



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

Appeal Number: OA/09939/2015

THE IMMIGRATION ACTS

**Heard at FIELD HOUSE
On 28th November 2017**

**Decision & Reasons Promulgated
On 14th December 2017**

Before

**DEPUTY UPPER TRIBUNAL JUDGE
G A BLACK**

Between

**MASTER MICHAEL ANTHONY HARVEY
NO ANONYMITY ORDER MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Hussain (Counsel)

For the Respondent: Mr P. Kotas (Home Office Presenting Officer)

DECISION AND REASONS

1. I shall refer to the parties as “the appellant” and “the Respondent”. This is an error of law hearing. I consider whether or not there is a material error of law in the decision the First-tier Tribunal (Judge Frazer) (“FTT”) promulgated on 23.11.2016 in which the FTT dismissed the appeal against a refusal of entry clearance to join his parent settled in the UK, under the rules and on human rights grounds.

Background

2. The appellant is a citizen of Jamaica who was under 18 years at the date of application but at the date of hearing he was an adult, although in full time education. His mother was granted discretionary leave in the UK and was married to a British citizen. The respondent refused the application on the grounds that paragraph 320 applied. The application was made for a purpose not covered by the Rules. There were no exceptional circumstances. The respondent refused the application on 1st June 2015 under paragraph 320(1) of the Rules on the grounds that the sponsor had discretionary leave in the UK until 25.2.2017. There was no consideration of paragraph 301 which covered joining a parent with limited leave to remain.

FTT decision

3. The FTT concluded that the Immigration Rules were not met as the sponsor had discretionary leave. In deciding if Article 8 was engaged the FTT referenced **SM & Others (Somalia) 2015 EWCA Civ 223 (Bean J.)** and the FTT concluded that the interference was not serious to engage Article 8.1. as the relationship could be continued on the current basis [18]. In the alternative if Article 8 was engaged the FTT found that the appellant was living independently in Jamaica since his father died and that family life could continue on the current basis by means of communication. Although the appellant's father had died in 2014, the appellant remained living in Jamaica. The sponsor could return to Jamaica to visit the appellant. The FTT found that the appellant was dependent on his mother emotionally and financially. The FTT considered factors under section 117B Nationality, Immigration & Asylum Act 2002 as amended. He spoke English but was not financially independent, and the balance lay in favour of the public interest.

Application for permission to appeal

4. In grounds it was contended that Article 8 factors were not fully addressed including the reasonableness of the sponsor returning to Jamaica. Further in considering Article 8 the FTT took into account erroneous considerations namely that the appellant had not visited the UK, when in fact his visitor applications had been refused. There was family life over and above the normal level of dependency.

Permission grant

5. Permission was granted on renewal by UTJ Latter who found that there were arguable grounds shown in the grounds and a letter to the sponsor's MP, that the FTT erred in concluding that it had not been show that the interference was sufficiently serious to engage family life. And if engaged the FTT failed to properly consider all relevant matters.

Rule 24 Response

6. The respondent opposed the application arguing that the FTT had considered all relevant matters and had made an “in the alternative” decision under Article 8.

Submissions

7. In submissions Mr Hussain argued that the FTT ought to have considered the rules first and looked at paragraph 301 and then Article 8. The old rules applied and the FTT should have considered all issues such as sole responsibility etc. and the death of the father. Mr Kotas responded that even if the FTT had failed to consider the Rules this did not mean that it was an error in law as the FTT had dealt with the issues identified. It was notable that nowhere in the decision was any reference made to issues such as sole responsibility. The case had been put on the basis of Article 8. The FTT may have been wrong to have applied the new rules under Appendix FM but had considered Article 8 outside of the Rules from the perspective that the separation between the appellant and his mother had been voluntary.

Discussion and conclusion

8. It seems to me that paragraph 301 was not considered at the Tribunal hearing and there is certainly no reference made in the decision and indeed it was not referred to in the grounds of appeal, although I accept that in the renewed grounds for permission to appeal to the UT it has been included at the end. The new rules were considered by the FTT under E.E.C 1.6. The grounds on which permission was granted relate to Article 8 only and it is on that basis that I deal with the error of law application. As its starting point the FTT failed to consider if there were compelling circumstances to justify consideration of Article 8. I am satisfied that the FTT erred in its consideration of the first question posed in **Razgar**. There was no proper consideration of the nature of the family life as between the appellant and the sponsor. That question is worded as to whether the interference has consequences of such gravity to engage Article 8. In **AG (Eritrea) V SSHD [2007] EWCA Civ 801** (28) it was held that the threshold for entry clearance cases was less stringent and it posits no specifically high threshold. Further such cases must be viewed in the context of the State’s positive obligation to facilitate family reunion. Thereafter I am satisfied that the FTT failed to assess proportionality with regard to all relevant matters including that fact that the appellant was under 18 at the date of application, his best interest, that he is in full time education, dependent in the sponsor financially and that the decision to live in Jamaica was made when the appellant was living with his father who at the time of the application had died. The FTT further failed to give sufficient attention to the reasonableness of the sponsor moving to Jamaica in order to maintain family life. In such cases it is important to

make clear findings of fact in order to follow the **Razgar** questions. The FTT sets out the detailed evidence but does not make findings of fact. The degree to which the appellant failed to meet the immigration rules will also be of relevance and which will require proper consideration. I have decided that the decision should be set aside and that the appeal remitted for hearing afresh before the First-tier Tribunal at Newport.

Decision

9. There is a material error of law in the decision which shall be set aside.

The appeal is to be remitted to Newport for hearing *de novo* (not before Judge Frazer).

Signed

Date 6.12.2017

GA Black
Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 6.12.2017

GA Black
Deputy Judge of the Upper Tribunal