



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11958/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 25th April 2016

Decision Promulgated
On 7th June 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

OYEDAYO OYEBAMGBOSE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs U Sood of Counsel instructed by 1st Call Immigration Services
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion and to be consistent, I shall continue to refer to the parties as they were before the First-tier Tribunal.

Background

2. On 11th February 2016 Judge of the First-tier Tribunal Fisher gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal A Hussain in which he allowed the appeal against the decision of the respondent to refuse further leave to remain applying the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules.
3. In granting permission Judge Fisher summarised the grounds. It was argued that the judge had erred in law because he failed to make any findings under Appendix FM or paragraph 276ADE of the Immigration Rules before considering Article 8 outside the them. Additionally it was argued that the judge had made inconsistent findings about the health of the appellant's sponsor and also failed to have regard to the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002.

Submissions

4. Mr McVeety confirmed that the respondent relied upon the grounds. These contend, in greater detail, that the judge failed to have regard to the approach recommended in *SS (Congo)* [2015] EWCA Civ 387 by identifying compelling circumstances to support a grant of leave to remain outside the Rules. The inconsistency in evidence relating to the appellant's spouse's physical health derives from the fact that the judge found, initially, that the sponsor's health had improved to the extent that she could take on part-time work but, when conducting a proportionality balancing test, referred to the same person's inability to work. It is also submitted that the judge failed to apply the factors set out in Sections 117A-D of the 2002 Act.
5. Mr McVeety also drew attention to the judge's conclusions in paragraph 39 to the effect that the appellant had been unable to live an independent life in the United Kingdom but then, paragraph 41, referred to circumstances showing that the appellant did not have an independent life.
6. Mrs Sood drew attention to the arguments put forward in her skeleton submitted to the First-tier Tribunal to support her contention that the judge had not erred in allowing the appeal. However, she was obliged to concede that the decision did not show that the judge had considered the application of the Rules or applied the provisions of Section 117A-D of the 2002 Act to the decision. She thought it relevant to note that the appellant had only ever claimed leave to remain on Article 8 grounds and therefore contended that the judge was not wrong to proceed immediately to deal with that right. Further, she submitted that the claimed inconsistency about the appellant's independence should not be seen as such although she offered no argument to support that claim.

Error on a Point of Law

7. After I had considered the matter for a few moments, I announced that the decision showed material errors on points of law such that it should be set aside and re-made before the First-tier Tribunal on all issues. My reasons for that conclusion follow.

8. Whilst in the section of the decision headed "The Issues" the judge refers to the relevant Immigration Rules and identifies the main issue under section EX. as whether there are "insurmountable obstacles" to the appellant and his wife's family continuing their lives outside the United Kingdom, the decision fails to examine any of those provisions. From paragraph 21 onwards, the judge apparently deals with matters relevant to an Article 8 claim outside the Rules yet overlooks the need to examine the insurmountable obstacles test set out in section EX of the Rules. The judge was obliged to consider the application of the Rules and then if the Rules could not avail the appellant, to consider Article 8 issues outside them only if compelling circumstances could be identified to warrant a grant of further leave on that basis. This approach was made clear by the Court of Appeal in *SS (Congo)*.
9. The judge's consideration of Article 8 issues is further flawed by the failure to make any reference to Section 117 of the 2002 Act which codifies the public interest in removal. Additionally, it cannot be said that the judge made reference to any matters set out in Section 117B of the 2002 Act which might show that he had regard to its provisions (*AM (S117B) Malawi* [2015] UKUT 0260 (IAC)).
10. The above matters, alone, amount to material errors on points of law. It is also evident that the decision contains inconsistencies in the conclusions, as referred to in the grounds and submissions, which suggest that the decision is irrational in the legal sense. That is because the judge reached conflicting conclusions about the appellant's employability and independence. These are further material errors.
11. For the preceding reasons it is appropriate that this appeal should be re-made by the First-tier Tribunal having regard to the need for the evidence to be re-heard and issues re-examined. In reaching that conclusion I have regard to the Practice Statements of the Senior President of Tribunals of 25th September 2012 at paragraph 7.2.

Anonymity

Anonymity was not requested before the First-tier Tribunal or the Upper Tribunal nor do I consider it appropriate in the circumstances of the case.

DIRECTIONS

12. The appeal is to be heard afresh before the First-tier Tribunal sitting at the Stoke Hearing Centre on a date to be specified by the Resident Judge.
13. No interpreter will be required for the hearing unless the parties indicate to the contrary.
14. The time estimate for the hearing is two hours.
15. The re-making of the decision should not be before Judge of the First-tier Tribunal A Hussain.

Signed

Date 7.6.2016

Deputy Upper Tribunal Judge Garratt