and paragraph GEN 1.9. He meets the requirements of Appendix FM EX1 and the appeal ought to have been allowed under the Immigration Rules.
15. Permission to appeal was granted by Judge Holmes for the reasons stated in the grounds.

Findings on the Appellant's challenge

16. The requirements for indefinite leave to remain as a partner are set out in Section R-ILRP of Appendix FM.
17. R-ILRP.1.1 states that the requirements to be met for indefinite leave to remain as a partner are –
 - (a) the applicant and their partner must be in the UK;
 - (b) the applicant must have made a valid application for indefinite leave to remain as a partner;
 - (c) the applicant must not fall for refusal under any of the grounds in Section S/LTR: suitability – leave to remain;
 - (d) the applicant must meet all of the requirements of Section E-LTRP: eligibility for leave to remain as a partner; and
 - (e) the applicant must meet all of the requirements of Section E-ILRP: eligibility for indefinite leave to remain as a partner.
18. The judge was wrong when he stated that the Appellant could not meet the Rules because he required to have made a valid application for the relevant leave. This is not a requirement where Article 8 is raised (GEN 1.9).
19. However he was right to state that the applicant must not fall for refusal under any of the grounds in Section S-LTR which includes, under S-LTR.2.2:

“Whether or not to the applicant’s knowledge –

 - (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application.”

20. The judge correctly stated that refusal on these grounds is discretionary. S-LTR.2.1 states that the applicant will normally be refused on grounds of suitability if any of the paragraphs S-LTR.2.2 to 2.4 apply. This is an Appellant who, on the judge’s findings, knowingly produced a false document in order to try to obtain leave on the basis of UK ancestry, leave which he knew that he was not entitled. In these circumstances the normal course of events should be followed and a refusal on suitability grounds made.
21. Accordingly the Appellant is not in a position to successfully navigate his way through to Section EX1 and to rely upon that exception so as to bring himself within the Immigration Rules.
22. Whilst the judge’s reasoning was overly compressed his conclusion was right.

The Respondent’s challenge

23. The Secretary of State also sought permission to appeal the decision to allow the appeal on Article 8 grounds in the following terms.
24. The Secretary of State noted that the Appellant had submitted false documents to acquire and repeatedly extend his leave in the UK. The judge failed to give adequate consideration to the Secretary of State’s legitimate interests in maintaining effective immigration control given the Appellant’s complete disregard for the Rules and laws in the UK. The judge found that the Appellant’s wife and child would be unable to return to Zimbabwe with him but her illness was under control at the date of hearing and there was no evidence that she was unable to acquire the relevant drugs in Zimbabwe. The Appellant failed to meet the requirements of the Rules and the judge failed to identify any compelling circumstances which would render his removal disproportionate.
25. The Tribunal did not apply the income threshold in its Article 8 assessment. In making a decision it was necessary for the decision maker to consider all the legislation relevant and to give reasons for the way it applies the legislation to the facts of this case. The income threshold ensures that those who choose to establish their family life in the UK should have the financial ability to support themselves and to be able to support their partner’s integration into British society. It was inappropriate that the Tribunal should decide to disregard the financial requirements of the Rules in its proportionality assessment.
26. The Immigration Rules specify that the existence of insurmountable obstacles to family life continuing outside the UK is a key factor in the proportionality assessment, albeit not a determinative factor. The Rules require an assessment of whether removal is prevented by

insurmountable obstacles rather than whether it is reasonable to expect the family to leave together. It was acknowledged that the facts of the individual case are the starting point when considering proportionality but they are also the starting point which then has to be balanced against the public interest as reflected in the new Rules. The public interest achieved by applying clear Rules must be measured by the effect of the Rules across the board not just in relation to an individual case. The Tribunal did not apply this approach and misdirected itself in law. Furthermore it was made clear in Gulshan [2013] UKUT 00640 that the Article 8 assessment should only be carried out where there are compelling circumstances not recognised by the Rules. The Tribunal did not identify such compelling circumstances and its findings are unsustainable. Gulshan also made it clear that an appeal ought only to be allowed where there are exceptional circumstances which are ones where refusal would lead to an unjustifiably harsh outcome.

27. Permission to appeal was granted by Judge Landes on 24th April 2014. Judge Landes said that there was force in the argument that the judge had failed to give adequate consideration to the interests of maintaining immigration control, given the Appellant's submission of false documents. However she considered the other grounds to be thin. There was no challenge to the adequacy of the judge's reasoning that it would not be reasonable for the family to live in Zimbabwe nor to his finding that the Appellant's wife and child would be at risk of harm there. If family members would be at risk it is difficult to see how this is not an insurmountable obstacle. If EX1 applies the financial threshold is not applicable under the Immigration Rules. It is difficult to see how the Respondent could argue that the judge should have applied the income threshold having found that the family could not live in Zimbabwe. If the judge was right in his factual conclusion there would be compelling circumstances.

Submissions

28. Mr Diwnycz relied on his grounds.
29. Mrs Preston submitted that the judge had identified the exceptional circumstances in this case and was right to conclude that the consequences of removal would be unjustifiably harsh for the British wife and child. The question of the income threshold was not relevant, and EX1 had no such threshold.

Findings and Conclusions

30. With respect to Ground 1, the judge plainly did take into account the Secretary of State's legitimate interests in maintaining effective immigration control. He started off his considerations by with an assessment of the Respondent's case, and stating in bold terms that the Appellant was a dishonest man. The judge noted that he had omitted to mention, in emphasising the fact that he has worked to maintain his

family, that he had no right to work and was occupying a job that potentially someone with the right to be here and to work was denied.

31. Essentially Ground 1 is a complaint about weight and amounts to a disagreement with the decision.
32. The reference to the income threshold is misconceived. The question of whether the Respondent's decision was in pursuant of a legitimate aim, one of which is the economic wellbeing of the country, was in fact addressed by the judge, who noted that the economic wellbeing of the country would be maintained by the Appellant working here and, if he were to be removed, his wife and child would lose their financial independence from the State. Moreover there is no reference to such a threshold in Section EX1 which refers solely to the reasonableness of expecting a British citizen child to leave the UK or to insurmountable obstacles to family life with the partner continuing outside the UK.
33. The finding by the judge that they would be at risk of harm in Zimbabwe was not challenged in the grounds nor by Mr Diwnycz at the hearing. It is therefore difficult to see why the substantive requirements of EX1 are not met and hard to argue that the judge's decision to allow the appeal on Article 8 grounds was not open to him.
34. Finally, the facts of this case are wholly different from the facts in Gulshan. Here there is a clear argument that there are compelling circumstances not recognised by the Rules. The Appellant's British wife suffers from a number of health problems. There is a British citizen child.
35. The Secretary of State's challenge therefore fails.

Decision

The judge's decision stands. The Appellant's appeal is dismissed under the Immigration Rules but allowed on human rights grounds.

Signed

Date

Upper Tribunal Judge Taylor