



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01883/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 of the Upper
Procedure (Upper Tribunal) Rules 2008
Without a hearing on 7th July 2020

Decision & Reasons Promulgated
On 20th July 2020

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MG

(ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Jamaica born in February 1977. He arrived in the UK in January 1999 with a visit visa and overstayed. In December 2016 he was remanded in custody accused of murder, but the charge was withdrawn due to additional information that conflicted materially with the prosecution case, and he was released from custody in June 2017. In June 2018 the Secretary of State proposed to remove the claimant as an overstayer, and he responded by claiming asylum. The application was refused on 6th February 2019. His appeal against that decision was dismissed on protection grounds but allowed on human rights grounds by

First-tier Tribunal Judge Bulpitt in a determination promulgated on the 20th November 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Macleman on 2nd March 2020 on the basis that it is arguable that the First-tier Tribunal erred in law on ground 2 when applying the principle in ZH (Bangladesh) v SSHD [2009] EWCA in the context of fraudulent documents. It was said that ground 1, which related to the evidence as to whether the claimant was a gang member, could be argued but the Secretary of State should consider whether it was worthwhile as there was currently nothing put forward from her representative's record to support the claim about the claimant's oral evidence, and it did not seem to be supported by the First-tier Tribunal Judge's typed record of proceedings.
3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by Upper Tribunal Judge Keith by email on 31st March 2020 seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were received from the claimant but not the Secretary of State in response to these directions.
4. The matter came before me to determine whether it is in the interests of justice to decide this matter without a hearing and if so to determine whether the First-tier Tribunal has erred in law and if so whether the decision should be set aside. I find that it is appropriate to determine whether there is an error of law on the papers as neither party has put forward any objection to this course of action, and I find, whilst appreciating that this is an issue of great importance to the claimant given it determines his Article 8 ECHR rights, that the issue is discrete and it can, I find, be done fairly and justly in this way.

Submissions – Error of Law

5. In the grounds of appeal drafted by Mr D Clarke, Senior Presenting Officer for the Secretary of State it is argued, in short summary as follows. This is a "Nexus" human rights appeal in which the First-tier Tribunal dismissed the protection claim but allowed the appeal by reference to paragraph 276ADE(1)(iii) on the basis that the claimant had been in the UK for 20 years and found there were no suitability issues arising under S-LTR 1.6 which requires that: "The presence of the applicant is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 -1.5) character, associations or other reasons, make it undesirable to allow them to remain in the UK." The Secretary of State

argues that there are two errors made by the First-tier Tribunal in allowing the appeal by reference to this suitability condition.

6. Firstly, it is argued that the evidence did show that the claimant was part of a the "S" gang. It is argued that this was the oral evidence of claimant and also the evidence of DC Hutchinson in his statement. It is argued that it was not accurate to say at paragraph 64 of the decision that the police evidence did not support the claimant being a member of that gang, as the evidence showed he associated at a club with the leader of the gang, Mr E.
7. Secondly, it is argued that the First-tier Tribunal wrongly applies ZH (Bangladesh) at paragraph 65 of the decision when finding that the use of a false birth certificate and a false driving licence does not provide justification for finding the claimant is unsuitable to remain. This is because it is clear from paragraph 14 of ZH (Bangladesh) the claimant did not use false documents, and it is clear that this claimant was supporting the trade in counterfeit documents which was a more serious matter making him unsuitable.
8. Mr Bazini for the claimant in his reply of 17th April 2020 argues, in summary, as follows.
9. With respect to the first ground it is noted that the Secretary of State has not produced any further evidence from her representative at the hearing with regards to the claimant's own oral evidence at the hearing as Judge Macleman suggested was needed in the grant of permission, and in light of the opportunity given in the directions of Judge Keith. There was no oral evidence from the claimant that he was a member of the S gang. It was also not contended in the reasons for refusal letter or in oral submissions by the Secretary of State's representative at the hearing before the First-tier Tribunal that the claimant was not suitable as a result of being a gang member so this is not an argument that can be made at this stage.
10. With respect to the second ground it is argued that ZH (Bangladesh), at paragraph 16, states that the appellant in that case used a false identity, but as it was used to avoid being detected as an illegal immigrant rather than for the more sinister reasons of committing fraud that it did not form a basis to refuse on the basis of making the appellant undesirable under a provision of the Immigration Rules which permitted those who had long illegal residence to remain, as this would be to defeat the purpose of that Rule. It is argued that the First-tier Tribunal correct applied the same principle here and there is no "overstretching" of the principle.
11. It is also argued that the appeal should have also been allowed by reference to s.117B(6) of the 2002 Act as the claimant has a genuine and subsisting parental relationship with his son and it would not be reasonable for his son to leave the UK, and that this matter was not determined by the First-tier

Tribunal. Reliance is placed on this contention in accordance with the principles in Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 219 IAC in raising this issue at this stage.

Conclusions – Error of Law

12. The Secretary of State had conceded before the First-tier Tribunal that the claimant has been in the UK for a continuous period of more than 20 years, as set out at paragraph 63 of the decision. It is also recorded, in a paragraph not challenged in the grounds, at paragraph 63 of the decision that the respondent's challenge to the claimant's ability to qualify under the long residence private life Immigration Rule at paragraph 276ADE(1)(iii) was based on the contention that he was not suitable due to: his previous convictions; his involvement with the murder investigation; and his use of a false birth certificate and driving licence to remain in the UK illegally. It is therefore correct to say that gang membership was not a matter explicitly argued by the Secretary of State with respect to suitability.
13. No challenge is made to the validity of the findings of the First-tier Tribunal that the claimant's past criminal record did not, of itself, make him unsuitable under the Immigration Rules.
14. The First-tier Tribunal makes clear findings at paragraph 64 of the decision that the claimant's involvement with the murder investigation did not undermine his character because, on the material before the First-tier Tribunal, there was ultimately no evidence to link him to the murder and it was not correct to say, as contended in the reasons for refusal letter, that he only escaped prosecution on a point of law. There is no challenge to this finding by the Secretary of State.
15. It is said by the Secretary of State that the finding of the First-tier Tribunal at paragraph 64 of the decision that the evidence of DC Hutchinson records that the intelligence picture did not support the contention that the claimant was part of the "S" gang is an inaccurate statement, and further that the claimant himself had given oral evidence that he was a member of that gang to which no consideration had been given, and thus material evidence had not been considered with respect to gang membership.
16. It is clear that the First-tier Tribunal did therefore consider that the Secretary of State's evidence had raised the possibility that gang membership could make the claimant unsuitable, but ultimately found that the evidence did not support this.
17. As set out in the grant of permission the evidence of the claimant, as set out in Judge Bulpitt's typed record of proceedings, does not contain an admission that he was part of the "S" gang although he accepted that he did socialise with them watching football and at parties. The Secretary of State has produced no record of what was said which would challenge the

accuracy of the First-tier Tribunal record of proceedings so I find that there was no error of law in relation to the contention that relevant evidence from the claimant indicating he was a gang member was not considered. I also do not find that the First-tier Tribunal has misrepresented the evidence of DC Hutchinson in his witness statement. The evidence in the decision correctly reflected what is said in DC Hutchinson's statement: that the claimant was "not widely known to police indices" and as there was little police intelligence on him there was no real evidence which supported him being a member of the gang, unlike in relation to Mr E, although consistent with the claimant's only oral evidence, there was evidence of him socialising with Mr E at a club. The findings that the claimant does not fail the suitability test on the basis of being a gang member are, I find, entirely properly reasoned and considered all material evidence accurately.

18. At paragraph 65 of the decision the First-tier Tribunal went on to consider whether the use by the claimant of a false birth certificate and a driving licence to facilitate remaining in the UK for a long period illegally made the claimant unsuitable. Consideration is rightly given to the decision of the Court of Appeal in ZH (Bangladesh). The appellant in that case did not have a national insurance number but had used a false identity, and had not paid tax or national insurance whilst working illegally. It was found that by virtue of this behaviour he could not be said to be undesirable due to his character, conduct or associations, absent evidence of fraud, as this was a provision of the Rules which allowed a person who had been unlawfully present and working to remain in the UK, and to use the methods by which the applicant had evaded immigration control to refuse would be to defeat the purpose of the Rule. It is not argued by the Secretary of State that ZH (Bangladesh) is inapplicable to this case, but it is argued that it "nothing at all to do with possession of fraudulent documents". As the appellant in ZH (Bangladesh) is found to have used a false identity I find that this is not the case. It is not contended by the Secretary of State that the claimant had committed fraud with the false birth certificate or driving licence, and it is found by the First-tier Tribunal that there was no evidence of any fraud. It is reasonably found by the First-tier Tribunal that the claimant possessed these documents to evade immigration control and remain in the UK, and that applying ZH (Bangladesh) that it would be to defeat this new version of the long residence Immigration Rule based on unlawful presence for a 20 year period if these matters made the claimant unsuitable by reference to his character, associations or others reasons making it undesirable for him to be allowed to remain in the UK.
19. As I have found that the First-tier Tribunal did not err in law it is not necessary to deal with the issue raised by the claimant in the reply that the human rights appeal might have also succeeded by reference to s.117B(6) of the Nationality, Immigration and Asylum 2002 Act. I note only that this argument was clearly raised before the First-tier Tribunal, as recorded at paragraph 20 of the decision, on the basis of the claimant's claimed

relationship with his son X, but the issue was not determined by the First-tier Tribunal.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I uphold the decision of the First-tier Tribunal allowing the appeal of the claimant on human rights grounds.

Signed *Fiona Lindsley*
Upper Tribunal Judge Lindsley

7th July 2020