



IAC-FH-AR-V1

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

Appeal Number: DA/01605/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 27 November 2015

On 26 January 2016

**Oral determination given following the
hearing**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MOUCTAR DIALLO
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Brocklesby-Weller, Home Office Presenting Officer

For the Respondent: Ms Hulse, instructed by CK Solicitors

DETERMINATION AND REASONS

1. This is the respondent's appeal against a decision made by First-tier Tribunal Judge Stanford which was promulgated on 31 December 2014 following a hearing at Taylor House on 12 December 2014. For ease of reference I shall throughout this determination refer to the Secretary of State who was the original respondent as "the Secretary of State" and to Mr Diallo who was the original appellant as "the claimant".

2. The claimant is a citizen of Guinea who was born on 26 December 1985 and he claims that he arrived in this country in April 2005 and claimed asylum on the same day. This claim was refused and certified as clearly unfounded but following judicial review proceedings the claimant was given permission to bring the application, which was then withdrawn by consent in April 2007. The Secretary of State then withdrew the decision to refuse the claimant's asylum claim, reconsidered it and refused it again but this time allowing the claimant a right of appeal. In other words the second decision did not include certification of the claimant's claim. However the claimant's appeal to the Tribunal was dismissed in June 2007.
3. Thereafter on 7 January 2008 at Canterbury Crown Court the claimant was convicted of possessing a false identity document with the intent of seeking to leave the country and sentenced to a period of eleven months' imprisonment. The judge who sentenced him made a deportation recommendation. Subsequently on 19 June 2008 the claimant was served with a notice of decision to deport him against which he appealed and his appeal was dismissed by a decision of the First-tier Tribunal dated 6 January 2009. Subsequent attempts to bring judicial review proceeds in the High Court were unsuccessful and a deportation order was made on 15 January 2010.
4. Further representations were made on the claimant's behalf in January and February 2010 which were treated as requests to revoke the deportation order which were refused with no further right of appeal. Subsequently further representations were made on 30 November 2010 and further to this additional representations were made on the claimant's behalf on 9 January 2013 and a decision was made on 25 July 2015 to refuse to revoke the deportation order and a supplementary decision was also issued in November 2014 which addressed the family issues which arose following confirmation that the claimant is the father of L who he claimed was his daughter, the mother being a Ms D W with whom he had been in a relationship.
5. Because the new representations raised matters which had not been considered earlier (and the respondent treated the representations as a giving rise to a fresh claim) the claimant had a right of appeal against this decision and it was this appeal which was considered by Judge Stanford who allowed the appeal. I note that in addition to founding his appeal on human rights grounds on the basis that he had a family life with his daughter, the claimant also now sought to claim that he should be entitled to asylum and that therefore his removal would be in breach of his rights under the Refugee Convention, notwithstanding that his earlier claim to asylum had been refused and his appeal against that decision dismissed. It is not necessary for the purposes of this appeal to consider this aspect of the claim because it was dismissed by Judge Stanford and no challenge has been made on behalf of the claimant to that aspect of the decision.

6. The judge did however allow the claimant's appeal on the basis of his Article 8 rights and he also allowed it under the Immigration Rules which is an aspect of his decision which will be discussed below.
7. The basis of the claimant's appeal can be summarised briefly insofar as the Article 8 aspects are concerned. The claimant had a relationship with Ms W but that relationship had come to an end in or about 2011. However there was a daughter L who was born and the claimant says that he was the father and it is not now in dispute and was not in dispute before Judge Stanford that DNA tests established that he was indeed the father. The appeal proceeded on the basis that he had so established to the necessary standard of proof and that is plainly right.
8. The claimant asserted that because he had a family life with his daughter it was in her interests to go on seeing him and also that his removal would bring that family life to an end, that in all the circumstances of this case such a decision would not be proportionate and so his removal would be in breach of his Article 8 rights.
9. The judge it is fair to say gave very careful consideration to this claim. The decision which he made is thorough, examines the evidence in detail and also sets out, in my judgement correctly, the legal basis upon which the decision had to be made. As the judge noted, because the claimant had not received a sentence of one year's imprisonment or above, he did not fall within the definition of "foreign criminal" for the purposes of the new Part 5A of the Nationality, Immigration and Asylum Act 2002 which was inserted as from 28 July 2014 by virtue of Section 19 of the Immigration Act 2014. For the purposes of Section 117C which sets out additional considerations in cases involving "foreign criminals" when considering their Article 8 rights, the definition of "foreign criminal" as set out within Section 117D(2) means a person
 - (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and
 - (c) who -
 - (i) has been sentenced to a period of imprisonment of at least twelve months,
 - (ii) has been convicted of an offence to cause serious harm, or
 - (iii) is a persistent offender ..."
10. It is common ground obviously that this claimant has not been sentenced to a period of imprisonment of at least twelve months and it is not suggested on behalf of the Secretary of State (and nor could it be on the facts of this case) that the offence of which he has been convicted has caused serious harm or that he is a persistent offender. Accordingly the judge was correct when finding at paragraph 67 that Section 117C is of no application in this appeal because the claimant is not a "foreign criminal"

as defined for the purposes of that section. He is also correct when stating that paragraph 398 of the Immigration Rules does not apply in this appeal (at paragraph 64) because none of the conditions set out within that paragraph are satisfied. He has not been sentenced to a period of imprisonment of at least twelve months and nor has the Secretary of State expressed her view that his deportation would be conducive to the public good and in the public interest because his “offending has caused serious harm or [he is] a persistent offender who shows a particular disregard for the law”. (The wording of this follows the wording set out within Section 117D of the 2002 Act already referred to above).

11. Accordingly the appeal had to be considered on the basis of what was contained within the Immigration Rules at paragraph 390 which is set out at paragraph 62 of the judge’s decision. As the judge set out paragraph 390 of the Rules states that :

“390.The application for revocation of a deportation order must be reconsidered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of effective immigration control; and
- (iv) the interests of the applicant including any compassionate circumstances.”

12. As the judge notes at paragraph 63 “the core issue in this appeal is whether deportation would breach the [claimant's] right to family life with his daughter” and accordingly he decided to “include the circumstances referred to in paragraph 390 when considering whether there would be such a breach”. This statement by the judge is relevant when considering the judge’s decision not just to allow the appeal on human rights grounds (clearly with reference to the Article 8 rights of the claimant and his family) but also “under the Immigration Rules”, because it appears that in reliance on paragraph 390 the judge considered there to be an overlap between the provisions set out within paragraph 390 and the human rights grounds under Article 8 which fell to be considered on the basis of whether or not in all the circumstances of this case the removal of the claimant pursuant to the deportation order which had been made would now still be proportionate given the change in the claimant's circumstances if so found in consequence of such relationship with his daughter as he was found to have.

13. The judge was also in my judgement correct when finding at paragraph 66 that paragraph 391 of the Immigration Rules which provides that “In the case of a person who has been deported following conviction for a criminal

offence, the continuation of a deportation order against that person will be the proper course: (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than four years, unless ten years have elapsed since the making of the deportation order ..." did not apply because the claimant had not yet been deported. He was also right in my judgement that if the deportation would now be in breach of his Article 8 rights then the order could not continue.

14. The task therefore for the judge was to weigh up all the factors, being those which would suggest the deportation order should still apply (and in particular the public interest in deporting people who commit offences and who have no right to remain) but also considering the strength of such private and family life rights as this claimant had. The judge properly took into account the provisions of Section 117B of the 2002 Act which sets out the "public interest considerations applicable in all cases" where Article 8 is concerned and in particular that it is in the public interest and in particular in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English (at subparagraph (ii)) and that it is in the public interest and in particular in the economic wellbeing of this country that persons who seek to enter or remain are financially independent because such persons are not a burden on taxpayers and are better able to integrate into society (at subparagraph (iii)).
15. He also had properly in mind that little weight should be given to either a private life or a relationship formed with a qualifying partner that is established by a person at a time when that person is in the United Kingdom unlawfully as this claimant was (at subparagraph (iv)) and also that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious, as this claimant's immigration status was (at subparagraph (vi)).
16. However with regard to Section 117B, the judge found (at paragraph 75) that although the claimant was not financially independent at the moment because he was not permitted to work, he had nonetheless demonstrated a willingness to work by working as a volunteer, albeit without permission in charity shops over a continued and considerable period of time whilst in the United Kingdom and also that he had "a reasonable basic understanding of English for the many necessities of life using English".
17. Although the judge acknowledged that he was required to give little weight to the claimant's private life or to his relationship with Ms W (which in any event was not then ongoing) and made a specific finding that the private life which the claimant had would not "alone ... make disproportionate his deportation", he was nonetheless correct when he stated at paragraph 77 that "This [claimant] is not relying as part of his family life on the relationship with his former partner but on the relationship with their daughter". Accordingly, the judge had to consider the Article 8 rights of the claimant according to established principles and this is what he did.

18. As Ms Brocklesby-Weller in her admirably succinct submissions confirmed, the issue in this case is a narrow one. Her arguments which rely on the grounds of appeal is that the judge's finding at paragraph 69 that the claimant had a family life with his daughter is not adequately reasoned in light of the judge's acceptance at paragraph 43 that "there is no corroborative evidence" in support of his claim to that effect. The judge, it should be noted, had in mind that he was not registered as the father on L's birth certificate (see paragraph 42) and set out the claimant's evidence in this regard in some detail. The way Ms Brocklesby-Weller put the Secretary of State's case is that there was "a lacuna in the evidence".
19. The claimant had not produced any evidence from L's mother or from her school. Further there was a letter on her, that is Ms Brocklesby-Weller's, file from Ms W's solicitors dated 20 March 2004 which seemed to have been attached to the claimant's bundle from which it was apparent that Ms W did not want to agree to DNA testing because it was said she believed that the claimant "would try and obtain parental responsibility for L which our client does not believe in L's best interests". Furthermore Ms W's solicitors state in their letter that "our client feels that your client [that is the claimant] is using L to secure his own immigration status and once he has this, he would no longer show any interest in her.
20. Ms Brocklesby-Weller submits that if the letter was before the judge that was something which should have been referred to in his decision because it was relevant evidence which should properly have been taken into account.
21. In my judgement this submission cannot succeed. In the first place there is no basis on which this Tribunal can properly conclude that that letter was actually before the judge. Ms Hulse who appeared at the original appeal before Judge Stanford has no memory of this letter at all and it is not in her file and I accept her submission that if that letter had at the time been in the file of the Secretary of State the Secretary of State's representative at that hearing would have been in a position to cross-examine the claimant with regard to the contents of this letter and had she done so Ms Hulse would then have stated that she did not have a copy of this letter. I consider it more likely than not in these circumstances that that letter was not within the papers which had been put before the judge.
22. Even if I am wrong about this it is clear from the judge's decision that he understood that the relationship between the claimant and Ms W at that time was strained. The judge sets out at paragraph 47 that the visits which the claimant had made to visit his daughter were variable. The judge set out the claimant's evidence that he "has tried to visit Sheffield to see his daughter when he can afford it. This has sometimes been twice a month and sometimes as infrequently as once every two months. He has tried to visit at Christmas, on birthdays and for school events".
23. The judge then says what other efforts he has made but also records that contact such as the claimant would have liked to make "has not been

possible recently because her mother has made it difficult for him” and that “She has on occasions not picked up his calls”. So it is quite clear that the judge had at the front of his mind the fact that whatever contact he had with his daughter was not at that time with the wholehearted consent or approval of Ms W.

24. The first task of the judge in this case as in any other where the evidence was challenged, was to make findings of fact. On the one hand there was the account of the claimant which was not corroborated as fully as it might be, in particular because there was no evidence from L’s mother, although it was supported by evidence of a Ms AR, a friend of the claimant who was cross-examined, and on the other hand there was the contention made on behalf of the Secretary of State that the Tribunal should not accept that evidence but should rather find that there was not a family life that existed between the claimant and his daughter.
25. The judge had to consider whether or not notwithstanding the lack of any substantial corroborative evidence he accepted the claimant's evidence in this respect. Although it is submitted within the grounds of appeal on which the Secretary of State continues to rely that “The FTT has failed to adequately reason” the finding that the evidence of the claimant was to be accepted, in my judgement this submission is not properly arguable and I reject it.
26. Having set out the evidence of the claimant in some detail and having at the front of his mind that “there is little documentary or other corroborative evidence” to support the claimant's evidence, the judge nonetheless finds at paragraph 49 that “the evidence of the [claimant] is consistent and detailed and in matters relating to his concern for his daughter, is supported by the cross-examined evidence of AR”, and that accordingly “I find the [claimant's] evidence to be credible”. It is hard to see what better reason a judge could give. The claimant was cross-examined by a representative of the Secretary of State and his story remained consistent and detailed and the judge was entitled to accept that evidence. Having accepted it, it was the judge’s job to apply the law properly to that evidence and he did so.
27. The grounds also complain that the finding at paragraph 80 that it would be “In the interests of L that she continues to see and meet her father from time to time” is not adequately reasoned but again I do not accept this submission. All that is said on behalf of the Secretary of State in this regard (at paragraph 6 of the grounds) is that “The FTT has failed to provide adequate reasons for this finding in light of the full circumstances of the case”. In fact what the judge has done is set out the evidence which he has accepted for the reasons he has given, which amounts in substance to the claimant wishing to have as strong a relationship with his daughter as he can and in those circumstances and taking into consideration also his finding that the claimant wanted to become financially independent and so on, that it would be in the interests of the claimant's daughter to have a relationship with her father.

28. The judge was entitled to find that it would be in the interests of the claimant's daughter to see her father in circumstances where he had found that the claimant wished to do the right thing by his daughter. Of course another judge may have come to a different conclusion but this Tribunal did not hear the evidence which the judge heard and would not lightly interfere with a finding made by a judge on the basis of the evidence he heard, when that judge has applied the law properly to that evidence. Whether or not I or any other judge may on that evidence have reached the same conclusion is beside the point. In my judgement the findings the judge made cannot by any stretch of the imagination be said to be perverse and they are accordingly sustainable.
29. It follows that the judge's finding that the appeal stood to be allowed on human rights grounds was open to him.
30. I turn now briefly to the issue of whether or not the judge should also "have allowed the appeal" under the Immigration Rules which was a matter troubling First-tier Tribunal Judge V A Osborne, when giving her reasons for granting the Secretary of State permission to appeal. At paragraph 5 of her reasons, Judge Osborne states that

"I also note that the judge has recorded that he has 'allowed the appeal' on human rights grounds and also allowed it under the Immigration Rules. I am not satisfied that the decision discloses any reason for allowing the appeal under the Immigration Rules and this may therefore constitute a further arguable error of law."
31. In my judgement the judge's decision to allow the appeal under the Immigration Rules does not in fact constitute an arguable or any error of law. The judge as I have noted earlier, set out at paragraph 62 the provisions contained within paragraph 390 of the Rules which included that he was obliged to consider the application for the revocation of the deportation order in light of the interests of the applicant, including any compassionate circumstances and had stated at paragraph 62 that "the core issue" in the appeal was whether or not deportation would "breach the [claimant's] right to family life with his daughter". He had regard to the circumstances referred to in paragraph 390 "when considering whether there would be such a breach". In these circumstances, as the judge was making his decision in light of what was contained within the Rules, having found that the maintenance of the deportation order would be unlawful because it would be in breach of the claimant's Article 8 rights, it was entirely reasonable for him to allow the appeal under the Immigration Rules as well as under Article 8. In any event, clearly this is not material to the substance of the appeal.

Decision

The Secretary of State's appeal against the decision of First-tier Tribunal allowing the claimant's appeal under the Immigration Rules and on human rights grounds is dismissed. The decision of the First-tier Tribunal to this effect is affirmed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the final letter.

Upper Tribunal Judge Craig

Date: 20 January 2016