



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

Appeal Number: IA/05011/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2015**

**Decision & Reasons Promulgated
On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NOEL MAKINDE

Respondent

Representation:

For the Appellant: Mr P Duffy. Senior Home Office Presenting Officer

For the Respondent: Mr P Haywood (Counsel) instructed by Paragon Law

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Keane, promulgated on 25 June 2015 which allowed the Appellant's appeal on Article 8 ECHR grounds.

Background

3. The Appellant was born on 30 December 1989 and is a national of Nigeria.
4. On 21 January 2014 the Secretary of State refused the Appellant's application for further leave to remain in the UK.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Keane ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR grounds only.

6. Grounds of appeal were lodged and on 22 September 2015 Judge Andrew gave permission to appeal stating *inter alia*

"2. Although the judge recites at paragraph 6 of the decision that it was intrinsic to the respondent's decision that the appellant could not meet the requirements of paragraph S-LTR of appendix FM he makes no findings in relation to this.

3. It is also an arguable error of law that the Judge did not consider the guidance in Farquharson (removal - proof of conduct) [2013] UKUT 00146 when coming to his conclusion as to the respondent's evidence in relation to the appellant's past criminality

4. It is further an arguable error of law that the judge has approached the assessment of article 8 incorrectly and with particular reference to the applicability of sections 117B and C."

7 (a) Mr Duffy, for the respondent, moved the grounds of appeal. He took me to the first ground of appeal and argued that the Judge had made a material error of law because he failed to make findings in relation to the suitability & character provisions of appendix FM (section S-LTR). He told me that the appellant's character & his history of criminality are central to this case, yet the Judge has not considered the appellant's appeal in terms of the immigration rules. He argued that even if it is conceded the appellant cannot fulfil the requirements of the immigration rules, findings in relation to section S-LTR, and a specific finding that the appellant cannot fulfil the requirements of that part of appendix FM, are necessary because that is one of the factors which should be taken into account in a full balancing exercise when assessing proportionality.

(b) Mr Duffy argued that the Judge had misdirected himself in law when assessing the evidence of DC Harvey. He relied on the case of Farquharson (removal - proof of conduct) [2013] UKUT 00146, and argued that the Judge had not follow the guidance provided in that case and, that when considering the evidence of the appellant's previous convictions and evidence from the crime reporting information system (CRIS), the Judge placed too high a standard of proof on the respondent. Mr Duffy told me that the standard of proof is the balance of probabilities and that the Judge's rejection of the

evidence from DC Harvey and the CRIS reports amounted to a material error of law.

(c) Mr Duffy did not address me specifically on either the article 8 assessment or on the Judge's approach to section 117C and B of the 2002 Act, but adopted the grounds of appeal. He urged me to set the decision aside and to remit this case to the first-tier tribunal to determine of new

8 (a) For the appellant, Mr Haywood told me that the Judge has written a very detailed decision containing an accurate summary of all of the relevant evidence and submissions. He told me that the Judge has made findings in fact which are beyond challenge and has reached sustainable conclusions. He told me that the decision does not contain errors of law, whether material or otherwise. He argued that the grounds of appeal amount to an expression of dissatisfaction with a decision that the respondent does not like. He drew my attention to the grounds of appeal and argued that the grounds of appeal fail to either challenge the Judge's findings of fact or identify an error of law or even a misdirection in law

(b) Mr Haywood told me that, at first instance, it was common ground that the immigration rules could not be met, and it is for that reason that the decision is written in the way it is written. He addressed the evidence of DC Harvey & the manner in which the Judge treated that evidence, and argued that even taking DC Harvey's evidence at its highest she could not give evidence of the appellant's history of criminality and lifestyle nor of prosecuted allegations made against the appellant. Mr Haywood submitted that DC Harvey could do little more than identify the CRIS reports & police records. He told me that the substantial amount of documentary evidence was made up of police intelligence reports which were not within the knowledge of DC Harvey. He argued that the Judge had followed the guidance in the case of Farquharson, and that the Judge's conclusion that the respondent had failed to discharge the burden of proof was a conclusion which was well within the range of reasonable conclusions open to the Judge.

(c) Mr Haywood addressed the evidence presented in relation to the impact removal would have on the appellant's British citizen's wife and British citizen children, and told me that the Judge made findings in fact which were reasonably open to him before reaching an unassailable conclusion. He told me that the Judge's proportionality assessment was flawless and took full account of the provisions of section 117B and C of the 2002 Act. He relied on the cases of Treebhawon & others (section 117B(6)) [2015] UKUT 00674 (IAC) & Clarke (S.117C- limited to deportation) [2015] UKUT 00628 (IAC). He urged me to dismiss the appeal and to allow the decision to stand.

Analysis

9. The second ground of appeal is a challenge to the manner in which the Judge dealt with police evidence and evidence of conduct and criminality. In Farquharson (removal - proof of conduct) [2013] UKUT 00146 it was held that

(1) Where the respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: [Bah \[2012\] UKUT 196 \(IAC\)](#) etc applicable.

(2) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct.

(3) If the respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them.

(4) The material relied on must be supplied to the appellant in good time to prepare for the appeal.

(5) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond.

(6) Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available.

10. The respondent argues that the Judge did not follow the guidance in [Farquharson](#), and that the judge applied the wrong standard of proof when addressing criminality or conduct.

11. The Judge starts his findings of fact at [42] after carefully setting out the background to the case and the submissions of the appellant and respondent. At [7] the Judge correctly directs himself and sets out the standard of proof. At [43] the Judge clearly identifies the correct standard of proof when considering the evidence of DC Harvey and the supporting CRIS reports. The Judge then goes on to discuss that evidence and explain why he rejects that evidence. At [49] the Judge repeatedly gives a correct self-direction, reminding himself each time he considers a specific offence that the standard of proof is the balance of probabilities.

12. The respondent does not like the conclusion that the Judge reaches, but the Judge clearly analyses the evidence, reminding himself correctly of the standard of proof, before making findings in fact which draw him to the conclusion that the respondent fails to discharge the burden of proof. A fair reading of the determination clearly indicates that the Judge followed the guidance given in [Farquharson](#). There is force in Mr Haywood's submission that the grounds of appeal do not identify an error in the fact-finding exercise, nor do they properly identify a material error of law.

13. Although there are three other grounds of appeal, in reality those three remaining grounds of appeal all amount to an attack on the Judge's article 8 assessment. The first ground of appeal argues that because the Judge did not carry out an assessment of paragraph S-LTR of appendix FM his overall proportionality assessment in terms of article 8 ECHR is undermined to the extent that a material error of law is created.

14. It has always been common ground in this appeal that the appellant cannot fulfil the requirements of S- LTR, but the Judge has not ignored that provision of the immigration rules. He records at [6] that is “...*intrinsic to the respondent’s decision that the appellant did not satisfy those requirements of the immigration rules which were concerned with the establishment of suitability and good character contained in section S LTR of appendix FM...*”. It is true that the Judge does not then revisit section S-LTR, but in a lengthy and detailed decision it is clear that the Judge focuses on the appellant’s lifestyle and history of offending.

15. At [53] it is clear that the Judge took account of the appellant’s suitability and character even though he did not refer specifically to section S-LTR in carrying out his proportionality assessment. The Judge records there that “*the appellant had received a total of 11 convictions for 20 offences. His is a lamentable criminal history*”. Those are the very factors which prevent the appellant from satisfying the requirements of section S-LTR. They are clearly the factors which were at the forefront of the Judge’s mind in his proportionality assessment.

16. Mr Duffy did not move the third grounds of appeal. The third grounds of appeal amounts to an argument that the Judge should not have considered article 8 out with the rules. I find that there is no merit in that argument.

17. In R (on the application of Esther Ebum Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 - MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

18. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 “*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of “very compelling reasons” (as referred to in MF (Nigeria) in the*

context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ".

19. In Khan (2015) CSIH 29 the Inner House (of the Court of Session) found in favour of immigrant spouses who challenged refusals to grant leave to remain. The Court ruled that there was no human rights rule that an immigrant, who married a UK national at a time when their immigration status was uncertain, must establish "*exceptional circumstances*" before removal could amount to a breach of Article 8 of the ECHR.

20. In any event a fair reading of the decision indicates that at [57] the Judge found that the interests of the appellant's wife and two children create the compelling circumstances referred to in SS Congo.

21. The final ground of appeal argues that the Judge took an incorrect approach to sections 117B and C of the 2002 Act. At [51] the Judge embarks on an article 8 assessment reminding himself of the five stage test set out in Razgar. At [53] to [55] and at [59] the Judge reminds himself to be mindful of the provisions of section 117B and D of the 2002 Act. An holistic reading of [51] to [60] makes it manifestly clear that the Judge is mindful of Section 117 of the 2002 Act as a factor to be taken into account in determining proportionality. It is clear that the Judge's approach acknowledges that Section 117A(2) obliged him to have regard to the considerations listed in Sections 117B and 117C. He demonstrates an awareness that Section 117A(3) imposes a duty of carrying out a balancing exercise.

22. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that the statutory duty to consider the matters set out in s 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant.

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (*inter alia*) the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

24. In this case the Judge has reached a decision which the respondent does not like. The Judge's decision might even have come as a surprise to the respondent, but the decision does not contain a material error of law. The respondent's criticisms of the fact-finding process are not made out. Careful analysis of the police evidence is contained within the decision, the correct burden and standard of proof have been applied and that the Judge directed himself correctly in law. The Judge quite clearly weighed all factors in carrying out a full and careful article 8 ECHR proportionality assessment. Overall the

fact-finding exercise cannot be criticised, the decision does not contain a misdirection in law.

25. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

26. No errors of law have been established. The Judge's decision stands.

DECISION

27. The appeal is dismissed.

Signed

Date 23 December 2015