



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01509/2014

THE IMMIGRATION ACTS

Heard at Field House
On 31 July 2015

Determination Promulgated
On 18 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR LEO LIVINGSTONE DAVIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER
(KINGSTON, JAMAICA)

Respondent

Representation:

For the Appellant: Ms Kansal of counsel

For the Respondent: Mr Tarlow, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING NO MATERIAL ERROR OF LAW

Introduction

1. This is an appeal by the Appellant.
2. The appellant is a citizen of Jamaica and his date of birth is 19 February 1977.

3. The appellant applied for entry clearance as an adult dependant relative. On 11 November 2014 the respondent refused his application having considered paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules HC 395 (as amended) ('the Immigration Rules'). The reason for refusal was because the appellant is subject to a deportation order.
4. The appellant appealed against the respondent's decision to the First-tier Tribunal.

The First-tier Tribunal Judge's Decision

5. First-tier Tribunal Judge Paul ('the judge') dismissed the appeal in a decision promulgated on 4 March 2015. There was no appearance by the sponsor, his representative, or the respondent's representative at the hearing. The judge proceeded to determine the appeal on the papers, recording that the notice of hearing had been sent on 8 July to the appellant's solicitors at an old address, namely, 1 Olympic Way, Wembley Park, London ('the old address').

Permission to Appeal

6. The appellant applied (out of time) for permission to appeal against the decision of the First-tier Tribunal on the basis that notice of the hearing was not received and that by proceeding in the absence of the sponsor and representative the appellant has not had a fair hearing. First-tier Tribunal Judge Grant-Hutchison extended time, admitting the application and granted permission to appeal.
7. The respondent filed a Rule 24 response opposing the appeal submitting that the judge directed himself appropriately. The respondent also requested that the Upper Tribunal check whether the notice of hearing was served on the appellant.
8. At the hearing we heard submissions from Ms Kansal on behalf of the Appellant and Mr Tarlow on behalf of the Entry Clearance Officer.

Legal Framework

9. Section EC-DR of the Immigration Rules states:
'Section EC-DR: Entry clearance as an adult dependent relative
EC-DR.1.1. The requirements to be met for entry clearance as an adult dependent relative are that-
....
(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability for entry clearance; and
...'

10. Section S-EC of appendix FM states:

‘Section S-EC: Suitability-entry clearance

S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.8. apply

...

S-EC.1.3. The applicant is currently the subject of a deportation order.’

11. Article 8 of the ECHR states that:

(i) Everyone has the right to respect for his private and family life, his home and his correspondence.

(ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

12. As a result of the amendments which came into force on 28 July 2014, inserted by virtue of section 19 of the Immigration Act 2014, the Immigration and Asylum Act 2002 (‘the 2002 Act’) now requires the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

...

117C Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

...

- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

13. The Tribunals, Courts and Enforcement Act 2007 provides:

S.11 Right to appeal to Upper Tribunal

- (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
- (2) Any party to a case has a right of appeal, subject to subsection (8).
- (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
- (4) Permission (or leave) may be given by –
 - (a) the First-tier Tribunal, or
 - (b) the Upper Tribunal, on an application by the party.

12 Proceedings on appeal to Upper Tribunal

- (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
- (2) The Upper Tribunal –
 - (a) may (but need not) set aside the decision of the First-tier Tribunal, and
 - (b) if it does, must either –
 - (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
 - (ii) re-make the decision.
- (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also –

- (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
 - (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
- (4) In acting under subsection (2)(b)(ii), the Upper Tribunal –
- (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
 - (b) may make such findings of fact as it considers appropriate.

Error of Law

14. Generally speaking the Upper Tribunal will only interfere with a decision of the First-tier Tribunal, it finds an error of law, if that decision was material to the outcome of the appeal.
15. Rule 28 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum chamber) Rules 2014 provide that if a party to an appeal fails to attend the hearing of the appeal the Tribunal may proceed in the party's absence if satisfied that the party was notified of the hearing and if it considers it is in the interest of justice to proceed with the hearing.
16. The relevant chronology, as ascertained from the Tribunal file, appears to be that:
 - On **10 March 2014** the appellant's representative, Grayson Solicitors, wrote to the Tribunal chasing for an update on the appeal. The address for Graysons was 1 Olympic Way – the old address.
 - On **1 May 2014** a further letter was sent by the same representative again chasing for an update. The address on this letter was 1 Ballards Lane, Finchley Central, London– the new address.
 - On **8 July 2014** the notice of hearing was served. It was sent to the old address.
 - On **15 July 2014** an email was sent by the representative to the Tribunal following a conversation with Tribunal staff in which the Tribunal indicated that it had not received notification of the change of address. The email asked that the system be updated and specifically asked for any correspondence that had been sent after 19 February 2014 to be re-sent.
 - On **13 August 2014** a further email was received in which the representative acknowledged receipt of the Respondent's bundle and that they hoped to hear soon about the appeal. Mr Tarlow was unable to inform us of the address that this was sent to.
17. The judge, at paragraph 4 of the decision, records that the notice of hearing had been sent to the solicitor's old address. At paragraph 5 the judge queries why

there was no follow up to the letter of 15 July 2014 chasing the hearing date but notes that the letter had specifically requested that all letters after 19 February 2014 were re-sent. At paragraph 6 the judge noted that the letter dated 13 August 2014 indicates that the representatives had received the respondent's bundle and found from this that there was no evidence to indicate that the representative had not been properly informed of the appeal.

18. In our view the judge ought not to have been satisfied that notice of the hearing had been received by the representative. The judge appears to have relied on the fact that the respondent's bundle had been received as evidence that the change of address had been recorded. However, the respondent's bundle was received in August, the notice of hearing was served over a month earlier and was in fact served on the old address.
19. The representative's request for any correspondence sent after the move to be re-sent does not appear to have been actioned. The representatives were actively pursuing the appeal as evident from the further correspondence.
20. We find that proceeding in the absence of the party in these circumstances was an error of law.
21. We heard submissions from Ms Kansal. In essence Ms Kansal submitted that the error was material as representations, which would have been made, might have made a material difference to the outcome of the case. Ms Kansal submitted that the application to the Entry Clearance Officer, although for entry as a dependant adult relative, was implicitly an application for revocation of the deportation order. There is no definition of how a revocation request must be served. Paragraph 390 of the Immigration Rules merely sets out representations must be made to an ECO or the HO. The Secretary of State for the Home Department must consider the case in hand. Ms Kansal referred us to the case of Latif (s120 -revocation of deportation order) [2012] UKUT 00078 (IAC) which she acknowledged was against her. However, she submitted that if the First-tier Tribunal judge had decided against the appellant on this issue then they could have appealed to the Upper Tribunal and eventually appealed to the Court of Appeal where it could have been argued that Latif was wrongly decided.
22. In reply Mr Tarlow argued that there was no indication that a revocation of the deportation order had been applied for even implicitly. The chance of a deportation order being revoked in this case was very low but it remains open to the appellant to make such an application. He submitted that even if proceeding in the absence of the appellant was an error it was not material to the outcome of this case which could not succeed.

Discussion/ consideration of the merits

23. There is nothing in the application before the ECO that could be considered to have been an implicit application for revocation of the deportation order.

Further, no suggestion has been made at any stage of these proceedings, prior to Ms Kansal's submission at the hearing, that a revocation was being applied for. In any event there appears to be no merit in these arguments for the reasons given below. The case of Latif, as Ms Kansal pointed out, is against her.

24. The appellant was deported after serving 5 years of what, we were told by Mr Tarlow, was a 9 year sentence. We do not have the details of the offence committed but clearly it must have been a very serious offence. We understand that the offence was committed in 2000 when the appellant was 23 years of age. The sponsor's witness statement indicates that the appellant left the UK in 2005 and has therefore been outside of the UK for approximately 10 years. It is established that family life will not normally exist between parents and adult children within the meaning of article 8 at all in the absence of further elements of dependency which go beyond normal emotional ties: see Abdulaziz, Cabales and Balkandali v. United Kingdom [1985] 7 EHRR 471, and JB (India) v. ECO [2009] EWCA Civ 234.
25. There is some medical evidence that the appellant is suffering from depression and relies on the emotional support of his mother and brother in the UK. This appears to have been ongoing for over 20 years. He asserts that he is financially dependent on his mother who sends £50 per month to him. Financial dependence on a parent does not demonstrate the existence of strong family ties between adult children and the parent nor are visits and regular telephone calls evidence of anything more than the normal ties of affection between a parent and her adult children. In any event there is no reason that we have been shown as to why this support should not continue.
26. The appellant cannot succeed under the Immigration Rules. Section S-EC1 provides that an application for entry clearance will be refused if the applicant is currently the subject of a deportation order. The appellant is currently subject to a deportation order. The Rule permits of no discretion.
27. The appellant can make an application for revocation of the deportation order but he has not done so. It is difficult to envisage circumstances in which it would be proportionate to allow a mandatory requirement such as this in the Immigration Rules to be circumvented by relying on Article 8. We do not consider that there is any compelling reason to consider this claim outside of the Immigration Rules.
28. When considering the statutory requirements in s117C the appellant's case appears hopeless. 117C provides additional considerations in cases involving foreign criminals. The deportation of foreign criminals is treated as being in the public interest. The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal. In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest **requires** deportation unless there are **very compelling** circumstances over and above the exceptions for family and private

life. By analogy these requirements must be even stronger where the appellant is not currently enjoying any family life in the UK.

29. No compelling circumstances exist in this case to require consideration under Article 8 of the ECHR outside the requirements of the Rules. The error of law was therefore not material as it is unlikely that if the judge had heard oral representations or evidence by the appellant's witnesses or representatives it would have reached any different conclusion from that which it reached. Thus in our view the failure of the appellant's representatives to attend the hearing has not made any difference to the outcome of this appeal which was bound to fail.

Conclusions

30. There was no material error of law - the decision of the First-tier Tribunal stands.
31. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

Notice of Decision

32. The appeal is dismissed. The decision of the First-tier Tribunal and the decision of the Entry Clearance Officer to refuse leave to enter as an adult dependant relative stands.

Signed

P M Ramshaw
Deputy Upper Tribunal Judge Ramshaw

Date 5 August 2015