



IAC-BH-PMP-V1

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

Appeal Number: IA/14647/2015

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 8th March 2016**

**Decision Promulgated
On 9th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**GUGULETHU STHEMBISO DIAMINI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion and to be consistent I shall continue to refer to the parties as they were before the First-tier Tribunal.

2. On 16th December 2015 Judge of the First-tier Tribunal Keane gave permission to the appellant to appeal against the decision of Judge of the First-tier Tribunal A J Parker in which he allowed the appeal on human rights grounds against the decision of the respondent to refuse leave to remain applying the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules. The appellant is a male citizen of South Africa born on 11th June 1984.
3. In granting permission Judge Keane noted that the grounds of application contended that the judge's human rights conclusions were inadequately reasoned being, apparently, limited to the statement in paragraph 41 that the decision of the respondent to remove the appellant was not compatible with the Human Rights Act and "the appeal is proportionate".
4. Judge Keane granted permission because it was arguably incumbent upon the judge to arrive at a reasoned decision applying the five stage tests set out in *Razgar* [2004] INLR 349 HL.
5. At the hearing before me Mr McVeety emphasised that the judge had quoted relevant case law but the decision did not show that he had applied any of the principles to findings in the appeal. Further, the judge had not applied the compelling circumstances test referred to in recent Article 8 jurisprudence such as that set out in *SS (Congo)* [2015] EWCA Civ 387. Further, whilst the judge had referred to Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended), there had been no finding made upon it. Indeed, the judge did not appear to have identified the limb of Article 8 which was relevant.
6. As the appellant was unrepresented I explained to him the nature of the proceedings and, in particular, the need for me to consider whether or not the judge had, actually, made an error on a point of law in the decision. The appellant indicated that he understood the arguments but emphasised that he was in agreement with the findings of the judge and he had noted that the decision had made reference to the application of Section 117B of the 2002 Act in paragraphs 34 and 35.

Conclusions

7. After considering the matter for a few moments I announced that I was satisfied that the decision showed an error on a point of law and should be set aside. My reasons for that conclusion follow.
8. Although the decision of the judge makes copious reference to relevant case law, it is not clear that the judge applied the principles to any findings of fact in this case. The decision refers to the evidence of the appellant and his wife, both written and oral, even classifying some of it as "vague" (paragraph 23) yet both were found to be credible witnesses. However, the judge does not make any initial decision about whether or not the Rules in Appendix FM can apply to the circumstances of the parties as he found them to be, particularly bearing in mind the existence of British citizen children. Further, no compelling circumstances are identified to establish that Article 8 issues can be considered outside the Rules applying the five stage *Razgar* approach. Whilst Section 117B is referred to in terms of its effect and the judge identifies two qualifying children for the purpose of that section, there is no consideration of the requirement that it would not be reasonable to expect a child to

leave the United Kingdom. All these matters amount to significant errors on points of law requiring that the decision should be set aside.

9. Having regard to the need for the appeal to be heard again and fresh findings of fact to be made, I am satisfied that it is appropriate to remit the matter to the First-tier Tribunal. In doing so find that such remittal comes within the terms of paragraph 7.2 of the Practice Statement of the Senior President of Tribunals of 25th September 2012.

Notice of Decision

10. The decision of the First-tier Tribunal shows errors on points of law. I set that decision aside and remit the appeal to the First-tier Tribunal for hearing afresh.

Anonymity

11. Anonymity was not requested before the First-tier Tribunal which did not make a direction. I do not consider that an anonymity direction is appropriate in this appeal before the Upper Tribunal.

DIRECTIONS

12. The appeal is remitted to the First-tier Tribunal for a fresh hearing at the Stoke Hearing Centre.
13. The fresh hearing should not be before Judge A J Parker.
14. No interpreter will be required for the hearing unless the parties otherwise indicate.
15. The time estimate for the hearing is two hours.

Signed

Date

Deputy Upper Tribunal Judge Garratt