



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

Appeal Number: IA/02295/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke-
on-Trent
On 23rd March 2015**

**Determination Promulgated
On 25th March 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR THOMAS MUCHERU

Respondent

Representation:

For the Appellant: Mr G Harrison (Senior Home Office Presenting Officer)

For the Respondent: Miss E Rutherford (instructed by Usman Khan Solicitors)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Respondent, with permission, against the determination of First-tier Tribunal Judge O R Williams promulgated on 22nd August 2014 by which he allowed the Appellant's appeal against the Secretary of State's decision to refuse him leave to remain on the basis of his private and family life and to remove him to Kenya.

2. For the purposes of continuity I shall refer in this determination to the Secretary of State as the Respondent and Mr Mucheru as the Appellant.
3. Permission to appeal was granted by a First-tier Tribunal Judge on the basis that he found it arguable that the Judge may have erred in failing to provide proper reasons why the Appellant's circumstances were exceptional or compelling or whether they simply amount, as submitted by the Secretary of State to 'an ordinary family life claim'.
4. The facts of this case are that the Appellant entered the UK in 2010 as a T4 student. Whilst in the UK lawfully he met, in 2011, and married, on 11th October 2013, Katie Jones, a British citizen by birth. Their child was born on 2nd May 2014. Both the Appellant's wife and child are British.
5. The Secretary of State in the grounds asserted that the Judge erred in considering the appeal under Article 8 outside the Rules and further erred in finding that removal of the Appellant would sever his relationship with his wife and child when the separation could be temporary while he sought entry clearance.
6. The Judge found, with reasons that the Appellant had a genuine and subsisting parental relationship with his child and that the child could not reasonably be expected to live in Kenya. The child is too young to have been inoculated against Malaria and his wife is white and the child mixed race. The child is entitled to grow up in the UK and enjoy the educational, health and other benefits of his nationality.
7. There is a reference in the determination to a criminal conviction. However that was disclosed to the Secretary of State in the application and did not form any part of the refusal. The Judge was entitled to consider it of no significance therefore and Mr Harrison accepted that to be correct.
8. I do not find that the determination contained an error of law to warrant it being set aside. The finding as to the relationship between the Appellant and his child and that it would be unreasonable to expect the child to move to Kenya were findings properly open to the First-tier Tribunal Judge and sufficient to warrant the appeal being allowed.
9. In a consideration of proportionality a Judge must take into account the provisions of s.117 of the Nationality, Immigration and Asylum Act 2002 as inserted by s.19 of the Immigration Act 2014. S117B (6) provides that:-

In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

10. In this case, based on the Judge's findings, s.117B (6) clearly applied and absent the public interest in removal there is no reason left to remove the Appellant.
11. On the findings of the Judge, which were based on the evidence and properly reasoned, the Appellant was entitled to succeed.
12. Mr Harrison did not make any submissions to the contrary.
13. The appeal to the Upper Tribunal is dismissed.

Signed

Dated 25th March 2015

Upper Tribunal Judge Martin