



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00480/2017

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2018

Decision & Reasons Promulgated
On 16 July 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ADK
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms A Seehra, Counsel, instructed by Barnes Harrid & Dyer
Solicitors

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Burnett (the judge), promulgated on 6 November 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 28 October 2016 refusing his entry clearance application to join his parents.

Background

2. The appellant is a national of Jamaica, date of birth 29 October 1998. On or around 25 July 2016, when he was 17 years and 9 months old, the appellant applied for entry clearance to join his father, who was settled in the UK, and his mother whom he claimed had limited leave to remain in the UK. The respondent was not satisfied that the appellant was related to his father as claimed, a finding based on the father's failure to mention the appellant in an earlier application and the absence of an original birth certificate. Nor was the respondent satisfied that his mother was lawfully resident in the UK, a finding based on the absence of evidence of his mother's immigration status. The application was refused under paragraph 297 and 301 of the immigration rules. Further evidence was provided on the appellant's behalf, including DNA evidence and further documentation confirming the appellant's mother had been granted further leave to remain on 8 August 2016 until 15 February 2019. An Entry Clearance Manager review, dated 14 March 2017, conceded that the appellant and father were related, and that there was evidence of his mother's lawful status in the UK. The Entry Clearance Manager however raised a new issue asserting that the appellant was living an independent life in Jamaica and that his care arrangements could continue as they have done previously. The refusal under paragraphs 297 and 301 was maintained.

The decision of the First-tier Tribunal

3. By the time the First-tier Tribunal considered the appeal, at a hearing on 13 October 2017, the appellant was over the age of 18. The judge considered a bundle of documents running to 674 pages, and heard oral evidence from the appellant's mother and father. In the section of his decision headed 'Findings and Conclusions', the judge accurately noted that the appeal could only be brought on human rights grounds, but that the refusal of an application under the rules may inform the human rights decision. The judge accurately directed himself to section 85(4) of the Nationality, Immigration and Asylum Act 2002 which empowers the Tribunal to consider evidence about any matter which it thinks relevant to the substance of the decision under appeal, including evidence which concerns a matter arising after the date of the decision.
4. Mindful of the decision in Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC), the judge considered whether there were "serious and compelling family or other reasons" which might make the appellant's exclusion undesirable pursuant to paragraph 297(i)(f). The judge found that the appellant now regularly saw his parents, that they were in active communication, and they supported him whilst he remained in Jamaica where he lives with his father's sister and her family. The judge noted that the appellant's father wanted him to finish his education before coming to the UK and that the appellant was waiting to obtain a place at an Academy to study welding. The judge noted the evidence that his parents sent him money and that his paternal aunt had several business interests and that the appellant was looked after in Jamaica. At [35] the judge did not

consider that the appellant's best interests were served by being with his father in the UK and attending further school in the UK because there would be a disruption to his life and continued education and schooling, and because he was settled in Jamaica with other family members. The judge was not consequently satisfied that the provisions of paragraph 297 were met.

5. The judge then considered paragraph 301 of the immigration rules, and in particular, paragraph 301(iii), which requires, *inter alia*, that the appellant is not leading an independent life. The judge considered the definition of "leading an independent life" in paragraph 5 of the immigration rules. At [40] the judge found that, at the date of the respondent's decision, the appellant was not leading an independent life. The judge found that the appellant was supported by his parents who reside in the UK, that they had regular contact with him, that he was attending school and completing his formal education, and that he remained living with family members.
6. At [41] the judge considered Art 8. The judge drew the parties' attention to Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511. At [42] the judge noted that, at the date of the hearing, the appellant was 19 years old, that he was waiting to go to college to study a welding course, and that he was visited by his parents but had not lived in the same household as them for most of his life. The judge found that the present appeal was different from a case where a person has been living with his parents in the same household for most of his life but for a short break in residence, such that their turning 18 had not greatly changed their family life situation. The judge again noted that the application was made 3 months before the appellant turned 18 and that it was not surprising that the respondent refused the application based on the information presented at the date of the application.
7. At [43] the judge acknowledged that the particular circumstances of the individual case were important, and that even some adult children before "making their own way" in the world often retained close emotional ties of dependency with their parent. The judge noted that the appellant had spent the vast majority of his childhood with other family members and relatives and not with his parents. The appellant had not had the benefit of day to day care from his parents. The judge found that any refusal of entry clearance would not disturb the balance of the family life that the appellant had enjoyed. That balance was said to have been a choice of his parents. At [44] the judge said he had taken into account that the appellant now met all the requirements of the immigration rules, except that he was over the age of 18. The judge once again referred to the "choice" made by the appellant's parents as to the timing of the application and that they took the risk that the application might be rejected. The judge noted that Art 8 should not be used as a general dispensing power. At [45] the judge considered that the appellant could continue with his family life in Jamaica and that it could continue to be conducted as it had been in the past. The judge concluded that the refusal of entry clearance was not a disproportionate

interference with the appellant's private and family life and dismissed the appeal on human rights grounds.

The grounds of appeal and the parties' submissions

8. The grounds essentially contend that the judge misdirected himself in relation to Art 8(1) by choosing as his starting point cases dealing with visitor entry clearance applications and not applications for settlement, and that, as a result, the judge neglected to ask himself whether the support provided by the appellant's parents was "real" or "effective" or "committed". It was submitted that the judge erred in attaching weight to the fact that the 'refusal of entry clearance would not disturb the balance of the family life that the appellant had enjoyed', as this overlooked and failed to apply relevant authorities in which the boundaries between the state's positive and negative obligations under Art 8 had been considered. It is further submitted that the judge overlooked his earlier findings that the appellant was not leading an independent life for the purpose of the immigration rules.
9. With respect to Art 8(2), the grounds contend that the judge failed to have regard to paragraph 27 of the immigration rules ("An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of Appendix FM solely on account of his attaining the age of 18 between the seat of his application and the date of the decision on it"), or s.117B of the Nationality, Immigration and Asylum Act 2002. It was submitted that the fact that the appellant met the requirements of the immigration rules when the respondent's decision was made was either significant or determinative in the context of the assessment under Art 8(2), and that this was also relevant in respect of the public interest in the maintenance of an effective immigration control. Nor had the judge considered that the appellant would have been admitted to the UK but for the errors of the past.
10. Ms Seehra adopted the grounds of appeal and submitted that the judge should have commenced his Art 8 assessment by reference to the test in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. Ms Seehra took me to the evidence before the judge, including the statements from the appellant's parents, the letter from Ms Anita Officer, who previously looked after the appellant, and the evidence of money remittals, visits and WhatsApp messages which spoke to the nature of the relationship between the appellant and his parents. In reliance on Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 it was submitted that the judge misdirected himself by looking at the choices made by the appellant's parents rather than whether he still enjoyed family life with his parents. It was submitted that the appellant circumstances do not materially change after he attained the age of 18 and that he was still dependent on his parents.

11. Ms Willocks-Briscoe submitted that the judge did not ignore the fact that the immigration rules were satisfied at the date of the respondent's decision and that the judge holistically considered all relevant matters in undertaking the proportionality assessment. The judge took into account the best interests of the appellant and was entitled to conclude, in light of the relative weakness of the Art 8 relationship (which it was accepted existed), that the refusal of entry clearance was not disproportionate.
12. I reserved my decision.

Discussion

13. The first ground of appeal challenges the judge's assessment under Art 8(1) ECHR. It is not entirely apparent from reading [42] to [45] of the decision whether the judge has found that family life existed between the appellant and his parents at the date of the First-tier Tribunal hearing for the purposes of Art 8. At [45] the judge refers to the appellant's 'family life' being able to continue in much the same way as it had previously, suggesting that family life existed. The judge does not expressly reject the existence of family life sufficient to trigger the operation of Art 8, and, at [46], concludes that the respondent's decision did not disproportionately interfere with Art 8, suggesting that he accepted that family life sufficient to trigger the protection of Art 8 existed.
14. The judge's Art 8 assessment outside the immigration rules begins at paragraph 41. He starts by quoting from Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511 in respect of the type of relationships through which Art 8 will usually come into play. This authority, and the Upper Tribunal decision in Mostofa (Art 8 in entry clearance) [2015] UKUT 112 (IAC) which was considered by the Court of Appeal, relate to entry clearance applications for visitors, i.e. those seeking to enter the UK to be with family members for a short duration only. The facts of the present appeal are markedly different. The appellant seeks entry for the ultimate purpose of permanent settlement. It is unclear why, in his starting point to the Art 8 assessment of the relationship between the appellant and his parents in the context of an entry clearance application that will eventually lead to settlement, the judge chose visitor entry clearance cases.
15. Although the judge cited AP (India) v SSHD [2015] EWCA Civ 89 as an authority in respect of the close ties that can continue to exist between adult children and their parents, he did not identify or expressly consider the approach to relationships between adult children and their parents as detailed in a line of cases beginning with Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and which include Singh & Anor v Secretary of State for the Home Department [2015] EWCA Civ 630, PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612, Butt v Secretary of State for the Home Department [2017] EWCA Civ 184, and most recently, Rai v Entry Clearance Officer, New

Delhi [2017] EWCA Civ 320. In determining the quality and extent of the relationship between the appellant and his parents the judge should have asked himself whether the appellant's parents provided him with "support" which was "real" or "committed" or "effective" (see, for example, paragraph 36 of Rai). The judge's assessment of the nature of the appellant's family life relationship with his parents, contained primarily in paragraphs 42 and 43, does not contain any assessment as to whether their support is "real" or "committed" or "effective".

16. Ms Willocks-Briscoe submitted that the judge did accept family life existed between the appellant and his parents. Although it is not so clear-cut to be, I do agree with her that the judge was satisfied there was sufficient family life to trigger Art 8. This is necessarily implicit from the judge's assessment in paragraph 43 of his decision, and from the references to family life in paragraph 45 and paragraph 46, where he finds that the interference with the appellant's private and family life is proportionate. However, in the absence of any assessment as to whether the support provided by the parents is "real" or "committed" or "effective", it is difficult to see how the judge could have then properly engaged in the proportionality assessment. I am satisfied this constitutes a material legal error.
17. Even if I am wrong in the above assessment, I find, in the alternative, that the judge's proportionality assessment has impermissibly focused on the maintenance of the status quo at the expense of the unusual fact that, at the date of the respondent's decision, the appellant met all the requirements for entry clearance under paragraph 301, which is an Art 8 category. In paragraph 43, having noted that the appellant had not had the benefit of day-to-day care from his parents, the judge stated that,

... any refusal of entry clearance would not disturb the balance of the family life that the appellant has enjoyed. That balance (until the current application) was a choice of his parents.

18. Then in paragraph 45 the judge stated,

I have considered whether the appellant could continue with his family life in Jamaica. There is no reason why his family life could not be conducted there as it has been in the past. The appellant's father left Jamaica, finally, in 2007 (although he 1st arrived in the UK in 2002). The appellant's family life could be continued in the manner in which it has been conducted in the past.

19. It is apparent from these extracts that a significant element in the judge's proportionality assessment centred on the family life being able to continue in the same remote manner. It is unclear from the decision whether the judge properly engaged with the positive obligation under Art 8 to consider the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (R (on the application of MM (Lebanon) and Others))

(Appellants) v Secretary of State for the Home Department (Respondent) [2017] UKSC 10). Then at paragraph 44 the judge stated,

I have taken into account that it has now been shown that the appellant would meet all the requirements of the rules, bar that he is now over the age of 18. The appellant's parents made the choice of when to apply and so took the risk that his application might be rejected. I remind myself that Art 8 should not be used as a general dispensing power (see SSHD v Tahir Abbas [2017] EWCA Civ 1393).

20. It is not apparent from this extract that the judge fully appreciated the consequences of his recognition that the appellant met the requirements of paragraph 301 when the respondent's decision was made, and the relevance of this finding in respect of section 117B(1) of the Nationality, Immigration and Asylum Act 2002. The fact that the appellant fulfilled all the requirements of entry clearance as a child under paragraph 301, and that he was wrongly refused entry clearance, is a highly significant factor that must be accorded appropriate weight during the proportionality assessment. In Mostafa (Art 8 in entry clearance) [2015] UKUT 00112 (IAC) the Upper Tribunal noted that a person's ability to satisfy the immigration rules is capable of being a weighty, though not determinative, factor when deciding whether refusal of entry clearance is proportionate to the legitimate aim of enforcing immigration control. In TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 the Court of Appeal held, in the context of applications for leave to remain by persons already in the UK, that, where a person satisfies the immigration rules, whether or not by reference to an Art 8 informed requirement, this will be positively determinative of that person's Art 8 appeal, provided their case engages Art 8(1), for the very reason that it would be disproportionate for that person to be removed. The appellant did not meet the requirements of the immigration rules at the date of the hearing because, by then, he was over the age of 18. He should not however have been refused entry clearance by the respondent in the decision dated 28 October 2016. The appellant has been placed at a very significant disadvantage because of a wrong decision by the respondent. Had the respondent not wrongly refused the entry clearance application, the appellant would have gained lawful entry into the UK. Despite purportedly taking into account the fact that the appellant fulfilled all the requirements of the immigration rules and was still under the age of 18 when the respondent's decision was made, the judge failed to take into account the significant disadvantage or unfairness flowing from the respondent's wrong decision, a highly relevant factor and one which is capable of significantly affecting the proportionality assessment (applying the principles enunciated in EB Kosovo (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2008] UKHL 41). This is not to apply Art 8 as a general dispensing power but to take into account a material consideration when evaluating the competing public and personal factors.
21. For the alternative reasons given above, considered independently as well as cumulatively, I am satisfied that the decision discloses material legal errors. I set

aside the First-tier Tribunal's decision and proceed to remake the decision pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007.

22. The appellant is still 19 years old. The voluminous evidence contained in the appellant's bundle includes money remittance slips showing that he is financially dependent upon and supported by his family in the UK, and plane tickets showing frequent visits by his father and, to a lesser extent, by his mother. I note that the First-tier Tribunal found that the appellant and his parents communicate regularly and that both parents are active in the appellant's life in the sense of communications and visits. The WhatsApp messages contained in the appellant's bundle demonstrate frequent contact between the appellant and his mother and disclose powerful and emotional affirmations of love, support and guidance. The appellant is not employed, is not in a relationship, and remains living with his father's sister. In these circumstances I am satisfied his parents provide him with "support" which is "real" or "committed" or "effective". I consequently find that Art 8 is engaged and that the refusal of entry clearance constitutes an interference with that private life. The respondent's decision is in accordance with the law in a broad sense in that it is in compliance with identifiable laws. The decision is in pursuit of legitimate aims. I must now consider whether the decision is proportionate.
23. I have considered the public interest factors identified in s.117B of the Nationality, Immigration and Asylum Act 2002. I note that the maintenance of effective immigration controls is in the public interest. It is relevant that the appellant met the requirements of the immigration rules both when his application was made and when it was decided. But for the respondent's wrongful decision the appellant would have entered the UK in compliance with the immigration rules. In these circumstances it is difficult to see how his entry to UK would now undermine the maintenance of effective immigration controls. I note that the appellant hails from a predominantly English-speaking country and no issue has been raised in respect of his proficiency in English, and that he would be capable of being financially independent as he is in good health and capable of working, although his parents are also able to financially support him. These are however only neutral factors. The factors in s.117B(4), (5) and (6) do not apply to the appellant as he is seeking entry to the UK.
24. In assessing the issue of proportionality, I attach significant, although not determinative weight to the fact that the appellant was wrongly denied entry clearance when he met all the requirements of the immigration rules. It is clear that the conduct of the respondent may, in appropriate circumstances, be taken into account in undertaking a proportionality assessment and detract from the public interest in either removing or refusing entry clearance (see, by way of example, delays by the respondent in reaching decisions - EB Kosovo (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2008] UKHL 41). For the reasons I have already given I find that the respondent's conduct does detract from the public interest considerations.

25. Having carefully weighed the competing factors outlined above the refusal of entry clearance would constitute a disproportionate interference with the family life relationship between the appellant and his parents. I therefore allow the appeal on human rights grounds.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law and is set aside. I remake the decision, allowing the appeal on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



12 July 2018

Signed
Upper Tribunal Judge Blum

Date