



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19813/2018

THE IMMIGRATION ACTS

Heard at Field House
On 28 May 2019

Decision & Reasons Promulgated
On 25 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

BEEBEE RASSIDA DINALLY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rene, Counsel

For the Respondent: Mr Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant's appeal which is said by Mr Rene to be effectively a consideration of Article 8 outside of the Rules, was considered by First-tier Tribunal Judge C J Woolley sitting at Newport on 11 March 2019. He dismissed the appeal by way of a decision promulgated on 22 March 2019.
2. Permission to appeal was granted by First-tier Tribunal Judge Saffer by way of a decision dated 18 April 2019. In the grant of permission, it was said:-

"It is arguable that the Judge has made conflicting findings regarding economic dependency and usefulness to society which may be material to the balancing exercise required under Article 8. All grounds may be argued".

3. Mr Rene in his oral submissions before me said that he relied on his grounds of appeal, that there were no credibility issues and nor had the Respondent raised any such issues in relation to credibility in the Rule 24 response. Mr Rene took me to various paragraphs of the judge's decision, and it may be useful to summarise those. He first took me to paragraph 34 where the judge had said:-

“Her continued presence will be an economic burden on the country. I find that the interference is necessary in pursuance of a legitimate aim, namely the economic wellbeing of the country ... The macro-economic effects of access to healthcare and accommodation must be given their due weight”.

4. The grounds of appeal said this should be viewed in context with the findings at paragraph 36(ii) where the judge states:-

“Since the expiry of her working permit the Appellant will not have had the right to work, although she has apparently been doing so continuously. She has not had to rely on State support and can be regarded as financially independent”.

5. The grounds say it is clear that these two findings are not compatible with each other which is material. It is also said that the judge is right in relation to his finding at paragraph 36(ii) in that the Appellant has been financially independent. It is also clear that he wrongly placed new weight on an erroneous factor, and this is a material error of law.

6. The grounds of appeal also say that at paragraph 36(v) the judge had said:-

“I accept that the Appellant has performed a socially useful role as a dispenser in a pharmacy. Nevertheless, the Appellant represents a significant economic burden on the country in terms of the provision of housing and potential healthcare, especially as she grows older”.

There is then reference to these findings. For example, it said the Appellant is aged 55 and that it was unreasonable for the judge to have used the Appellant's age against her in that she still has many years of working life left, but it was entirely plausible that having worked and paid her taxes in the past and would likely to do so in the future she would be entitled to a pension rightly earned and therefore could not be properly regarded as a burden on the state as stated by the judge. It was also said that the judge accepted the Appellant has been of benefit to the community in the UK in light of her work as a dispenser. Evidence was provided to show the concerns of the General Pharmaceutical Council in relation to shortage of workers in this field of work post-Brexit. The grounds of appeal say, “It is not clear whether due weight had been given to the important factor in the public interest”.

7. The grounds say at 36(iv):-

“It must however be emphasised that Article 8 is properly concerned only with the integrity of private and family life. The FT Judge had made reference to the Appellant’s age, he had also made clear findings that the Appellant had established a private life here and that there would be interference as to engage Article 8, however there is one dimension that the judge fails to consider, that is physical and psychological integrity of the Appellant (see **Pretty v UK [2002] 35 EHRR**). At this stage of her life the judge has simply failed to give weight to what she has established here as a person. This was material to the appeal”.

8. The grounds then say:-

“At paragraph 37 there is a more glaring error of law in its application. The FT Judge states the social usefulness of her employment does not reach the level expressed by Sir David Keene in **UE (Nigeria)** so as to affect the importance of a firm immigration policy. It is submitted that no reasonable authority could have come to such a conclusion on the facts on this case, especially when the FT Judge found that “I accept that the Appellant has performed a socially useful role as a dispenser”. Coupled with this is the article by the General Pharmaceutical Council expressing its concern about the shortage of workers in this area of work. The court is referred to Counsel’s skeleton argument, paragraph 4, which quotes the relevant findings by Sir David Keene. The judge’s interpretation dilutes exactly what has been said by Sir David Keene. This is a material error of law”.

9. In the grounds, still at paragraph 37, is said “The FT Judge states and in a measure of refusing her application is rationally connected to the objective legitimate immigration control in the economic interests of the UK. It is submitted that this finding is indicative of the judge’s mindset and has been a recurring theme of his determination. The fault of this finding was not supported by the evidence and also the FT Judge has made a clear finding that the Appellant can be regarded as financially independent. This was a material error of law”.

10. Added to those detailed grounds of appeal Mr Rene in his oral submissions said at paragraph 34 the judge effectively focused on the economic wellbeing of the country but that the portion of the actual evidence does not make out the point. The judge was looking for further reasoning. There is reference to the Appellant’s age. The Appellant was granted leave and the Appellant had paid the immigration health surcharge and it would be in compliance of the Rules had she paid the surcharge when she made her current application. In any event she had worked in the UK as well and had paid tax and national insurance. The P60s had borne that out and in any event further work should be continuing in the same vein. There was no evidence to show she would be a burden. In any event, economic independence is a neutral factor when looking at Section 117.

11. The second point said Mr Rene was that the Appellant had worked as a dispenser at a pharmacy. The judge takes the positives at paragraph 36 but where he notes the useful role as a dispenser, but he diluted it by taking a point against the Appellant which he should not have taken. It was a factual error in itself. There is reference to Mauritius and that needs to be considered in the context of the integrity of family and private life. Although the Appellant did not meet the Rules because of a short absence she had lived in the UK for over twenty years.
12. At the hearing at the First-tier Tribunal, Mr Rene said he had given the judge a copy of a policy for analogy purposes. There were no credibility findings against the Appellant. It was necessary to consider the case of **Pretty** and the psychological and physical effect of the position. The pharmaceutical journal at 31 and 33 noted there was a huge drop in a number of pharmacies since Brexit and it was of huge concern. That point had been made to the Respondent.
13. The Appellant had undertaken various courses and there were copies of those in the Respondent's bundle.
14. I was taken to the Rule 24 and Mr Rene made submissions in respect of it. The case of **Thakrar** was not on point. There was a family member who was relevant. I was taken to head note (2) and (3). I was also taken further to the judgment itself, particularly at paragraphs 83 and then 87 to 94. He said the most important paragraph was paragraph 94 which referred to a social worker. It was submitted that the judge was wrong to conclude that the Appellant's employment did not reach the **UE (Nigeria)** levels and so the decision was unsafe. Mr Rene said the final ground was in respect of his paragraph 7 and that related to the economic interest and he took me through that.
15. I then heard from Mr Tufan. He said he thought that it would appear that Mr Rene had sought to expand the grounds which had been drafted, particularly in respect of paragraph 276ADE and that matter was not before me. Mr Tufan said he relied on the Rule 24 response but that he thought his colleague who drafted that document was wrong at paragraph 2 but he went on to the other matters. Ultimately insofar as this he said that looking at the case of **Rhuppiah v Secretary of State [2018] UKSC 58** at paragraphs 52 and 58 that case was all about financial independence and Mr Tufan said that case did not take things too much further, but in any event Section 117 views financial independence and English language as a neutral factor.
16. Insofar as the Appellant's contribution to society is concerned the Appellant's history was set out within the reasons for refusal letter which was not disputed. As of April 2005, the Appellant had no leave to remain. Mr Rene said what she had done was to leave the United Kingdom in September 2017 and then she came back as a visitor for only six months. When that leave ran out, she then made the current application. She has no right to work and she did not have a right to work. Her contribution to the society, if it could be called that, had to be considered in that context. He said insofar as her qualifications are concerned, he did not think the Appellant was qualified. Mr Tufan referred to the case of **UE** and particularly paragraph 21 of that

judgment. He also took me to paragraphs 35 and 36. It was necessary to consider the context of what was being said by the Court of Appeal, “very significant contribution” to the community was required. As for the other decision of **AE (Algeria)** there was reference to treatment and care but that was a secondary point. Insofar as the case of **Thakrar** is concerned, the head note at (2) and (3) set that out as did paragraph 94. The difference here was that the whole local community had come to depend on the Appellant so in those circumstances this was a very different case to this Appellant’s case.

17. Mr Rene in reply said that by its very nature someone who would be relying on coming to the court now would have to have been working illegally, but there was a period of time in 2003 for around two years where the Appellant had been working legally on a salary of around £20,000, therefore she had not been here illegally in the UK throughout. The positive contribution from the Appellant was accepted by the judge. In fact, the judge had made that point twice in terms of the social usefulness and the economic burden aspect. Mr Rene submitted that the determination contains an error of law. He took me to the Respondent’s bundle where it showed that although a dispenser is not a pharmacist the Appellant had a qualification on 21 January 2008 as a Level 2 in Pharmacy Services dispenser. I was shown a copy of that certificate.
18. I had reserved my decision. Having considered the rival submissions and having reconsidered the judge’s decision alongside the documents that were before him. It is clear to that the judge sought to deal with the positives and negatives of the case in accordance with the Supreme Court’s guidance in **Hesham Ali**. Indeed, the judge in this case set out various sub-headings to his decision. He made very clear what the issues in the appeal were, namely paragraph 276ADE and then whether or not an appeal pursuant to Article 8 could succeed.
19. Insofar as this appeal is concerned, and as Mr Rene himself said, this was an appeal in respect of consideration of Article 8 outside of the Rules. That was fully set out from paragraphs 28 onwards. There is no criticism from any of the parties that the judge fully and properly referred to all of the leading case law including **Agyarko v Secretary of State [2017]** UKSC 11, **Hesham Ali [2016]** UKSC 62, **Razgar, UE (Nigeria) v SSHD [2010]** EWCA Civ 975 and indeed references to **AG (Eritrea) [2007]** EWCA Civ 801 and indeed to other authorities as well which I shall return to.
20. In my judgment the judge considered, for example at paragraph 36, those factors which went against the Appellant and those factors which were in favour of the Appellant and he put those sub-headings to highlight this. Therefore, it clear to me that he considered against the Appellant her immigration history. The judge was entitled to do that, and indeed he was duty bound to do that. Similarly, the judge considered knowledge of English, the financial independence, he considered development of private life, the reasonableness of return and the economic burden on the country in compliance with the Rules. In favour of the Appellant, the judge considered all the positives including, the importance of the family and private life in the UK, social usefulness, the fear of returning to Mauritius. Then ultimately the

judge in his sub-headings of overall conclusions in relation to the proportionality exercise balanced all the factors into account. I see no conflict in what he said. The judge had to take into account the evidence that the Appellant had been working as a dispenser, but he also had to take into account that the work was without permission for almost all of the period of time. Indeed, I note that on re-entering the UK as a visitor the Appellant would have to have declared her previous overstaying and intention to leave the UK after her visit. I am not sure that she did that. Whether she did or not, there is nothing wrong with the judge concluding that a person living in the UK even if in their mid-fifties, is likely to require medical treatment. It is also reasonable to assume that at some stage assistance from the state will be required for that medical treatment and indeed for assistance with living in the UK in terms of accommodation. This was not mere speculation. It is a reality that as we get older our health needs increase and our reliance on support services, including on those providing accommodation increases.

21. Having considered the case law, in my judgment it is imperative to have at the forefront that the Court of Appeal's decision in **UE (Nigeria) v The Secretary of State [2010] EWCA Civ 975**, Sir David Keene (with whom Richards and Ward LJ) agreed) very clearly noted at paragraphs 35 and 36 as follows:-

"35. For my part, therefore, I conclude that it is open to this court to find that the loss of such public benefit is capable of being a relevant consideration when assessing the public interest side of proportionality under Article 8 and as a matter of principle I do so find. That is where this aspect comes in to the proportionality exercise. Given that conclusion, it is unnecessary for me to deal with Mr Knafler's argument about whether removal would fall to be in accordance with the law.

36. I would, however, before concluding, emphasise that, while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in **Bakhtaur Singh**. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case and in particular on the extent of the interference with his private and/or family life."

22. Additionally, in the case of **Thakrar (Cart JR, Art 8, value to community) [2018] UKUT 00336 (IAC)** the President considered issues in respect of removal from the United Kingdom. I was referred to head notes (2) and (3) which say as follows:-

"(2) Before concluding that submissions regarding the positive contribution made by an individual fall to be taken into account, for the purposes of

Article 8(2) of the ECHR, as diminishing the importance to be given to immigration controls, a judge must be satisfied that the contribution is very significant. In practice, this is likely to arise only where the matter is one over which there can be no real disagreement. One touchstone for determining this is to ask whether the removal of the persons concerned would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.

- (3) The fact that a person makes a substantial contribution to the United Kingdom economy cannot, without more, constitute a factor that diminishes the importance to be given to immigration controls, when determining the Article 8 position of that person or a member of his or her family”

and then I was taken particularly to paragraph 94 of that decision which refers to Lord Bridge in **Bakhtaur Singh**, and particularly sub-paragraph (3) where it was said:-

“A person liable to deportation is a social worker upon whom a particular local community has come to depend. His deportation will deprive the local community of his services which will be difficult to replace”.

23. Without going into detail in the further authorities which have been referred to, I turn again to the judge’s decision. In my judgment the judge did clearly consider the contribution of the Appellant to the United Kingdom. He set it out, particularly at 36(ii) because the judge said, “I accept that she has performed a socially useful role in her work as a dispenser”. There can be no doubt therefore that this relevant factor was considered by the judge. The issue of what effect that was to have is the crux of the matter being raised before me. In my judgment the case law is very different to this Appellant’s case. As is abundantly clear of what is required in **Thakrar**:-

“One touchstone for determining this is to ask whether the removal of the person concerned would lead to **an irreplaceable loss to the community of the United Kingdom or a significant element of it**”

or as Sir David Keene said:-

“I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances with a positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in **Bakhtaur Singh**”

and that then takes me back to paragraph 94 of the decision in **Thakrar** where there is reference to the **social worker**.

24. In my judgment, even if there is a shortage of dispensers at pharmacies in the United Kingdom this Appellant clearly did not meet the sort of level which the case law

envisages. It is certainly not to the level of being one of the “limited number of cases” which the Court of Appeal contemplated, and indeed which the Upper Tribunal contemplated in **Thakrar** either.

25. My task is to consider whether or not the judge made a material error of law, and it is right to say that I have much sympathy for the Appellant, because it is possible that a different judge might have come to a different conclusion, but that is not the legal test that I have to apply. That is because the Court of Appeal’s decision in **R (Iran)** defines the limits of the appeal before me. I have to find that there is a material error of law. In my judgment there is no such material error of law. The judge had weighed up the positives and negatives of the Appellant’s case. He had taken into account the various positives, but ultimately, he has decided, having considered the fact that the Appellant has been working illegally in the UK, that she has resided here in the UK in breach of the Immigration Rules for a long period of time, that although there is a socially useful role in her work as a dispenser it did not meet the level which was required. The judge specifically said at paragraph 37:-

“The social usefulness of her employment does not reach the levels expressed by Sir David Keene in **UE (Nigeria)** so as to affect the importance of a firm immigration policy”.

26. The judge did apply the case law. Ultimately the judge said that the importance of legitimate immigration control outweighed the rights of the Appellant which he had fully and properly summarised previously. The judge also noted the Supreme Court’s decision in **Agyarko** that the Appellant had not produced a very strong or compelling case so as to outweigh the public interest in removal. In my judgment, ultimately the judge was also entitled to bear in mind that there might come a time where the Appellant would have to look to using the healthcare system in the United Kingdom, that there might be issues in terms of housing, but those were not factors of such magnitude to enable me to conclude that the balancing exercise was somehow incorrectly performed by the judge. In my judgment the judge had weighed up the relevant factors, he had done so fully and completely taking into account the various submissions which were made by Mr Rene. The judge saw and heard from the Appellant and came to the decisions that he did.
27. Not all judges would have come to the decision that this judge did. I have said already, that would not be the test for finding a material error of law. In my judgment the judge appropriately considered and balanced the various aspects of both sides. The fact that the judge did not agree with the Appellant’s side does not mean that there is a material error of law.
28. In the circumstances, although sympathetic to the Appellant’s position and although Mr Rene has said all that he possibly could have on behalf of the Appellant, I conclude that there is no material error of law.

Notice of Decision

There is no material error of law. The decision of Judge C J Woolley stands.

No anonymity direction is made.

Signed A Mahmood

Date: 4 June 2019

Deputy Upper Tribunal Judge Mahmood

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed A Mahmood

Date 4 June 2019

Deputy Upper Tribunal Judge Mahmood