



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

**Appeal Number: IA/48471/2014**

**THE IMMIGRATION ACTS**

**Heard at** Field House

**Decision and Reasons  
Promulgated**

**On** 10 February 2016

**On** 23 February 2016

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**WINSTON GEORGE OTTEY  
(Anonymity Direction Not Made)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Appellant in person.

**DECISION AND REASONS**

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. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier

Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Webb, promulgated on 17 August 2015 which allowed the Appellant's appeal.

### Background

3. The Appellant was born on 16 October 1961 and is a national of Jamaica.
4. On 18 November 2014 the Secretary of State refused the Appellant's application for discretionary leave to remain in the UK.

### The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Webb ("the Judge") allowed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 19 December 2015 Judge Frankish gave permission to appeal stating *inter alia*

"2. The application for permission to appeal asserts that the Ft-TJ wrongly allows the appellant further leave under the respondent's policy because she mistakenly granted him such leave previously; such extension is, in any event, discretionary, not mandatory; the appellant's circumstances entitled the respondent to refuse an extension under her discretion.

3. Essentially the decision holds the respondent to her original mistake, a conclusion that is an arguable error of law"

### The Hearing

7 (a) Ms Everett, for the respondent, adopted the grounds of appeal, and told me that the undisputed facts in this case are that the original grant of discretionary leave to remain was made on the basis of a material error of fact. The respondent was granted discretionary leave to remain on the basis that the respondent mistakenly believed that the appellant was the father of a British child, when in fact he is the grandfather of that British child. She told me that, in effect, the Judge's decision simply perpetuates that initial error.

(b) Ms Everett reminded me that the wording of the policy was that discretionary relief would "...normally be granted" and that there is no obligation on the Secretary of State to grant leave. It is not a mandatory grant of leave, it is a discretionary grant, and that discretion lies with the secretary of state.

8. Mr Ottey was without representation, so I spoke to him about this appeal. His position is quite clearly that the decision does not contain a material error of law, and that he did nothing to cause or contribute to the respondent's original error. He accepts that he is not the father of a British child, but that he is the grandfather of a British child, and tells me that he wants leave to remain in the UK because all of his family are here. He urged me to dismiss the appeal and allow the decision to stand.

## Analysis

9. It is beyond dispute that the foundation for the original grant of discretionary leave to remain was the respondent's belief that the appellant's circumstances were different. The appellant accepts (and the Judge found) that the original grant of discretionary leave was made on the basis that the appellant was the father, rather than the grandfather, of a British citizen child. It is not disputed that that was the respondent's own mistake and that the appellant did nothing to contribute to a misunderstanding; The appellant did not hold himself out to be the father of the British citizen child.

10. In VM (Zambia) v SSHD (2009) EWCA Civ 521 the Court of Appeal said that successive grants of discretionary leave did not put the SSHD in a position where she was required to show a change of circumstances in order to refuse Indefinite Leave to Remain.

11. At [19] & [20] the Judge correctly quotes from the respondent's own guidance. At [22] and [23] the Judge finds that because there has not been a change in the appellant's circumstances the appellant's appeal succeeds.

12. The difficulty with the Judge's reasoning is that his focus is on one part only of the respondent's guidance (set out at [20] of the decision). When the guidance is read as a whole it can be seen that the respondent's discretion is emphasised. There is no obligation on the respondent to grant discretionary leave to remain. The sentence which is quoted in part in [22] and [23] of the decision reads

"If the circumstances remain the same and the criminality thresholds do not apply, a further period of three years DL should normally be granted, decision makers must consider whether there are any circumstances that may warrant departure from the standard period of leave."

13. At [22] and [23] the decision of the Judge focuses on part only of that sentence. The Judge's reasoning places unwarranted emphasis on an examination of whether or not there has been a change of circumstances; the Judge closes his eyes to the discretion the Secretary of State is clearly empowered to exercise. The guidance does not contain a guarantee that if there is not a change in circumstances discretionary leave will be granted. I therefore have to find that the decision contains a material error of law. As the decision contains a material error of law, I must set it aside.

14. There is no great dispute about the facts in this case. I therefore find that there is sufficient material before me to enable me to substitute my own decision.

## Findings of Fact

15. The appellant arrived in the UK as a visitor in 2001. He has remained in the UK since then. Between 2001 and 2011 he was an overstayer. On 1<sup>st</sup>

September 2011 the respondent granted the appellant discretionary leave to remain outside immigration rules for three years.

16. The respondent granted the appellant discretionary leave to remain because the respondent believed that the appellant is the father of a British citizen child. That is wrong. The appellant is the grandfather of a British citizen child. That child's father is the appellant's son, who has a similar name to the appellant.

17. Before coming to the UK the appellant lived with his mother in Jamaica. In the time that the appellant has been in the UK, the appellant's mother has removed to the USA.

18. The appellant has three children, all of whom live in the UK. He also has five grandchildren in the UK. The appellant enjoys close relationships with his children and grandchildren. He typically looks after his grandchildren while their parents work. The appellant no longer has either relatives or property in Jamaica. The appellant regularly visits each of his children. His former partner (the mother of his children) lives in the UK, and has recently had treatment for breast cancer.

### Conclusions

19. At [18] of the decision, the Judge records that the appellant's former solicitors accepted that the appellant cannot fulfil the requirements of appendix FM of the Immigration Rules. The application made by the appellant is for leave to remain out with the rules and so contains a concession that the appellant cannot fulfil the requirements of the immigration rules.

20. In any event, the respondent considered appendix FM and correctly found that the only category the appellant could fall into (in terms of appendix FM) is leave to remain as a parent. The appellant cannot fulfil the requirements of paragraph R-LTR PT 1.1, nor can he fulfil the requirements of paragraph E-LTRPT 2.2 because none of the appellant's children is under 20 years of age.

21. The appellant cannot satisfy paragraph 276ADE(1)(i)to(v) of the rules because of a combination of his age and the length of time that he has been in the UK.

22. The appellant cannot fulfil the requirements of paragraph 276 ADE(1)(vi) because there is no evidence of the absence of social and cultural ties to Jamaica nor is there evidence of significant obstacles to reintegration there

23. The respondent granted discretionary leave to remain in the UK in September 2011. Both the transitional provisions and the respondent's guidance (issued on 24 June 2013) indicate that the appellant's case should be determined by reference to article 8 ECHR out-with the rules.

24. I remind myself of the guidance contained within Razgar. I must ask the following questions

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

25. In Kugathas v SSHD (2003) INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD (2009) EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was "*no way exceptional or beyond the norm*". In JB(India) and Others v ECO, Bombay (2009) EWCA Civ 234 the Court of Appeal reiterated that the approach in Kugathas must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children.

26. The weight of reliable evidence indicates that the appellant's adult children are independent and have started families of their own. There is no reliable evidence of dependency between the appellant and his adult children. The weight of reliable evidence indicates that there is nothing more than the normal emotional ties. Family life within the meaning of article 8 ECHR does not exist for the appellant in the UK.

27. The appellant assists with childcare for all of his grandchildren. But the primary carers each of his grandchildren are those children's parents, not the appellant. The weight of reliable evidence indicates that the appellant does not live with his grandchildren. Family life within the meaning of article 8 ECHR does not exist between the appellant and his grandchildren.

28. Private life within article 8 ECHR might exist for the appellant in the UK. He has lived here for the last 15 years. He has, in the past, worked in the UK. He enjoys the company of his children and grandchildren. He has his home in the UK.

29. The effect of implementation of the respondent's decision would be that the appellant would have to leave behind the regular social contact that he has with his children and grandchildren. He would have to leave his home in the UK, and his prospect of finding employment UK will come to an end.

30. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in

Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise.

31. The appellant speaks flawless English. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

32. Effective immigration control is in the public interest. For approximately two thirds of the appellant's time in the UK he did not have the right to be in the UK, so that I can give little weight to the inception, creation and development of private life. Since 2011 the appellant's immigration has been precarious (AM (Malawi)) so that I can give little weight to the appellant's private life.

33. I balance the respondent's interest in preserving fair and effective immigration control to protect this country's fragile economy. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was held that the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

34. Balancing all of these matters I have to find that the respondent's decision is not a disproportionate interference with the appellant's right to respect for private life.

35. I therefore find that the respondent's decision is not a disproportionate breach of any of the appellant's article 8 ECHR rights.

## **Conclusion**

36. I therefore have to find that the respondent's decision is not a disproportionate breach of any rights that the appellant might have in terms of Article 8 ECHR.

## **Decision**

37 The decision promulgated on 17 August 2015 contains a material error of law. I therefore set it aside.

38 I substitute the following decision.

39 The appeal is dismissed under the Immigration Rules.

40 The appeal is dismissed on Article 8 ECHR grounds.

41 There is no need for an anonymity direction.

Signed

15 February 2016  
Deputy Upper Tribunal Judge Doyle