



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

Appeal Number: HU/13291/2015

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 13 October 2017

On 14 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ALVIN WALTER ODHIAMBO OWOUR
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Counsel Senior Presenting Officer

For the Respondent: Miss C Jaquiss of Counsel

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Kenya born on 28 July 1975. However, for the sake of convenience, I shall continue to refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant's appeal to the First-tier Tribunal was against the decision of the respondent dated 30 November 2015 to refuse his application for indefinite leave to remain on the basis of 20 years continuous residence, pursuant to Article 8 of the European Convention on Human Rights.
3. A Judge of the First-tier Tribunal, Metzger allowed his appeal. Upper Tribunal Judge Martin in a decision dated 3 August 2017 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge erred in law by giving wholly inadequate reasons to grant the appellant leave to remain in the United Kingdom based on his private and family life and by failing to engage with section 117B.
4. Thus, the appeal came before me.

First-tier Tribunal's Findings

5. The First-tier Tribunal allowed the appellant's appeal, concluding, in summary, the following. The parties agreed that the appellant could not meet the immigration rules as at the date of application, but he now has been present in the United Kingdom for over 20 years. He has significant private and family life in the United Kingdom including a relationship with Miss David which has lasted for some years and the sole issue for my determination was whether it would be disproportionate for the appellant to be returned to Kenya under Article 8 (2) of the European Convention on Human Rights.
6. The appellant has been in the United Kingdom for a period of over 20 years although at the time of the application he fell short of the 20-year residence. There is no challenge to the period the appellant has been in the United Kingdom and that he is in a serious relationship with Miss David although there were some challenges as to when it commenced and when they began living together. The appellant has now spent half of his life in the United Kingdom and undoubtedly could make another application under the 20-year rule, if he needed to.
7. In considering the appellant's application I need to take into account the respondent's legitimate interest in immigration control and considered the five limb test in **Razgar [2004] UK HL 27** in paragraph 117B of the Nationality, Immigration and Asylum Act 2002 in relation to the public interest. The appellant can speak English and would not be a burden on taxpayers as his partner is in full-time employment. The appellant is fully integrated into United Kingdom society particularly in light of the fact that he has spent 20 years in the United Kingdom and now has a genuine and subsisting relationship with his partner and has taken on a parental role in relation to her daughter.

8. Taking all the evidence into account and paragraph 117B, the appellant's exclusion would be a disproportionate interference with the appellant's rights under article 8 (2) of the European Convention on Human Rights to be returned to a country where he has not been for over 20 years and with which he has no present social, cultural or family ties.

The grounds of appeal

9. The respondent in her grounds of appeal states the following which I summarise. It is submitted that the decision is not adequately reasoned. The judge failed to consider the matter through the prism of the rules and failed to conduct a proper proportionality balancing exercise. As a result, he gave inadequate weight to the public interest in immigration control and fails to attach weight to the appellant's failure to meet the rules. There are also no adequate consideration of whether there are compelling/exceptional circumstances to warrant a grant of leave outside the rules. The judge failed to consider that it would be appropriate for the appellant to return to Kenya to seek entry clearance as the spouse/partner of a settled person.

The hearing

10. I heard submissions from both parties as to whether there is an error of law in the decision of the First-tier Tribunal.

Decision on the error of law

11. Having considered the decision as a whole, I find the Judge's consideration of the appellant's appeal in respect of Article 8 is not materially flawed. The Judge accepted that the appellant does not meet the requirements of the Immigration Rules as at the date of application and then went on to consider Article 8 of the European Convention on Human Rights and allowed the appeal based on the appellant's family life, with his partner and his private life in the United Kingdom. The Judge stated that the appellant had spent 20 years in the United Kingdom and it would not be proportionate for him to return to a country where which he no longer belongs to.
12. As at the date of the hearing, the appellant had established residence in the United Kingdom for 20 years although at the date of application, he fell short of 20 years. As this is an in-country appeal, the Judge was entitled to consider evidence as of the date of hearing. At the date of the hearing the appellant met the requirements of the immigration rules as he had been in the country, albeit unlawfully for 20 years. The respondent took no issue with the fact that the appellant has lived in this country for 20 years.

13. The appellant either satisfies the Immigration Rules or he does not. In this case the appellant did not meet the requirements of the Immigration Rules for leave to remain as at the date of application but as at the date of the hearing, he did.
14. Even if I was to conclude that the Judge erred in law in his evaluation of the appellant's appeal pursuant to Article 8, I find that it is not a material error.

DECISION

The respondent's appeal is dismissed.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

The 15th day of February 2016