



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/05472/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 21st October 2015

Decision & Reasons Promulgated
On the 3rd November 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR KWABENA ADU GYAMFI

Respondent

Representation:

For the Appellant (the Secretary of State): Mr Wilding (Home Office Presenting Officer)

For the Respondent/Claimant Mr Gyamfi: Mr Ngwuosha (Solicitor)

DECISION AND REASONS

1. This is the Secretary of State for the Home Department's appeal against the decision of First-tier Tribunal Judge Oxlade promulgated on the 2nd June 2015. Throughout this decision, the Appellant will be referred to as the as "the Secretary of State" and Mr Gyamfi will be referred to as "the Claimant", for the purposes of clarity.

Background

2. The Appellant is a national of Ghana who was born on the 30th December 1969. On the 5th August 2014 he applied for Entry Clearance to the United Kingdom as a tourist visitor, intending to enter the UK on the 26th August 2014 in order to rest for 7 days and to take time off, before travelling onward to New York. On the 12th August 2014 his application for Entry Clearance as a tourist visitor was refused, and he appealed against that decision to the First-tier Tribunal, which appeal was heard by First-tier Tribunal Judge Oxlade at Harmondsworth on the 28th May 2015, on the papers. Although the First-tier Tribunal Judge found within his decision that the Appellant did not have a private or family life which was subject to interference by the decision, nor the gravity which engaged Article 8 of the ECHR, and therefore dismissed the appeal on the basis of the ECHR, the Judge allowed the appeal under the Immigration Rules, specifically under paragraph 320 (7A) and 320 (7B) to the extent of remitting the case back to the Respondent for reconsideration. The First-tier Tribunal Judge at [27] found that on the evidence the Appellant was married, having married in 1990 and that his application form had been completed by administrators, and that although it had been put on the form that the Appellant was single, the First-tier Tribunal Judge accepted that no deception had been exercised and there was no dishonesty on part of the Appellant in that the UKBA form, unlike the previous Canadian form that he had filled in, did not lend itself to being able to specify that the Appellant had been married by means of a customary marriage. The First-tier Tribunal Judge considered as the Appellant had in his Grounds of Appeal asserted that the decision was not in accordance with the Immigration Rules, he was entitled to appeal against the application of Rule 320 (7A) and 320 (7B) which affected his current and possible future entry into the UK and as to whether or not the Appellant had misrepresented his marital status in 2009 and 2014 and whether or not this amounted to deception. It was against this decision that the Secretary of State has appealed.
3. Within the Grounds of Appeal it is argued that the First-tier Tribunal Judge materially misdirected himself in law, in that it is argued that the First-tier Tribunal Judge had no jurisdiction to consider the appeal beyond the residual grounds specified by section 84 (1) (b) and (c) of the Nationality, Immigration and Asylum Act 2002, namely, an appeal on human rights and race relations grounds and that the First-tier Tribunal Judge did not have jurisdiction to consider the appeal under the Immigration Rules as to whether or not the decision was "otherwise not in accordance with the law". It is argued that changes were made by the Crime and Courts Act 2013, and that section 52 of the Act commenced on the 25th June 2013, so as to amend section 88A of the Nationality, Immigration and Asylum Act 2002 to remove the right of appeal for persons visiting specified family members and that the only residual appeal right thereafter related to the appeal on human rights and race relations grounds under section 84 (1) (b) and (c) of the 2002 Act.
4. It was further argued within the Grounds of Appeal that the Judge failed to

have regard to statutory public interest considerations set out by section 117 B of the Nationality, Immigration and Asylum Act 2002, and that proportionality exercise has not been carried out following the decision in Razgar.

5. Permission to appeal was granted by Judge of the First-tier Tribunal Andrew on the 19th August 2015, when he found that "It is arguable that there is an error of law in the Judge making the decision that he did in view of the fact that there is no right of appeal against the decision made by the Respondent other than, in this case, on human rights grounds and this was dismissed by the Judge". This is the only reason stated within the grounds before appeal for permission being granted. It was on this basis that the appeal came before me in the Upper Tribunal.

Submissions

6. Mr Ngwuosha on behalf of the Claimant accepted that the First-tier Tribunal Judge had erred in law and got it wrong by allowing the appeal under the Immigration Rules. He accepted that the Judge did not have jurisdiction, but argued that if the decision was set aside and remade the Claimant would then have the right to advance the argument again that he did have a private life in the UK and that he was an ordained Pastor who had a significant reputation and that he did have a private life in going to shops in the UK which were of a better quality and that it was a breach of his private life to make a finding as a result of deception having been utilised for the purpose of paragraph 320 (7b) that such deception maybe utilised as a reason for not allowing him to come to the UK for the next 10 years and that a 10 year ban was disproportionate and should be reconsidered. He argued that even though there had been no cross appeal on behalf of the Claimant regarding the Judge's findings that there was no private life, he argued that the case should be remitted back to the First-tier Tribunal, in order that the Article 8 private life could be reconsidered, given that the Claimant was a regular traveller and a man of god. He argued that the Claimant had been to the UK several times and visited shops and that there was a higher duty when considering whether or not to prevent him coming again. He argued that if private life exists, then the threshold for engagement is extremely low. He sought to rely upon the case of Adjei [2015] UKUT 251, in that if Article 8 is engaged, then the Tribunal may need to look at the extent to which the Claimant is said to have failed to meet the requirements of the Rule, because that may inform the proportionality balance in exercise.
7. In his submissions on behalf of the Appellant Mr Wilding relied upon the Grounds of Appeal. He argued that the Judge should not have allowed the appeal in the way that she did and that even before the changes to Section 88 of the Nationality, Immigration and Asylum Act 2002, as a result a Section 52 of the Crime and Courts Act 2013, the right of appeal in Entry Clearance cases for visitors was restricted to those who met the requirements of the requisite Family Visitor Regulations, other than on human rights or race relations grounds and that there is no general right

of appeal. He argued that following the instruction of amendment to Section 88A, there was now no general right of appeal even for those visitors seeking to visit members of the family, other than on human rights and race relations grounds.

8. Mr Wilding further argued that there was no cross appeal on behalf of the Claimant and no Rule 24 notice had been filed by the Claimant and that there was no authority to say that the whole case should be reconsidered upon the First-tier Tribunal decision being set aside as a result of an error of law and that it was nonsense to say that the question of Article 8 needed to be considered afresh.

My Findings on Error of Law and Materiality

9. The original decision of the Secretary of State in this case which was appealed to the First-tier Tribunal was made on the 12th August 2014. Section 52 of the Crime and Courts Act 2003 was commenced on the 25th June 2013 and amended Section 88A of the Nationality, Immigration and Asylum Act 2002 by removing the right of appeal for persons visiting specified family members under the Immigration Appeals (Family Visitor) Regulations 2012. As a result of that change, a person could not appeal under Section 82 against refusal of Entry Clearance as a visitor, other than on the grounds referred to in Section 84 (1) (b) and (c), namely in respect of race relations and human rights grounds as to whether or not the decision was unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the Appellant's Convention rights. The Claimant did not have a right of appeal under Section 84 (1) (e) that the decision is otherwise not in accordance with the Law.
10. Therefore, as was properly conceded by Mr Nqwuosha on behalf of the Claimant, the Judge did materially err in law. Nor did he have a right of appeal under Section 84 (1) (a) the decision was not in accordance with the Immigration Rules. Therefore, the First-tier Tribunal Judge did materially err in allowing the appeal to the extent that she did, based upon the assertion that buried within the Claimant's Grounds of Appeal is an assertion that the decision was not in accordance with the Immigration Rules [25]. The Judge did not have power to consider under the rules whether or not paragraph 320 (7A) or 320 (7B) applied.
11. Although the extent to which a Claimant does meet the requirements of the Immigration Rules may well be a factor in considering whether or not the proportionality balancing exercise is met under Article 8, the Judge did not have power simply to consider the appeal under the Immigration Rules. However, this is not a case where the Judge found that there was any private or family life in the UK, such as to enable her to consider the extent to which the Rules might have been met for the purpose of determining proportionality. Having found that there was no family or private life in the UK, the First-tier Tribunal Judge should simply have dismissed the appeal on human rights grounds.

12. I therefore set aside the decision of First-tier Tribunal Judge Oxlade to the extent that she has allowed the appeal under the Immigration Rules (320 7A) and (7B) to the extent of remitting the case back to the Respondent for reconsideration.
13. Although it has been argued by Mr Nqwuosha on behalf of the Claimant that if the decision is set aside, and the Appellant should have the opportunity of rearguing the Article 8 issue, the First-tier Tribunal Judge's findings in respect of whether or not the Claimant did have a family or private life in the UK are not infected by her error of law in determining whether or not the case should be remitted back to the Respondent for further consideration under the Immigration Rules, such that I do not set aside her findings in respect of Article 8 and whether or not the decision amounted to a breach of the Claimant's rights under the ECHR. I maintain her findings that in this case that the Claimant intended to come to the UK for-in essence a "stopover"- in order to rest, to shop and then intended to go on to New York and that he did not have an existing private life in the UK and that all of his family are in Ghana. I also maintained her finding at [23] that the Claimant had not satisfied her that there was a family or private life which is subject to interference by the decision nor the gravity which engaged Article 8 of the ECHR and that the dismissing of the appeal would not breach the Claimant's right to a private or family life in the UK.
14. However, even if I am wrong in maintaining her findings in this regard, although it is argued on behalf of the Claimant that he is an ordained Pastor who has a significant reputation, this does not in itself give rise to any private life in the UK, and even though the threshold for the engagement of Article 8 is low, in any event I would have found that the Claimant simply having come to the UK on holiday on several occasions previously for periods of less than one week, did not actually establish a private life within the UK or that the interference will have consequences of such gravity so as to potentially engage the operation of Article 8.
15. I therefore remake the decision of First-tier Tribunal Judge Oxlade, dismissing the Claimant Mr Gyamfi's appeal against the Respondent's decision dated the 12th August 2014. I find that there is no jurisdiction to consider the appeal under the Immigration Rules, and that the Claimant's appeal on human rights grounds is dismissed for the reasons set out above.

Notice of Decision

The decision of First-tier Tribunal Judge Oxlade did contain a material error of law and I set (paragraph 320 (7A) and (7B)) by remitting the case back to the Respondent for reconsideration;

I remake the decision finding that there is no jurisdiction to consider the appeal under the Immigration Rules and dismissing the appeal of Mr Gyamfi on human rights grounds;

The First-tier Tribunal did not make any order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed

Dated 22nd October 2015

Handwritten signature in black ink, reading "RFM McGinty". The letters are slightly slanted and connected, with a small flourish at the end of the "y".

Deputy Upper Tribunal Judge McGinty