



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10849/2014

THE IMMIGRATION ACTS

Heard at Field House
On 23 October 2015

Decision and Reasons Promulgated
On 5 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

A. D.

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Yeo (counsel) instructed by Elder Rahimi, solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, or his children. I do so on the basis of the minority of the children and their best interests in remaining anonymous.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Davey promulgated on 21st August 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 29 September 1982 and is a national of Zimbabwe.
4. On 20 November 2014 the Secretary of State refused the Appellant's application to revoke a deportation order signed on 30 April 2009.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Davey ("the Judge") dismissed the appeal against the Respondent's decision.
6. Grounds of appeal were lodged and on 16 September 2015 Judge Ford gave permission to appeal stating

"It is arguable that Judge Davey erred in failing to make clear findings of fact and give clear reasons for his decision on relevant issues under paragraphs 390, 390A, 398, 399, and 399A of the Immigration Rules"

The Hearing

7. (a) Mr Yeo, for the appellant, argued that the decision contains many material errors of law, and that the Judge had failed to establish whether he looked at the case through the lens of revocation or deportation. He told me that it is impossible to discern what legal tests the Judge has applied, and that the Judge has not looked at the relevant paragraphs of the immigration rules. He referred me to paragraphs 390A, 398, 399 & 399A of the immigration rules and complained that the Judge had not considered which rule would apply to trigger a deportation decision; and that in any event the Judge incorrectly looked at the exceptions set out in paragraphs 399 and 399A of the rules. In essence, Mr Yeo told me that the Judge completely omitted a fundamental step and applied the wrong test.

(b) Mr Yeo was critical of the Judge's handling of the evidence, telling me that at [16] the Judge incorrectly states that there was no up-to-date evidence from the mother of the appellant's children, yet she had provided a witness statement & was present at the hearing. At [21] the Judge refuses to reach a conclusion about whether or not the appellant is in a durable relationship with his partner, when he argues that evidence was available. Mr Yeo told me that [16] and [21] indicate that the Judge had not understood the evidence submitted. At [30] the Judge refers himself to section 117A to 117D of the 2002 Act, but then failed to carry out any analysis or reach any conclusions. At [31], instead of applying the "*insurmountable obstacle test*", the Judge considers whether or not it is impossible for the appellant's partner to join him in Zimbabwe. Overall, Mr Yeo submitted that the determination was fundamentally flawed by material errors in law. He asked me to set aside the determination and to remit the case to the First-tier Tribunal because an inadequate fact finding exercise had been carried out.

8. Ms Everett, for the respondent, relied on the rule 24 reply dated 25 September 2015. She argued that there are no material errors of law contained within the decision; that the correct test had been applied, and that there was no inadequacy in

the Judge's fact finding exercise. She told me that the Judge had correctly directed himself in law before reaching conclusions which were open to him to reach. She urged me to dismiss the appeal and to uphold the decision.

Analysis

9. The rules provide, at paragraph 397, that a deportation order will not be made if it would be contrary to the UK's obligations under the Refugee Convention or the ECHR or if not contrary to those obligations in exceptional circumstances. Paragraphs 398, 399 and 399A then set out the requirements to consider when assessing the Article 8 position. In MF (Nigeria) [2013] EWCA Civ 1192 the Master of the Rolls indicated that where the "new rules" (in force from 9 July 2012) apply (in a deportation case), the "*first step that has to be undertaken is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8*". Paragraphs 399 and 399A set out the exceptions to deportation.

10. In Chege (section 117D & Article 8 & approach) [2015] UKUT 165 (IAC) it was held that the correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider: (a) is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c); (b) if so, does he fall within paragraph 399 or 399A of the Immigration Rules; (c) if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon.

11. At [10] the Judge finds that the appellant raises no challenge under the refugee Convention to the deportation order and, in the final sentence there, appears to dismiss the appeal under the immigration rules (with specific reference to paragraphs 390 to 399A). The Judge opens [12] by saying "*the asylum claim having effectively come to an end, it seemed to me it would have failed in any event....*" He then proceeds to dismiss the appeal in terms of articles 2 and 3 ECHR,

12. The problem created by the Judge's approach is that it gives, at the very least, an appearance of superficiality. It is not clear from a straightforward reading of the decision that the Judge weighed the evidence in this case against the requirements of the immigration rules. A careful reading of the decision discloses that the Judge did not make evidence-based findings of fact before considering the relevant paragraphs of the immigration rules. I consider that the lack of findings of fact and the absence of an explanation of the reasoning behind the finding that the appellant cannot fulfil the requirements of paragraphs 390 to 399A of the immigration rules amounts to a material error of law.

13. The Judge moves on to consider article 8 ECHR, but appears to conflate his proportionality exercise with consideration of paragraph 399 of the immigration rules. The Judge embarks on an exercise considering paragraph 21 of the Immigration (EEA) Regulations 2006, when the respondent's decision does not involve the consideration of the 2006 regulations. The case file reveals that medical evidence was produced. At [26] the Judge says that he has no up-to-date medical evidence before him. The Judge makes reference to section 117A to 117D of the 2002

Act, but the decision does not contain adequate discussion of the factors which must be taken into account when assessing proportionality.

14. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

15. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

Conclusion

16 I find that the Judge's decision is tainted by material errors of law. The Judge's decision cannot stand and must be set aside in its entirety. All matters to be re-determined afresh.

17. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

18. In this case I find that the case should be remitted because of the extent to which judicial fact finding is necessary for the decision in the appeal to be re-made. In this case none of the findings of fact are to stand; the matter requires a complete re-hearing.

19. I consequently remit the matter back to the First-tier Tribunal to be heard before any First-tier judge other than First-tier Tribunal Judge Davey.

Signed

Date 30 October 2015

Deputy Upper Tribunal Judge Doyle