



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

Appeal Number: IA/15907/2013

THE IMMIGRATION ACTS

Heard at Field House

On 24th July 2014

Determination

Promulgated

On 11 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**IAN HOWARD MULLINGS
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr C Jacobs, instructed by J McCarthy Solicitors

DETERMINATION AND REASONS

1. In this case, the Secretary of State appeals a decision of the First-tier Tribunal (Judge Finch) promulgated on 10th March 2014 in which she allowed Mr Mullings' appeal against a refusal to grant his application to regularise his immigration status on Article 8 ECHR grounds.
2. For convenience I refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The Appellant is a citizen of Jamaica born on 26th January 1968.
4. The immigration history is complex.
5. On 7th April 2001 he arrived as a visitor, accompanied by his son Tyan Mullings, born on 29th October 1998, and was subsequently granted leave to remain as a student until 30th September 2007. He then made an in-time application to remain as a spouse of a British citizen, Goldie Ann Coats who was, then or subsequently, imprisoned for a serious criminal conviction because in 2013 the evidence was that at that time she had been in prison for some five years.
6. In February 2009 the application was refused.
7. On 17th March 2009, as the Appellant had not appealed he became appeal rights exhausted and an overstayer.
8. In 2009 and 2011, the Appellant made further applications to remain, refusals of which did not give rise to any appeal rights.
9. On 4th July 2012, i.e. on the old rules, he made an application for leave to remain on the basis of ten years' residence and Article 8 rights, and it is that application which forms the basis of these proceedings.
10. On 19th April 2013 the Respondent refused the application.

The Reasons for refusal

11. The decision is made on long residence grounds with reference to 276B(i) (a) on the basis that the Appellant could only show seven years eleven months' lawful residency as opposed to the ten years required, and in the context of unlawful residence, required fourteen years and could only show twelve.
12. The decision is made on Human Rights grounds with reference to Appendix FM: the Appellant failed to meet the parent requirements because whilst the child Tyan lived with the Appellant some of the time he also had a place of residence with his mother so that the Appellant did not have sole responsibility as required.
13. The Respondent noted that the Appellant did not rely on his relationship with his estranged wife or any other partner.
14. In respect of the Appellant's private life the Respondent considered paragraph 276ADE and finding that the Appellant had not lived continuously in the United Kingdom for twenty years and had social, cultural and family ties with Jamaica, and could obtain medical treatment in respect of his chronic kidney problems, rejected the Appellant's claim.

15. The Respondent concluded there was no evidence which justified the Appellant remaining exceptionally outside of the Rules.

The Appeal

16. The Appellant appealed to the First-tier Tribunal. Judge Finch heard evidence from the Appellant and his partner Ms Lawik. The judge found that both the Appellant and Ms Lawik were witnesses of truth and that their relationship was genuine and subsisting and of a character and quality to engage Article 8.
17. The judge found that the reason that the couple had not married and were not cohabiting was because of Ms Lawik's position that the precarious immigration status of the Appellant made it inappropriate because in the context of her responsibilities, with five of her seven children, the eldest of whom is disabled as a result of mental health problems and requiring her full-time care, living with at home with her. The judge's reasoning makes it clear that she found that to be an entirely reasonable and principled position. The judge found that the Appellant provided his British partner with considerable support in the context of the challenges of caring for the British children. The unchallenged evidence was that the Appellant and Ms Lawik spend most of their time together. The judge clearly treated them as a family unit.
18. The judge gave particular and significant weight to the Appellant's relationship with the youngest child, Jymoyah, finding the Appellant to be being closely involved in her care at home, taking her to and from school regularly, as well as on outings at the weekend. The judge found that the child, particularly in the context of having never known her natural father, had come to regard the Appellant as her father figure.
19. The judge found the relationships between the Appellant and his partner's children was significant, and gave them weight in the global assessment as to whether there was Private and Family life that engaged Article 8 ECHR.
20. Taking into account the length of residence, the educational qualifications obtained the Appellant's involvement in a small business, and the relationships with his partner and their children, particularly the daughter Jymoyah, the judge found that the Appellant had established a family and private life here which engaged Article 8.
21. The judge noted that the British citizenship of the five children, and, finding the evidence showed the partner's youngest child Jymoyah's interests as being significantly affected by the immigration decision, considered her best interests as a primary consideration. Taking into account that she has no contact with her birth father, and the Appellant's involvement in her life, the judge found that the Appellant's removal would deprive her of a father figure, and so be contrary to her best interests.

22. The judge considered whether the British partner should relocate to Jamaica so as to preserve the family relationship and found that it would not be reasonable to expect Ms Lawik to do so bearing, in mind her citizenship and her family responsibilities.
23. The Appellant's son Tyan is still here, he has at times lived with the Appellant. In February 2013 the Appellant's son's school confirmed that whilst Tyan's parents were living separately the child lived with each of them at their different addresses. He now lives with his mother only. There are no formal court orders. The judge found that although the relationship between the Appellant and his son had deteriorated, to the point that the son had not wanted to see his father since July 2013, it was none the less significant that the Appellant maintained a parental role, still being in contact with his son's school, and also noted that the Appellant had had a text communication from his son earlier in the year and was hopeful of rekindling contact. The judge found that to be a positive when considering the best interests of the child. The judge noted that in the context of paragraph 276ADE(4) at the time of the Appellant's application in July 2012 his son would have had an entitlement under paragraph 276ADE(4) and would be entitled to remain.
24. The judge weighed the individual circumstances of the Appellant and the family against the competing public interest of removing those who have no entitlement to remain under the Immigration Rules, and found that on the facts of this case the individual rights of the family outweighed the public interest, so that the decision constituted a disproportionate interference with the respect to be accorded to their family life under Article 8 ECHR.
25. It is against that decision that the Secretary of State now appeals to the Upper Tribunal.
26. The application for permission set out three grounds:
 - (1) The judge failed to find an arguable case that there are good grounds for granting leave outside of the Rules on account of compelling circumstances not sufficiently recognised by the Rules, prior to engaging in an Article 8 analysis.
 - (2) The judge erred in finding that family life continued between the Appellant and his son, given that contact between them ceased in July 2013.
 - (3) The judge erred in finding the Appellant's business contribution to be a positive factor sufficient to outweigh the public interest in immigration control.
27. Permission was granted by the First-tier Tribunal (Judge Chohan) on 23rd May 2014 because : referring to the case of **Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 640.**

“Whilst the judge considers the appellant’s family and private life and conducts a proportionality exercise, however, it is not clear what exactly are the compelling circumstances in the appellant’s case. In that respect, the judge may well have fallen into error.”

The Submissions

28. Mr Tufan on behalf of the Respondent adopted the grounds and submitted that the judge had failed to consider whether there were any arguably good grounds for granting leave outside the Rules and that in reality there were no compelling circumstances based upon non-standard features of the Appellant’s case which resulted in an unjustifiably harsh effect if the decision were upheld. The factual finding in respect of the Appellant’s relationship with his son was not sustainable on the evidence. The Appellant’s business contribution cannot be a positive factor sufficient to outweigh the public interest in light of the case of **EU (Nigeria) [2010] EWCA Civ 975** which requires a unique, irreplaceable social contribution of sufficient significance to a community or the nation as a whole.
29. Mr Jacobs submitted that the challenge was essentially a perversity challenge which could not succeed and defended the judge’s favourable decision under Article 8 on the basis that he fully took into account the public interest reflected in the Appellant’s inability to meet the requirements of the Rules but was entitled to conclude that they were outweighed by the particular circumstances of this case which taking into account the primary consideration of the best interests of the child Jymoyah, the inability of the Appellant’s partner to relocate to Jamaica given the exceptionally compelling circumstances of all of her five children who live with her but particularly the eldest for whom she is a full-time carer.

My Consideration and Findings

30. I begin by considering whether the judge was in error in even assessing Article 8 ECHR as averred by Mr Tufan. The application predated the change in the rules, none the less the Judge at paragraph 10 reminds herself that the Appellant has failed to establish an entitlement to remain under Appendix FM to the Immigration Rules as a partner or a parent. The judge correctly self-directs at paragraph 11, setting out the case of MF (Nigeria) v SSHD [2013] EWCA Civ 1192. The case of MF reviews and confirms the jurisprudence, including that of Gulshan. I am satisfied that unless it is shown that his decision is inconsistent with correct self direction the failure to make specific reference to Gulshan is not a material error.

31. The substance of the case is, as identified in the grant of permission, whether or not in the Article 8 assessment the reasons provided for finding the decision proportionate are sufficient to amount to compelling circumstances which result in unduly harsh consequence. I return to that assessment having considered the other grounds raised, because whilst it is clear that the grant of permission did not accord them significant merit, permission was granted, and Mr Tufan relied, on all grounds and they are matters which have potential to affect the overall conclusions.
32. In respect of the ground to the point that the judge was in error in finding family life existed between the Appellant and his son, I find that the judge was entitled to his conclusion.
 - (i) The judge did not ignore the fact that the son no longer resided with the Appellant, or that they had had no contact since July 2013. The judge accepted the evidence of the Appellant's parental involvement in the context of contact with the school. He found the Appellant credible but in any event there was some corroboration from the school. The judge noted there had been a text communication from the son earlier in the year. Taking into account the biological relationship, and noting the persuasive jurisprudence of **Keegan v Ireland 18 EHRR 342** and **Berrehab v The Netherlands 11 EHRR 322**, the judge found that the absence of cohabitation, in the context of a relationship involving a biological son, who had lived with the Appellant from his birth in 1998 to 2001 when he brought him to the United Kingdom, with continuing cohabitation on a full-time basis until 2007, and then on a part-time basis until 2013, the judge was entitled to conclude that the relatively recent position of the lack of contact was not the determinative factor. Family life is a matter for assessment and judgement, taking into account the entirety of the circumstances. The Appellant's son is a minor. The parents' relationship had ended. In the context of the volatility of family relationships and children in teenage years, the judge's conclusion is not perverse.
 - (ii) I find that the ground is in any event misconceived because a full reading of the judge's decision makes clear that whilst he took into account the evidence of the relationship, and the aspirations of the Appellant in terms of its future, as well as the benefit to the son in the event that that came to fruition, it was only a small part of the factual matrix of the Appellant's family and private life which led the judge to find that the threshold had been met for establishing that he had a family and private life deserving respect.
 - (iii) The judge was bound to take into account the Appellant's natural son's best interests as a child affected by the immigration decision. Indeed the respondent herself in the refusal assesses his best interests, with the implication that she did not consider it an irrelevant consideration, but one carrying little weight. The inclusion of the factor as in the subsequent balancing exercise as a relevant

consideration is unassailable. The weight, absent perversity, to be attached to a particular factor in the balancing exercise is for the judge hearing and seeing the evidence, absent perversity. The judge makes it plain at paragraph 24 that he considers the rekindling of the relationship to be no more than “a chance” and in the context of the whole decision it is clear that he does not accord the matter significant or determinative weight in the balancing exercise, as the respondent’s grounds suggests.

33. I find that the challenge on the basis of the treatment of the Appellant’s son is not made out.
34. In respect of the Appellant’s business interests the evidence before the judge from the Appellant was that he had been economically self-sufficient as a result of being able to run his business as well as being able to provide occasional employment to others including his partner’s son. The judge concludes that the circumstance is a positive. However, contrary to the prominence of the factor in these grounds, it is clear that the judge did not find the issue of the business to be a determinative or tipping factor in the Appellant’s case, but rather as one of many positive factors he took into account. The judge has not given the factor such significance so as to be perverse and so I find that the counting it in the balance does not give rise to any material error. I pause to note that the new statutory codification of Article 8 in the Immigration Act 2014 at Section 117B Article 8, whilst not giving determinative weight to the issues, refers to the public interest being better served by those who are able to integrate into society because they can speak English and/or because they are financially independent, so as to be a lesser burden on taxpayers.
35. Returning to the ground given merit in the grant of permission, namely the issue as to whether or not Article 8 is adequately covered by the rules or required judicial assessment via a traditional balancing exercise, the first point I note is that the grounds as drawn fail to take into account the judge’s finding that the Appellant enjoys a parental relationship with the British child Jymoyah, and that it is not reasonable for her to relocate to Jamaica. That was an issue not considered in the original refusal because it was a matter only relied on in the appeal process. It is a matter which, in the context of positive findings as made by the judge, is given weight in Appendix FM. In addition the judge found that the character and quality of the relationship between the Appellant and the child’s mother carried significant weight. Again that was a relationship not assessed by the Respondent because it was only relied on in the appeal process. The judge had the benefit of hearing and seeing both the Appellant and his partner give evidence. The judge was impressed by their honesty and found that they had adopted a principled and laudable stand in connection with their decision to postpone marriage because of the precariousness of the Appellant’s immigration status. The judge gave considerable weight to the character and quality of the family relationships of the British citizen partner and the British child.

36. I find that on the facts as found by the judge, there is no merit in the grounds contention that her consideration of Article 8 ECHR is inconsistent with the jurisprudence of requiring identification of arguable compelling circumstances. In this case the judge's reasoning is consistent with the case law dealing with the application of the Rules in Article 8 cases, including Gulshan, so that any error in failing to refer to the case of Gulshan directly, or use the phrase compelling circumstances or unduly harsh consequences, is formulaic rather than substantive.
37. I can see no basis for concluding that the judge's ultimate finding that the decision was disproportionate was perverse or irrational. Such a conclusion requires that no reasonable judge could have reached those findings. Perversity or irrationality is a "very high hurdle" to overcome and a "demanding concept" (see, **R (Iran) and Others v SSHD [2005] EWCA Civ 982** at [11]). Merely to disagree with the finding comes nowhere near overcoming the "very high hurdle" of irrationality or perversity. Indeed, as Carnwath LJ (as he then was) observed in **Mukarkar v SSHD [2006] EWCA Civ 1045** at [40] in relation to a challenge to a judge's finding that removal was disproportionate on the ground that it was perverse:

"The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ...".

38. For these reasons I reject the Respondent's contention that Judge Finch erred in law in allowing the Appellant's appeal under Article 8 of the ECHR. The judge's decision was properly open to her.

Decision

39. For these reasons, the First-tier Tribunal's decision to allow the Appellant's appeal under Article 8 of the ECHR did not involve the making of an error of law. That decision stands.
40. Thus the Secretary of State's appeal to the Upper Tribunal in respect of the Appellant's appeal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Davidge