Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37733/2013
IA/37742/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 October 2015	**On 8 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR RICARDO JOSE NUESA MIRO
MRS EDEN GAPIT MIRO

Respondents

Representation:
For the Appellant: Ms Shirley Vidyadharan, Home Office Presenting Officer
For the Respondent: Mr Greg O'Ceallaigh, counsel instructed by Augustine Clement Solicitors

DECISION & REASONS

1. This is an appeal by the Secretary of State for the Home Department, against a decision by First Tier Tribunal Judge Telford promulgated on 20 April 2015, in which he allowed the appeal by the Respondents on Article 8 grounds against the decision by the Secretary of State for the Home Department dated 29 August 2013 to remove them from the United Kingdom pursuant to a decision to refuse their human rights claims.

2. The Respondents are both nationals of the Philippines, born on 20

February 1960 and 7 January 1962 respectively. They arrived in the United Kingdom on 13 April 2000 together with their son, Jose, born on 10 March 1988 with a visit visa valid for 6 months. The Second Respondent made an application for leave to remain as a student in November 2000, which was refused and thereafter the family remained without leave. In 2006, the Respondents instructed LH Immigration Services to submit an application for leave to remain on their behalf but it does not appear that this application ever received a response from the Secretary of State for the Home Department. On 3 November 2010, the First Respondent was apprehended as an overstayer and served with an IS151A notice. An application was made on 5 November 2010 for leave to remain on the basis of human rights. This application was refused on 11 November 2010 and certified as clearly unfounded. Judicial review proceedings were then commenced which resulted in the withdrawal by the Secretary of State of her previous decisions. Further representations were then made which resulted in new decisions of 23 August 2013, refusing the two Respondents leave to remain but granting their son, Jose, discretionary leave to remain.

3. The Respondents appealed and their appeals came before First Tier Tribunal Judge Telford for hearing on 25 March 2015. In a decision promulgated on 20 April 2015 the Judge allowed the appeals on the basis that there were exceptional circumstances that justified consideration outside the Immigration Rules [17] and he found that the Secretary of State for the Home Department had failed to establish that in this particular case the decision was proportionate [24].

4. The Secretary of State for the Home Department sought permission to appeal against his decision on 28 April 2015 on the grounds that the Judge had erred materially in law in that: (i) he made a mistake as to material fact in findings at [20] that the Respondents' son had been granted Indefinite Leave to Remain, whereas he had, in fact, been granted 30 months Discretionary Leave and (ii) he failed consider sections 117A-117D of the Nationality, Immigration & Asylum Act 2002 which required him to have regard to the public interest considerations in the case. Reliance was also placed on Dube (s.117A-117D) [2015] UKUT 00090 (IAC). Permission to appeal was granted by First Tier Tribunal Judge Cruthers on 24 June 2015 on the basis that the grounds were arguable.

5. At the hearing before me, Ms Vidyadharan for the Secretary of State relied upon the grounds of appeal and submitted that the crux of her argument is that the Judge failed to properly go through sections 117A-117D and failed to give weight to matters that the Tribunal was statutorily obliged to do. She submitted that the error of fact in relation to Jose's status permeated through the determination and the Judge further failed to take the Respondents' unlawful residence into account. She submitted that the Judge at [18] stated that he bore in mind that the Respondents did not come to the United Kingdom with anything but a short visit in mind and remained illegally but he failed to factor the public interest into the mix and the fact that he was not prepared to accept they have not worked illegally did not sit well with the public interest.

6. In response, Mr O'Ceallaigh submitted that this was an exceptional case in that the Respondents had been providing enormous benefit to the United Kingdom through their work for Couples for Christ. In respect of the assertion that the Judge failed to take into account the Respondent's unlawful presence, he drew my attention to [18] and [19] where the Judge expressly stated that he needed to balance the appalling and deceptive immigration history with the positive factors. He submitted that at [17] the Judge gave clear reasons as to the exceptional circumstances which justified consideration outside the Immigration Rules and that the Judge had conducted a proper balancing exercise. In respect of the status of the Respondents' son, Jose and the reference at [20] to the grant of indefinite leave to remain, this was obviously a mistake because reference was made in the witness statements, particularly that of Jose at [4] and the skeleton argument to the fact that Jose had been granted discretionary leave to remain. He submitted that a misprint was the most obvious explanation, but even if it was not a typo or a misprint ultimately the Secretary of State for the Home Department had granted Jose discretionary leave because it would be disproportionate to remove him. In respect of the second ground, Mr O'Ceallaigh submitted that the Judge took into account the factors he was required to and following Dube it did not matter if section 117A-D was expressly referred to if it had been taken into account in substance. Dube states in terms that it is not necessary for the Judge to set out section 117. At [18] in his criticism of the behaviour of the Respondents he is clearly taking the public interest into account. At [19] he rightly decided that the immigration history was appalling. At [21] he took into account that the Respondents speak English and contribute economically to the United Kingdom and it is clear he had the public interest in mind. He correctly directed himself in respect of caselaw principles *cf.* UE (Nigeria) [2010] EWCA Civ at [22] and did not accord weight to private life but rather reduced the weight to be accorded to immigration control. He submitted that there was no error of law in the decision of the First Tier Tribunal Judge. There was no reply by Ms Vidyadharan on behalf of the Secretary of State for the Home Department.

7. I find that there was no material error of law in the decision of First Tier Tribunal Judge Telford. In respect of the first ground of appeal *viz* material error of fact in respect of Jose's immigration status in the United Kingdom, I agree with Mr O'Ceallaigh that the reference to the grant of indefinite rather than discretionary leave to the Respondents' son, Jose, is most likely to be a typographical error, given that the evidence before the Judge was that he had been granted discretionary leave. Even if that is not the case, the error was not a material one given the evidence, which the Judge accepted at [17] and was not challenged by the Secretary of State for the Home Department, that Jose has had the majority of his life in the UK and he is now effectively English and at [20] that he was aiming to become a British citizen and would be affected by the loss of his parents from his life.

8. In respect of the second ground of appeal *viz* the failure to consider sections 117A-117D of the Nationality, Immigration & Asylum Act 2002, the Judge at [3] made express reference to the public interest elements to be considered under sections 117A-D inclusive of the Nationality, Immigration & Asylum Act 2002 which apply where Article 8 is considered and thus properly

directed himself. Whilst there is no specific paragraph in the decision where the Judge sets out those considerations, Dube (s.117A-117D) [2015] UKUT 00090 (IAC) makes clear at [2] of the headnote that it is not an error of law to fail to refer to the ss117A-D considerations if the Judge has applied the test he was supposed to apply according to its terms and that what matters is substance not form. First Tier Tribunal Judge Telford clearly had regard to the public interest and made express reference to it not only at [3] but also at [21]. The Judge was clearly aware of the precarious nature of the Respondents' private life and expressly found at [18] that their period of unlawful presence was from 2000-2010, but he properly balanced this "*appalling and deceptive immigration history*" [19] with the positive factors which included their ability to speak English and support themselves financially [21] along with the absence of criminal convictions, the impact on Jose and their work for the wider community [19]-[21].

9. For the reasons set out above, I find that First Tier Tribunal Judge Telford did not err materially in law in allowing the Respondents' appeal. Consequently, the appeal by the Secretary of State for the Home Department is dismissed and the decision of First Tier Tribunal Judge Telford is upheld.

Deputy Upper Tribunal Judge Chapman

7 October 2015