



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10484/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 15 July 2015

Decision & Reasons Promulgated
On 23 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**ALBERT RETHABILE LESOLE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moksud for IIAS

For the Respondent: Ms C Johnson Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Holt promulgated on 9 February 2015 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 11 May 1993 and is a national of South Africa.
4. On 29 October 2009 the Appellant applied for asylum. On 22 March 2010 the asylum application was refused but the Appellant was granted discretionary leave to remain in the United Kingdom until 11 November 2010 when he reached 17 ½. On 10 November 2010 the Appellant made an application for further leave to remain and this was refused on 9 February 2011 and was reconsidered on 23 March 2011 and refused on 12 July 2011 and reconsidered on 26 August 2011 and refused again. The Appellant lodged a further appeal on 21 September 2011 and then the refusal decision was withdrawn to be reconsidered and the decision subject of this appeal was made on 10 November 2014. The reasons for refusal can be summarised as follows:
 - (a) The claim that he would have no where to live is not one which engages the convention.
 - (b) The Appellant had given contradictory accounts of his relationship with his family in South Africa and therefore it was not accepted that he had no where to go.
 - (c) The Appellant had produced a further witness statement in support of his further application for leave addressing the contradictions but it was noted that the Appellant would now be returning as an adult and it was still asserted that he had family there.
 - (d) The failure of the Respondent in trying to trace his family had not disadvantaged the Appellant.
 - (e) The Appellant does not have a British partner or child so cannot meet the requirements of Appendix FM.
 - (f) The Appellant has family in South Africa and therefore he failed to demonstrate that he had no

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal and was unrepresented at the appeal. First-tier Tribunal Judge Holt ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :
 - (a) The Appellant and his sister Albertina gave evidence before the Judge who found them 'pleasant and polite' and found that they did not exaggerate and she had a degree of sympathy for them.
 - (b) The Appellant in evidence admitted he had no basis for fearing torture , inhuman or degrading treatment.
 - (c) His claim was based on the fact that he had lived in the UK since 2009 with his grandmother Lucy who he described as his mother, and his sister Albertina.
 - (d) The Appellant gave evidence that it would be very difficult for him to adapt to life in South Africa.

- (e) He admitted that he had relatives there including his birth mother and an aunt but they were living in precarious economic circumstances and would not be able to care for him.
 - (f) The Judge found that he would not qualify under Appendix FM or paragraph 276 ADE and therefore concluded that this was a case for consideration under Article 8 outside the Rules.
 - (g) She set out the five questions under Razgar [2004] UKHL 27 against that factual background and determined that the assessment came down to proportionality and found that the decision was proportionate.
6. Grounds of appeal were lodged arguing that the reasoning in respect of paragraph 276 ADE (vi) was not sufficiently reasoned; there were no findings about the testimony of the second witness.
7. On 4 March 2015 First-tier Tribunal Judge Simpson gave permission to appeal on both grounds.
8. At the hearing I heard submissions from Mr Moksud on behalf of the Appellant that :
- (a) The reasons why the Appellant could not meet the provisions of paragraph 276ADE were not adequately reasoned.
 - (b) When asked which provision he could arguably meet that would make tgis error material Mr Moksud conceded that he could not meet any of them but the reasons for this were not set out.
 - (c) He stated that the Judge failed to discuss or give weight to the evidence of the Appellant's sister's evidence. He accepted that this may have made no difference to the outcome of the case but it may have but was unable to articulate for me what evidence she gave might have made a difference and why.
9. On behalf of the Respondent Ms Johnson submitted that :
- (a) At the time of the application the Appellant was 16years old and given the period he had lived in the United Kingdom the provisions of paragraph 276ADE could not be met.
 - (b) The Judge looked at Article 8 outside the Rules.
 - (c) The sister was an adult. There was no evidence that given that they could not continue their family life in South Africa.

Legal Framework

10. It is now generally accepted that the new IRs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:
- "30. ... if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it

would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules.”

11. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

“64. ... there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules.”

12. More recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

“In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that **compelling circumstances** would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of “very compelling reasons” (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State’s formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ.”(my bold)

13. In an Article 8 assessment the Tribunal is also to take into account Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) which sets out the public interest considerations that I must have regard to in determining proportionality.

Finding on Material Error

14. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

15. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): “*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.*”

16. The first challenge to the Judge’s decision was that insufficient reasons were given as to why the Appellant could not meet the private life requirements of paragraph 276ADE of the Immigration Rules.

17. Mr Moksud was unable to advance an argument that failure to set out why the Appellant could not meet the private life requirements was material to this

decision on the basis that it was arguable that he could meet any of the provisions. I am satisfied that in fact the Appellant could not meet any of the provisions that would have led to success under this Rule. The undisputed background to the Appellant's application was that he had come to the United Kingdom in 2009 when he was 16 years old made the application for further leave in 2010 when he was 17 years old. Paragraph 276 ADE sets out various avenues by which an applicant can rely on private life in the United Kingdom under the Rules. While not explicitly referring to each route the Appellant had not lived in the United Kingdom for over 20 years and therefore could not fulfil the criteria for 276 ADE(iii)); while under 18 had not lived in the United Kingdom for 7 years and therefore 276ADE(iv) did not assist; while under 18 and under 25 he had not spent at least half his life in the United Kingdom and therefore 276ADE (v) did not apply and finally he was not over 18 at the time of application and therefore could not benefit from 276ADE(vi). Perhaps the Judge could have set out her reasoning more fully but it could not have made any material difference to the outcome as the Appellant could not meet the requirements of the Rule.

18. It was suggested that there was no finding about the testimony of the second Appellant who was the Appellant's sister. Again Mr Moksud failed to articulate it what way this was material or what aspect of her evidence could have made a difference to the outcome in this case. The only issue in the case was whether there were compelling reasons not covered by the Rules that warranted a grant of leave outside the Rules. In so far as the sister's evidence might be of relevance that was the issue it would have to be relevant to. I further remind myself that as a matter of principle the Judge is not required to summarise or indeed make findings in relation to every witness in the case.
19. The Judge rightly concluded that this case was an assessment under Article 8 outside the Rules and carried out a detailed assessment by reference to the questions posed by Razgar. Indeed the Judge while not particularly detailed the Judge took into account the sisters evidence at paragraph 5 and at paragraph 14. She concluded that given that the sister's status in the United Kingdom was by her own evidence something that could be categorised as precarious she was likely to be returning to South Africa also. Given that the assessment of proportionality involves an assessment of whether family life can reasonably be enjoyed elsewhere in this case she took into account that the relationship between these adult siblings could in all likelihood continue in South Africa.
20. I am also bound to say that in assessing the public interest factors the Judge should have considered (but did not explicitly) those matters set out in paragraph 117B of the Nationality Asylum and Immigration act 2002 which would have included, amongst other things, a finding that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. So again it is difficult to determine in what way the evidence of a sister that the Judge found was also likely to be returning to South Africa could have made a difference to the outcome.
21. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

22. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

23. **The appeal is dismissed.**

Signed

Date 22.7.2015

Deputy Upper Tribunal Judge Birrell