



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15165/2016

THE IMMIGRATION ACTS

Heard at Field House
Decision given orally following hearing
On 4 September 2018

Decision & Reasons Promulgated
On 20 September 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SEYMERE ROBERTS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Mannion, Counsel instructed by Stuart & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Gambia who was born on 24 January 1994. He arrived in the UK aged about 10 in 2004 as a dependent of his mother and his leave was

extended subsequently on various occasions. On one of these occasions leave was originally refused but he and his mother appealed against that decision and Immigration Judge Dineen in a determination promulgated on 23 June 2011 allowed the appeal. At paragraph 34 of his decision when referring to the private and family life of this appellant he said that “were he to be removed to Gambia, I am satisfied that he would be effectively a stranger in a foreign country.” At this time the appellant was about 18 years old.

2. In 2011 when he was 17 and therefore still a minor the appellant was convicted in a juvenile court of two offences of battery. He also has a history of not paying his fare on the underground or trains from time to time and although there is some confusion as to precisely when or how often he did this it is accepted that ultimately these matters were all dealt by agreement with the transport authorities and without the appellant having any convictions recorded against him. However, the appellant apparently accepts that these matters did occur.
3. In 2015 when aged about 21 the appellant made a further application for leave to remain which was refused by the respondent. The main reason for refusal was that in his application the appellant had failed to disclose the conviction that he had in 2011 for the offences of battery. The appellant appealed against this decision and his appeal came before First-tier Tribunal Judge Fox who allowed the appeal to the very limited extent that he sent it back to the respondent (which outcome was then available to the Tribunal) for the respondent to reconsider the decision. However Judge Fox did make some findings of fact including that the appellant’s failure to disclose his conviction for battery in 2011 was dishonest and that the appellant had been aware at that time that he should have disclosed the convictions but had dishonestly failed to do so.
4. The respondent then reconsidered the decision but on reconsideration the same decision was made and the application was again refused.
5. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge K Real sitting at Columbus House Newport on 23 January 2018. In a Decision and Reasons promulgated just over two weeks later on 9 February 2018 Judge Real dismissed the appellant’s appeal. The appellant now appeals to this Tribunal, permission as having been granted on 5 June 2018 by First-tier Tribunal Judge Saffer.
6. Although the appellant’s grounds of appeal contained six grounds permission was given on grounds 1, 4 and 5 only. On behalf of the appellant, Mr Mannion, who represented the appellant before this Tribunal did not seek to rely on any of the other grounds.
7. The judge when considering the application had heard submissions on behalf of both parties and also heard evidence from the appellant and his mother who were both cross-examined. The judge considered first of all whether or not the appellant was entitled to succeed under paragraph 276ADE(1) of the Rules, and then, having found that he was not, considered the application under Article 8 outside the Rules.

8. When considering whether or not the applicant could succeed under paragraph 276ADE(1) the judge had in mind that certainly the appellant fell within 276ADE(1)(v) because he was aged over 18 and under 25 and had spent at least half of his life living continuously in the UK. However she concluded that he did not meet the requirements of 276ADE(1) because it is provided under 276ADE(1)(i) that an application under 276ADE(1) cannot succeed if it falls for refusal under “any of the grounds in Section S-LTR.1.2 to S-LTR.2.3...”.
9. Regrettably, when considering the application under the Rules, the judge when setting out the law, stated as follows, at paragraph 34:
- “34. The maintenance of effective immigration controls is in the public interest: S117B(1). The potential barriers to the appellant meeting the substance of the Immigration Rules in respect of private life are two-fold: the failure to disclose his 2011 conviction, which is capable of engaging the general ground of refusal under paragraph 322(1A) of the Immigration Rules, and his conduct and character as disclosed by the history of incidents on the railways, which I find is relevant to both the suitability requirements as expressed in S-LTR.1.6, and under Rule 322(5), which are expressed in similar terms”.
10. Paragraph 322(1A) of the Rules is a mandatory ground of refusal and sets out that one of the grounds on which “leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused”, is as follows:
- “Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused...”**
- (1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed...”
11. In fact, by paragraph A320 of the Rules, it is provided that the provisions of paragraph 322(1A) do not apply to an application for leave to remain on the grounds of private life under paragraph 276ADE. It is accepted on behalf of the respondent that the judge was wrong in considering that it did. That is the first ground of appeal. The other two grounds of appeal can be dealt with briefly. The fourth ground of appeal (the second on which leave to appeal was granted) complains that the judge was in error when holding, at paragraph 36, that “following a long and well-established line of case law, only compelling circumstances resulting in unjustifiably harsh consequences will outweigh the public interest”.
12. It is stated at paragraph 18 within ground 4 that “whilst the precise phrase used by the judge does not appear in the Rules or reported case law, the phrase echoes the deportation Rules” and what was said in *MF Nigeria* which was a case which concerned deportation. It is submitted that “the public interest in the removal of an

appellant will invariably be stronger in a deportation case than in a non-deportation case”.

13. As was discussed during the course of the hearing this submission is misguided. The judge was correct when he stated that “only compelling circumstances resulting in unjustifiably harsh consequences will outweigh the public interest”. This is the phrase that is used within the guidance given by the respondent and it is that guidance which was recently found to be compliant with the respondent’s obligations under Article 8 by the Supreme Court in *Agyarko and Another* [2017] UKSC 11. This guidance has also subsequently been approved by the Court of Appeal in *TZ (Pakistan) and Another* [2018] EWCA Civ 1109. The decision in *Agyarko* was handed down prior to Judge Real’s decision and the decision in *TZ* subsequently, and they confirm that she had been correct in her statement of the law. At paragraph 2 of the judgment of the Senior President in *TZ* (with which the other members of the court agreed) it is stated as follows:

“In *Agyarko* the Supreme Court made clear that the scheme established by the Rules and the Secretary of State’s instructions are lawful and compatible with Article 8. Accordingly, the Secretary of State is entitled to apply a test of insurmountable obstacles to the relocation of the family within the Rules and a test of exceptional circumstances as described outside the Rules”.

14. Accordingly, this ground cannot succeed because the test which the judge applied was the test that she was obliged to apply when considering the application outside the Rules.
15. The fifth ground (the third ground on which permission was granted) was that the judge when considering proportionality should have started from the position expressed by Judge Dineen at paragraph 34 of his decision that in 2011 which was that were the appellant to be removed to Gambia “he would be effectively a stranger in a foreign country” rather than considering Judge Fox’s 2015 decision as his starting point. However, the judge in this regard had found at paragraph 33 that “insofar as ties to Gambia are concerned, the position has moved on [from what Judge Fox had found] and the appellant now has no family in Gambia.” She also found that although there was not family life between the appellant and his mother in the UK sufficient to engage Article 8, nonetheless he had always had a close relationship with his mother who is settled in the UK.
16. Accordingly, the judge was very well aware of the fact that when returning to Gambia the appellant would effectively have to make his own life and find his own friends as he would start without knowing anyone in that country. Moreover, even if the Tribunal had been obliged to consider paragraph 276ADE(1)(vi) of the rules, the fact that the appellant knows no one in Gambia could not without more lead to a conclusion that there would be very significant difficulties such as would prevent him, a fit young man, from integrating within that country, which is the country of his nationality, if he were to be returned there.

17. That leaves for consideration just the first ground which as I have already noted was made out to the extent that the judge had made an error of law.
18. The judge found (and this finding is not now challenged) that the appellant had been dishonest in filling in his application. The judge's findings in this regard are at paragraph 35 as follows:

"35. I find that the position has not materially changed from the findings of Immigration Judge Fox. The appellant's explanation about the application form was not accepted, and I find that I should treat that as a settled point. The application form declares no convictions when the appellant knew that he had been convicted in 2011, and his innocent explanation for that was rejected in the previous determination. In light of those findings I do not find that I can come to any other conclusion than that the appellant was dishonest."
19. The next sentence shows the effect of this finding on the judge when considering the application under the Rules, for she went on to find as follows:

"For this reason, I find that the appellant would fail to meet the requirements of the Immigration Rules."
20. In other words, so far as the application under the Rules was concerned the judge regarded the dishonesty as effectively a mandatory ground of refusal, obliging her to refuse the application under the rules, having made the finding that the appellant was dishonest.
21. The judge then carried out a balancing exercise when considering whether or not permission should be granted outside the Rules; her statement which followed on immediately afterwards at paragraph 35 that "insofar as character and conduct are concerned I find that they remain as factors in the overall assessment" is unarguably correct but she did not regard this as a determinative factor because she went say that "the nature of the incidents themselves would not automatically result in refusal", and that (adopting what had previously been found by Judge Fox) "I find they are not of the utmost gravity, and there has now been a period without incident".
22. It was after the judge had made a finding that the application had to be refused under the Rules that she then went on at paragraph 36 to set out that when considering the appeal outside the Rules "only compelling circumstances resulting in unjustifiably harsh consequences will outweigh the public interest."
23. The question that this Tribunal now has to consider is whether or not the judge's erroneous belief that the appeal had to be dismissed under the Rules because of the appellant's failure to disclose his previous convictions was a material one.
24. On behalf of the respondent, Mr Clarke submitted (echoing what had been stated on behalf of the respondent in the Rule 24 response to the grounds) that the failure was not a material one because the appeal would have been bound to fail in any event. He

referred in particular to what is provided within Appendix FM, Rule S-LTR 2.1 and 2.2 which is as follows:

“S-LTR.2.1. the applicant **will normally be refused** on grounds of suitability if any of paragraphs S-LTR.2.2 to 2.5 apply.

S-LTR.2.2 whether or not to the applicant’s knowledge –

- (a) False information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
- (b) there has been a failure to disclose material facts in relation to the application.”

25. The provisions of S-LTR2.1 and 2.2 were helpfully set out within the grounds in which it is argued at paragraph 5 that the applicant’s failure to disclose his 2011 conviction within the application form “would not inevitably lead to his refusal under the scheme of the Rules and there was no other factor in his case which would grant a mandatory refusal”.
26. In argument the Tribunal invited Mr Mannion to state what factors there were in this case which arguably could persuade a decision maker that the discretionary ground of refusal (which was that the application **will normally be refused** on grounds of suitability) should not apply. Mr Mannion was only able to point to two factors, being first that the appellant had been in the UK since the age of 10 and secondly that the judge should have had as his starting point what Judge Dineen had said in 2011 which was that he would effectively be a stranger in the Gambia.
27. In the judgment of this Tribunal neither of these factors could arguably be said to come close to a legitimate reason why what should normally be the case (which is that when somebody lies on their application form permission should be refused) should not apply. So far as the first ground is concerned that or something similar will always apply where one of the requirements set out within paragraphs 276ADE(1)(iii) to (vi) is satisfied. It is only because the appellant has lived in the UK continuously for over half his life (at the time of application still being under 25) that these provisions within the Rules fall to be considered in any event. Insofar as the applicant would be a stranger in Gambia, that is not a reason even for suggesting that there would be very significant obstacles preventing his reintegration there. He may not know anyone there but it is not a country in which on return he would appear to have any difficulty in integrating.
28. Accordingly, because in the judgment of this Tribunal there is no arguable basis upon which even if the judge had found (as she should) that the applicant’s dishonest failure to disclose his previous conviction was a discretionary ground of refusal rather than a mandatory ground of refusal, there were no factors advanced before the Tribunal capable of persuading a judge that the normal consequence should not apply. It follows that although the fact that the judge was wrong in law when considering she

was obliged to refuse the appeal under paragraph 276ADE because of suitability grounds rather than appreciating that this was a discretionary matter that error was not material. It follows that this appeal must be dismissed and I so find.

Decision

There being no material error of law in the decision of First-tier Tribunal Judge Real, this appeal is dismissed and Judge Real's decision, dismissing the appellant's appeal, is affirmed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter "g".

Upper Tribunal Judge Craig

Date: 17 September 2018