IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14794/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 July 2015	**On 11 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/Respondent

and

MR CHARLES LOUIE CHERY
(ANONYMITY DIRECTION NOT MADE)

Respondent/Appellant

Representation:
For the Appellant: No Attendance
For the Respondent: Mr E Tufan, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. In this appeal I will adopt the descriptions of the parties in the decision of the First-tier Tribunal (FtT).

2. This is an appeal against the decision of the FtT Judge Seifert ("the Immigration Judge") promulgated on 30 March 2015. In her decision the Immigration Judge allowed the appellant's appeal against the respondent's decision to refuse leave to remain under Article 8 of the European

Convention on Human Rights ("ECHR"), it appears, inside and outside the Immigration Rules.

3. The respondent appealed to the Upper Tribunal against that decision on 2 April 2015 because, it was contended in the grounds, the judge had:

   (1) Failed to properly consider the requirements of paragraph 276ADE (iv) in relation to the appellant's son (E Chery).

   That paragraph of the Immigration Rules (found in Phelan Immigration Law Handbook at page 807) deals with the requirements to be met by an applicant for leave to remain on the grounds of private life.

   Subparagraph (iv) thereof deals with the requirements to be met by an applicant who is under the age of 18 years but who has lived in the UK continuously for at least seven years and in circumstances where it would not be reasonable to expect the applicant to leave the UK.

   (2) The finding that he appellant's son, E Chery, met the requirements of paragraph 276ADE (iv) had influenced the remainder of the decision so that the remainder of that decision could not be relied on. The reference in paragraph 55 to "public interest considerations" had arguably not been properly applied having regard to the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002.

   (3) Whilst it was accepted that there was only one appeal before the Immigration Judge, it was contended in the grounds that the judge was wrong to consider Section 117B considerations in relation to the appellant but not to all the family members dependent on the appeal.

   (4) The Immigration Judge had not carried out a proper **Razgar** assessment at paragraph 56 of his decision in that the Immigration Judge had failed to carry out a proper and adequate balancing exercise in respect of the proportionality assessment. The judge had failed to take into account the wider circumstances and countervailing factors having regard to recent case law such as **PG (USA) v SSHD [2015] EWCA Civ 118** such as the overstaying of the appellant's wife and the fact that none of the children had ever had leave to remain as well as the fact that the appellant himself had overstayed (see **Zoumbas [2013] UKSC 74**).

4. When she came to consider these grounds Judge Shimmin thought they were at least arguable. Specifically, Judge Shimmin noted an apparent error in properly applying paragraph 276ADE (iv) of the Immigration Rules and the finding that E Chery met the requirements of that Rule. The judge had also arguably failed to apply the public interest considerations in Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") fully and the appellant and not his dependent family appears to have been subject to a **Razgar** assessment. All grounds were stated to be arguable by Judge Shimmin, who gave permission.

The Hearing

5. At the hearing there was no attendance by the appellant's representatives, Messrs. Farringdon Solicitors. I checked the Tribunal file and noted that a notice of hearing had been sent out on 30 June 2015. This notified the appellant of the date and enclosed appropriate directions. There was no response to those directions from the appellant's representatives and no response under Rule 24 under the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, I decided to proceed with the hearing in the absence of the appellant or his representative.

6. Mr Tufan relied on the grounds. He also indicated that the eldest child had been in the UK for nine years but the issue was whether the child could now return to Gambia with his family. Mr Tufan referred me to two recent cases which I found helpful. He referred to the case of **EV (Philippines) [2014] EWCA Civ 874** and **Zoumbas [2013] UKSC 74**. He specifically referred me to paragraph 58 in the later decision where the Court of Appeal said:

> "…The assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

7. He also referred me to paragraph 24 in **Zoumbas** where it states:

> "There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and healthcare in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. …"

8. Mr Tufan submitted that at paragraph 52 of the determination the Immigration Judge had considered the evidence and then asked himself

whether it was "reasonable" to expect the appellant's son, E Chery, to leave the UK. However, he goes on and states that the appellant would not be taught English at school in Gambia whereas he "only speaks English". Mr Tufan submitted that this was factually incorrect. English was widely spoken in Gambia. This was one of a number of errors the Immigration Judge made.

9. Finally, Mr Tufan referred to the requirements of Section 117A of the 2002 Act, which provided for public interest considerations to be taken into account in "all cases" where Article 8 was advanced as a reason for granting leave to enter or remain in the UK. Mr Tufan pointed out that one of the public interest considerations to be taken into account was the lack of weight which should attach to a private life established by a person at a time when his immigration status was precarious. It was submitted that the Immigration Judge had failed adequately to consider this point in his determination.

10. At the end of the short hearing I decided to reserve my decision as to whether or not there had been a material error of law in this case.

Discussion

11. The appellant first came to the UK in 2000 but subsequently returned to Gambia. It seems that he met and married his wife, Marian, there in 2004. They therefore returned to the UK in 2005 with knowledge of their lack of immigration status in the UK. Indeed, they would inevitably have to return to Gambia. Notwithstanding this, the appellant and his wife embarked on family life in the UK. Meanwhile, his status as a student no longer subsisted. An application for a student visa in 2006 was refused and he had no right of appeal against that refusal. He was served with a notice under IS.151A on 13 September 2007 informing him of his immigration status. Mrs Chery applied in her own right in June 2004 but her entry clearance was only valid until December 2004. She applied for a further visa in 2005 and entered the UK in May 2005 but her status was that of residency for a period of about eight years when the application was made, which was, as the respondent stated in her refusal, substantially less than was required for leave to remain under paragraph 276ADE. She had continuing ties with Gambia and although the immediate family had been in the UK. The family did not attempt to regularise their status until 2014.

12. Three children were born in the UK (on 6 July 2005 in the case of Ernest, 28 December 2008 in the case of Susan and 26 July 2011 in the case of Marie) at a time when the appellant and his wife did not have any right to remain in the UK.

13. This is a factor of considerable weight, as the respondent contends in her grounds of appeal. On the other hand, the children are not to be punished for the mistakes of their parents and the respondent acknowledges her duty regarding their welfare under section 55 of the Borders, Citizenship

and Immigration Act 2009. However, the need to safeguard and promote the interests of the children, including E. Chery, was only one factor to consider, albeit one of paramount importance.

14. Reference is made in the grounds to the changes brought about to the 2002 Act by the 2014 Immigration Act. In particular, Section 117B imports the requirement that public interest considerations are be taken into account in any assessment under Article 8. The need for effective immigration control (which means respect for the need for foreign nationals to return to their own countries when their leave expires), the need for the United Kingdom to admit only those who were not a burden on taxpayers and able to integrate into society, and the need to accord little weight to a private life established by a person whose immigration status is precarious, are all factors that should weigh in the balance.

15. I am not satisfied that the decision of the Immigration Judge, which focused on the needs of the appellant's son, E Chery, properly considered the requirements of the 2014 Act. As the judge granting permission, Judge Shimmin, stated, it appears that the Immigration Judge's favourable assessment in relation to E Chery and Section 55 of the UK Borders Act 2007 (the rights of the child) influenced the remainder of the decision.

16. When the Immigration Rules are considered in full and the requirements in the 2002 Act (as amended) are placed into the balance it is clear that public interest considerations would outweigh the requirements of Article 8 to respect a private or family life.

17. Furthermore, it is not clear from the decision that the Immigration Judge did not carry out a proper balancing exercise as required by **Razgar** and the countervailing factors that operate in this case having regard to the case of **Zoumbas**.

Conclusions

18. I have concluded, having carried out a careful consideration of the decision of the FtT that the Immigration Judge did not carry out an assessment as required. Accordingly, the appellant's story, in particular, the interests of his son, were only part of the proper balancing exercise to be conducted.

19. When the interference with the appellant's private or family life was properly put in the balance as set against the wider considerations described above, it is clear that the correct conclusion was that the appellant had failed to establish that he satisfied the requirements of the Rules. The requirements of the Rules were a benchmark to be considered in all cases and not simply cases where the application only made under the Rules. There was no justification for allowing the appellant's appeal on a free-standing basis outside the rules either.

20. I find that the grounds of appeal are made out and that there is a material error of law in the decision of the FtT. The fact-findings of the FtT are not essentially in dispute and they will be allowed to stand. The appellant and his family as a whole can return to Gambia where they have a number of ties.

Notice of Decision

The decision of the FtT contains a material error of law. Accordingly, that decision is set aside.

I substitute the decision of the Upper Tribunal which is to dismiss the appeal against the notice of decision of the respondent to refuse further leave to remain whether inside or outside the Immigration Rules. The removal of the appellant and his family would not constitute breaches of the UK's obligations under the ECHR. Accordingly, the decision to remove the appellant as an illegal entrant stands.

There was no claim for any anonymity directions.

Signed Date

Deputy Upper Tribunal Judge Hanbury