



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

Appeal Number: OA/06138/2013

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 11 April 2014

On 24th April 2014

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JJ

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Presenting Officer

For the Respondent: Mr S Chelvan, instructed by JCWI

DETERMINATION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. For the sake of convenience I will refer to JJ as the claimant.
2. JJ is a citizen of Jamaica born in 1979. He appealed to the First-tier Tribunal against a decision of an Entry Clearance Officer ("ECO") dated 29 January 2013 refusing to grant him entry clearance to join his wife ("C"), child ("M") and step-child ("A") in the United Kingdom. In a determination promulgated on 13 February 2014 First-tier Tribunal Judge Herbert OBE allowed the claimant's appeal (i) under the Immigration Rules and (ii) on

the basis that the ECO's decision would lead to a breach of Article 8 of the Human Rights Convention.

3. First-tier Tribunal Judge Ransley granted the Secretary of State permission to appeal to the Upper Tribunal in a decision of the 7 March 2014. Thus the appeal came before me.
4. It is not in dispute that the Judge Herbert erred in allowing the appeal under the Immigration Rules. In doing so the judge properly concluded that the claimant failed to meet the requirements of paragraph EC-P.1.1(c) of Appendix FM to the Rules (with reference to paragraph S-EC.1.4) as a consequence of the fact that he had an unspent conviction having been sentenced to 12 months imprisonment on 8 August 2007. Further, he failed to meet the maintenance requirement in paragraph EC-P.1.1(d) of Appendix FM (with reference to E-ECP.3.1). Judge Herbert, nevertheless, allowed the appeal under the Immigration Rules on the basis that the claimant met the requirements of paragraph EX.1(b) of Appendix FM.
5. It was confirmed by the Upper Tribunal in Sabir [2014] UKUT 63 (IAC), that paragraph EX.1 does not provide freestanding rights but *"is "parasitic" on the relevant Rule within Appendix FM that otherwise grants leave to remain."* In this case the claimant cannot meet the requirements of the relevant Rule in Appendix FM, thus his appeal brought in relation to the Immigration Rules ought to have been dismissed. For this reason I set aside the determination of the First-tier Tribunal.
6. Turning to the ground relating to Article 8, the Secretary of State's challenge to the First-tier Tribunal's decision is fivefold:
 - (i) The tribunal's error made in relation to the Immigration Rules infected its Article 8 conclusions; the failure to satisfy the Rules being an essential element of the proportionality assessment under Article 8;
 - (ii) The tribunal erred by failing to identify the compelling circumstances which led it to allow the appeal on the Article 8 ground, as it was required to do following the decision of the Upper Tribunal in Gulshan [2013] UKUT 00640 (Cranston J and Taylor UT));
 - (iii) The tribunal's conclusion on Article 8 is wrong;
 - (iv) The tribunal erred in its consideration as to the risk of the claimant committing further criminal offences; the evidence before the tribunal being insufficient to demonstrate the claimant's good character.
7. At the hearing Mr Saunders maintained all of the above grounds and pursued a further ground not pleaded in the notice of application; that being that the First-tier Tribunal erred in failing to consider whether there were arguably good grounds for granting leave to remain outside of the Rules prior to engaging in a substantive consideration of Article 8.

8. I deal first with the ground identified in paragraph 6(iv) above i.e. that the First-tier Tribunal erred in its assessment of the risk the claimant would pose were he to return to the United Kingdom.
9. The claimant was convicted of “attempting to obtain property by deception and attempting to obtain 2 passports from the IPS.” A deportation order was signed in his name on 18 July 2008 and he was removed from the United Kingdom pursuant to that order on 11 October 2008. He later made an application seeking to revoke the deportation order. The Secretary of State refused this, but Judge Rabin allowed the claimant’s appeal against that refusal in a determination of November 2011 (“2011 determination”). The Secretary of State was unsuccessful in her attempts to set aside the 2011 determination.
10. When coming to his conclusions Judge Herbert set out a number of findings made in the 2011 determination, including those relating to the genuineness of the claimant’s reformation of character [26-31]. He further observed that the claimant had, by the time of the hearing before him, spent nearly 5 years outside of the United Kingdom without further conviction [55]. Given the findings in the 2011 determination, which Mr Saunders accepted Judge Herbert was entitled to take into account, and the unobjectionable observation in paragraph 55 of his determination, in my conclusion it was clearly open to Judge Herbert to find as he did in paragraph 59 of the determination:

“There is no evidence before me that this appellant is likely to reoffend and therefore is not a risk in my view to the law and order being maintained in the United Kingdom nor does he pose a risk to any other member of society given the special circumstances of his offence”
11. I turn next to the ground upon which a majority of the oral argument before me focused, i.e. whether the error perpetrated by the tribunal in relation to its consideration of the Immigration Rules infected its conclusions on the Article 8 ground.
12. It is trite that the Secretary of State’s view as to where the public interest lies in Article 8 considerations is identified through the Immigration Rules and, consequently, a failure to meet those Rules is a matter of much significance in the tribunal’s deliberations on the issue of proportionality under Article 8.
13. In the instant case Judge Herbert correctly identified that the claimant failed to meet certain of the requirements of the Immigration Rules. His error in relation to paragraph EX.1(b) was not that his conclusion that the requirements of this Rule had been met was legally flawed, but rather in his understanding of the consequences for the claimant of meeting such requirements. Nevertheless, Mr Saunders is correct in his assertion that if Judge Herbert’s legal misdirection in relation to the Rules played a part in his consideration of the Article 8 ground, then the decision in relation to such ground must be vitiated by legal error.

14. In support of the respondent's position Mr Saunders placed reliance on paragraph 52 of Judge Herbert's determination, which reads:

"Even if this decision were not to be allowed under the Immigration Rules I have to adopt the case of Gulshan v SSHD [2013] UKUT 00640 and find that the Entry Clearance Officer failed to properly apply the Immigration Rules and under paragraph EX.1 this is an exceptional case and there are compelling circumstances that ought to have lifted entry clearance for the benefit of this appellant."

15. At first blush this paragraph appears to favour Mr Saunders submission, but when read in the context of the determination as a whole I do not accept that this is so. The paragraph plainly starts by identifying that the reasoning which follows is premised on the fact of the claimant failing to meet the requirements of the Immigration Rules. This, in my conclusion, is the approach that is taken thereafter by Judge Herbert, a conclusion which is re-enforced by paragraph 58 of the determination, where Judge Herbert says as follows:

"That having been said, the impact on the individuals in this case is so severe and long-term that the maintenance of immigration control whilst it must be weighed heavily in the balance is overridden by the impact on the individual family on the circumstances of the case"

16. Had Judge Herbert been considering Article 8 on the basis of the claimant having succeeded under the Immigration Rules then the maintenance of immigration control would not have weighed at all, let alone heavily, against the claimant in the assessment of whether the ECO's decision was proportionate to the legitimate aim pursued.
17. The reference by the First-tier Tribunal to paragraph EX.1 of Appendix FM in paragraph 52 of its determination is, in my conclusion, nothing more than identification of the fact that the claimant meets the requirements of that paragraph of the Rules, which on the unassailable findings of Judge Herbert he does i.e. that the claimant is in a genuine and subsisting relationship with a partner who is the United Kingdom and is a British Citizen and that there are insurmountable obstacles to family life with the partner continuing outside the United Kingdom. Judge Herbert comprehensively dealt with the latter issue in paragraphs 26, 29 and 39 to 42 of the determination. The family had lived together in Jamaica for seven months, but were unable to maintain this position primarily because of the adverse effect on A's health and well-being of living there. The fact that the claimant was in a genuine relationship with a British Citizen and that there were insurmountable obstacles to such relationship continuing in Jamaica is clearly a relevant factor in the assessment of the issue of proportionality.
18. When the determination is looked at as a whole, I conclude that Judge Herbert proceeded on his Article 8 analysis unencumbered by his earlier finding that the claimant met the requirements of the Immigration Rules and, consequently, I do not accept that the error made by Judge Herbert in

relation to the Immigration Rules infected his conclusions on the Article 8 ground.

19. Turning to the grounds identified in paragraphs 6(ii), 6(iii) and 7 above; these are freestanding challenges to Judge Herbert's consideration of Article 8 and can readily be considered together.
20. Contrary to that submitted in the grounds, Judge Herbert not only properly directed himself to the *ratio* of the decision in Gulshan but, thereafter, applied such self direction. The judge was at pains to identify, in his conclusory paragraphs, the particular circumstances of this claimant's case that he considered to be compelling. The reasons he gives for his conclusions in this regard are, in my view, legally adequate. The losing party, in this case the Secretary of State, can readily identify why she lost. The decision to allow the appeal on Article 8 grounds was one that was open to Judge Herbert for the reasons he gives. Had I exercised my discretion to re-make the decision on Article 8 grounds, I would have come to the same conclusion.
21. As to the additional point raised by Mr Saunders at the hearing, permission was not sought to adduce such ground and I refuse to admit it. In any event, it is self evident that given that the judge found that there were sufficiently compelling and exceptional circumstances not sufficiently recognised under the Rules so as to require him to allow the appeal on the Article 8 ground, he must also, although he did not expressly say so, have found there to be "good arguable grounds for granting leave to remain outside of the Rules" within the meaning attributed to that phrase by the Tribunal in Gulshan.
22. For the foregoing reasons I set aside the decision of the First-tier Tribunal. The Upper Tribunal has discretion as to scope of the re-making of the decision on appeal. Upon re-making the decision I dismiss the appeal brought in relation to the Immigration Rules. I have considered whether to exercise discretion to re-visit the Article 8 ground but have concluded that it is not necessary for me to do so given my finding that the First-tier Tribunal's determination of this ground was without legal error.
23. Mr Chelvan submitted that in all the circumstances of this case I ought to make a direction pursuant to section 87 of the Nationality, Immigration and Asylum Act 2002 that the claimant be granted entry clearance. In the ordinary course of events one would hope that the claimant will be granted entry clearance forthwith but I, nevertheless, decline to exercise my discretion to direct that this be so. This appeal has been allowed on the basis of the circumstances that appertained as of the date of the ECO's decision, which is now over 14 months ago. It may be that those circumstances have not changed, but this will be a matter for the ECO when considering whether to grant entry clearance. Although I have some up-to-date evidence before me, that evidence has not been tested and has not been the subject of submissions.

Decision

The determination of the First-tier Tribunal is set aside.

Upon re-making the decision I allow the claimant's appeal on the basis that the decision of the ECO is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the claimant's rights under Article 8 of the Human Rights Convention.

The ECO's decision is in accordance with the Immigration Rules and consequently the appeal brought on the ground asserting to the contrary is dismissed

I make an anonymity direction in this appeal given that two minors play a part in the proceedings and the tribunal's decision. Unless and until a Tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

A handwritten signature in black ink, appearing to read 'M. O'Connor', written over a horizontal line.

Upper Tribunal Judge O'Connor
Date: 15 April 2014