Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12016/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 February 2014	**On 28 February 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SS

Respondent

Representation:
For the Appellant: Ms J. Isherwood, Home Office Presenting Officer
For the Respondent: Mr S. Jaisri, Counsel instructed by Legal Rights Partnership

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Tanzania, born on 28 September 1975. He arrived in the UK on 2 March 2006, with leave as a student. He was granted further leave to remain in the same capacity until 28 December 2012. He made an 'in-time' application for leave to remain as a parent which was refused. His appeal against that decision was allowed, under Article 8 of the ECHR, by a judge of the First-tier Tribunal after a hearing on 29 October 2013.

Preliminary issue-timeliness of application for permission to appeal

3. The Secretary of State applied for permission to appeal which was granted by a judge of the First-tier Tribunal. I had initially considered that the application for permission to appeal was in fact out of time. The application for permission sought an extension of time but the matter was not addressed by the First-tier judge who dealt with the permission application. Ms Isherwood agreed that the application was out of time.

4. On that basis I decided that the grant of permission to appeal was 'conditional' only (see Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC) and Samir (FtT Permission to appeal: time) [2013] UKUT 00003(IAC)). I then decided to deal with the question of the late application, sitting as a judge of the First-tier Tribunal. The explanation given for what was thought to be the lateness of the application was that the drafter of the grounds was out of the office because of "an unforeseen domestic incident", and the grounds were lodged at the first opportunity following the drafter's return.

5. Mr Jaisri submitted that I should not extend time for appealing because the person who allocated the file to the drafter of the grounds should have been aware that that person was not going to be available to draft the grounds. Ms Isherwood referred to the explanation, submitting, in effect, that by its nature the incident could not have been foreseen.

6. I decided to extend time for appealing because I was satisfied that by reason of special circumstances it would be unjust not to extend time.

7. On further reflection however, I now see that the application was not out of time in the first place. The decision of the First-tier Tribunal was sent to the Secretary of State by second class post on 15 November 2013. The deemed date of receipt was the 19 November 2013 (rule 55(5) of The Asylum and Immigration Tribunal (Procedure) Rules 2005. The time for lodging notice of application for permission to appeal expired on 26 November 2013 (there being a weekend after the deemed date of service; and see rules 24 and 57 of the 2005 Rules). The application was received on 25 November 2013.

8. Whether or not the application for permission to appeal was in time has no bearing on the validity of the proceedings before me. If in time, there is no difficulty; the grant of permission was not conditional and needed no further consideration. My considering the matter on the basis that it was out of time was irrelevant to the initial and correct grant of permission. If it was in fact out of time, the procedure I undertook dealt with the issue of timeliness and the grant was perfected.

The decision of the First-tier Tribunal

9. The First-tier judge noted that it was conceded on behalf of the appellant that he was not able to meet the requirements of the Immigration Rules for leave to remain as a parent.

10. Considering Article 8, the judge concluded that the appellant and his wife were credible witnesses. She referred to the fact that the appellant's wife has leave to remain until 2016. They have a daughter born on 30 January 2008, although it appeared that their daughter was not formally granted leave as her mother's dependant.

11. The judge accepted that the appellant has family life with his wife and daughter and the contrary was not suggested by the Secretary of State at that hearing. It was found that requiring the appellant to leave the UK would amount to an interference with his family life with them. The legitimate aim of immigration control was acknowledged by the judge.

12. She noted the competing arguments. The Secretary of State contended that despite the leave granted to the appellant's wife, she and their daughter could accompany him to Tanzania. The appellant argued that his daughter was born in the UK, has settled here and has a private life in her own right. This would be disrupted if she and her mother had to return to Tanzania at this stage.

13. In concluding that the appellant's removal would be disproportionate in Article 8 terms, the judge noted that the appellant and his wife have both been lawfully in the UK to date. It would be disproportionate for the appellant to have to leave, leaving his wife and child in the UK which is what was likely to happen. The judge referred again to the family being a law-abiding one and that the appellant is heavily involved in his daughter's life. She referred to the view of both the appellant and his wife which was that it was not in their daughter's best interests to relocate to Tanzania, she now having settled at school. Lastly, she took into account that the appellant's wife has been in the UK for some twelve years which was said to be for most of her adult life. The judge concluded at [52] by stating that

> "I find that in all the circumstances the interference that would ensue in the life of this family should the appellant return to Tanzania will be disproportionate to the legitimate aim pursued."

Submissions

14. Ms Isherwood submitted that the First-tier judge materially erred in law. The appellant was not able to meet the requirements of the Immigration Rules and had entered the UK in a temporary capacity. His wife also only has temporary leave. The decision in Gulshan (Article 8-new rules-correct approach) Pakistan [2013] UKUT 640 was relied on.

15. The appellant's daughter would be able to adapt to life in Tanzania. She was only 6 years old. There were no compelling circumstances here. There was nothing to indicate that their daughter could not continue her education in Tanzania. The judge had not considered that the appellant's wife has the choice of returning with him.

16. Ms Isherwood referred to what was said to have been an assault on the appellant in 2008, noting that there was no evidence to suggest that he was not able to function as a result. They could both be employed in Tanzania.

17. The judge had given no weight to the Secretary of State's position in relation to the public interest under Article 8 as set out in the Immigration Rules. In reality, all the five paragraphs of reasons in the determination amount to no more than the conclusion that the appellant and his wife would prefer to stay in the UK.

18. Ms Jaisri suggested that the grant of permission to appeal was limited to ground 3. More widely, it was submitted that the First-tier judge had given full reasons for her decision and the grounds of appeal are no more than a disagreement. With reference to various paragraphs of the determination it was submitted that the judge had given adequate consideration to the public interest.

19. The decision in Gulshan could be distinguished on the facts. In that case the appellant was able to make an application for entry clearance. Furthermore, the appellant's wife wants her daughter to be able to stay in the UK in terms of her education. The appellant's wife herself has established "Article 8 rights" since 2001. To preserve family unity the Secretary of State granted discretionary leave to the appellant's wife in 2009, and again up to 2016. All that was being asked for was that the appellant be granted leave in line with his wife.

My assessment

20. The grounds of appeal before the Upper Tribunal, reflected in Ms Isherwood's submissions, contend that the First-tier judge did not have regard to the public interest in immigration control as expressed in the Immigration Rules. Mr Jaisri argued to the contrary. He referred to [47] of the determination in which the judge stated that the appeal fell to be determined in accordance with Appendix FM and paragraph 276 ADE. This, it was submitted, was an acknowledgment of the public interest as set out in the Rules.

21. Furthermore, at [3]-[6] the judge had set out the Secretary of State's position under the Rules. At [49] she had referred to the legitimate aim of immigration control, and at [51] concluded that his removal would be disproportionate to that legitimate aim.

22. Mr Jaisri did not disagree with the suggested need to recognise and give effect to the Secretary of State's view of the public interest as expressed in the Immigration Rules. That there is the need to afford that recognition of the public interest is clear from the decision in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC), a conclusion that is unaffected by the subsequent Court of Appeal decision (MF [2013] EWCA Civ 1192).

23. I am not satisfied that the decision of the First-tier Tribunal does give recognition to the public interest in this respect. It is true that it was accepted before the First-tier Tribunal that the appellant is not able to meet the requirements of the Immigration Rules for leave to remain (as it was before me). The only basis on which the appellant could theoretically succeed in his appeal was under Article 8 of the ECHR which was the basis for the judge's assessment of the facts.

24. I do not accept that [47] demonstrates a recognition of the public interest as reflected in the Immigration Rules. That paragraph appears under the sub-heading "The Law". Stating that the appeal "falls to be determined in accordance with Appendix FM and paragraph 276ADE of the Immigration Rules" was not an accurate statement of the basis on which the appeal was to be determined, which was on Article 8 grounds only: the appellant was not able to meet the requirements of the Immigration Rules and that fact was conceded. What the judge ought to have said under that subheading was that the appeal fell to be determined only under Article 8. The point is not that the judge perhaps included a 'standard' or 'template' paragraph here by mistake. Such errors can happen from time to time. There really is no significance in this except to reveal that this is what plainly occurred here, rather than what has been suggested on behalf of the appellant, namely that the judge was giving recognition to the public interest as per the Immigration Rules. This is self-evident from the subheading and from the context of the determination, in which "The Law" was not the Immigration Rules, which the appellant was not able to meet.

25. The two occasions in which the judge did quite properly refer to the legitimate aim that was pursued in the Article 8 exercise did nothing more than recognise what the legitimate aim was. It could not realistically be said that the judge implicitly recognised the part that the Immigration Rules have to play in that assessment of the legitimate aim. No such recognition can be detected in the determination in the "Findings and Conclusions" paragraphs. Still less could it be said that the rehearsal of the Secretary of State's reasons for refusing the application for further leave to remain, set out much earlier in the determination, somehow indicate the necessary appreciation of this aspect of the public interest in the reasoning process.

26. In these circumstances, I am satisfied that this experienced judge did err in law in the assessment of proportionality. This is an error of law which means that the decision is to be set aside.

27. In re-making the decision I again take into account that it is conceded that the appellant is not able to meet the requirements of the Immigration Rules. He applied for leave to remain as a parent. It is as well to note that it was not suggested that the appellant is able to meet the Immigration Rules in any other respect, for example as a partner.

28. I adopt the structured approach set out in Razgar [2004] UKHL 27. The First-tier judge found that the appellant enjoys family life with his wife and child. The appellant and his wife married on 20 August 2011.

29. I have assumed that the decision of the respondent will involve an interference with the appellant's family (and private) life, putting aside for present purposes the question of whether the appellant's wife (and child) would return to Tanzania with him. The interference will have consequences of such gravity as potentially to engage the operation of Article 8.

30. The decision is in accordance with the law and pursues a legitimate aim, namely the economic well-being of the country expressed through the maintenance of effective immigration control.

31. As to proportionality, the best interests of the appellant's daughter are a primary consideration. The First-tier judge found that the appellant is heavily involved in his daughter’s life. Again, there is no reason for me to depart from that finding and it is a finding that is reflected in the oral evidence and the witness statements. Likewise, the appellant's wife has been in the UK since 2001 and will have established a private life in that time.

32. I note the various letters of support for the appellant and his wife in the bundle that was before the First-tier Tribunal. They are both closely involved with the Luton Christian Fellowship. There is also evidence of charitable donations by the appellant to several charities.

33. Contrary to what was suggested on behalf of the respondent at the hearing before me, there is medical evidence in relation to the appellant, which appears to relate to his having been the victim of an assault, as set out in his witness statement. The medical report, from Dr Parvati Rajamani a consultant psychiatrist, is dated 16 July 2013. It states that at that time the appellant was suffering from PTSD and depression. It lists the medication he was then taking. It refers to his daughter being his protective factor. This was also the effect of the appellant's oral evidence to the First-tier Tribunal, whereby he said that he plans to continue on his ACCA course but has been unable to start because of the effects of the attack on him, and would wish to undertake the course on a part-time basis. Reference was made to an ACCA document in the appellant's bundle.

34. In cross-examination he said that both his wife and daughter are Tanzanian nationals, but explaining why they could not return to

Tanzania as a family. His daughter loves the UK, is settled at school and has many friends, does not speak Swahili and is not familiar with Tanzania. He also said that he has a sister in Tanzania who is married with a family, and that that his parents are there.

35. The evidence given by the appellant's wife before the First-tier Tribunal is also set out in that determination, and I have taken it into account. Her witness statement is summarised in the determination, the statement referring to having friends in the UK, the length of time she has been here (since 2001), her work and her involvement with the Church. The statement continues that she did not know what she would do without the appellant, that they had been together for five years and work as a team. She said that it would be very difficult for her to cope with their daughter without him and she thought that she would have to give up work. She has a sister in the UK with indefinite leave to remain and she states that she is very close to her and her children. She explains in the statement why it would be better for her daughter to remain in the UK; her school, her friends, that she does not want to go to Tanzania and that the education there would not be as good for her.

36. In cross-examination she said that in Tanzania she has her mother, father, three sisters and a brother. However, she said that they have their life in the UK and life in Tanzania would not be best for their daughter. She had not found out specifically what the education facilities are like in Tanzania.

37. I also note the evidence given on behalf of the appellant before the First-tier Tribunal by JRM who described the closeness of their relationship and their respective families, as well as the effect on him if the appellant and his family were no longer here.

38. Mr Jaisri submitted that the appellant's wife was granted discretionary leave in 2009 in order to preserve the family unity. Likewise in 2013, being granted leave until 2016. It was submitted that the recent grant of leave to the appellant's wife “watered down” the Secretary of State’s position in relation to the appellant given that the decision to refuse the appellant leave to remain was made in March 2013 which the Secretary of State would of course have been aware of.

39. So far as the best interests of the appellant's daughter are concerned, ordinarily it is in a child’s best interests to be brought up by both parents. I accept that she is settled and is making progress in school. I note the letter from the school in the appellant's bundle at page 55 and the accompanying School report. She has friends here. I take into account all the evidential matters to which I have referred.

40. However, I do not accept that the evidence establishes that it is necessarily in her best interests to remain in the UK, or to put it another way, that her best interests are only served by her remaining here. There is no evidence to indicate that she would not be able to receive

an education in Tanzania. She has close family there, on both her parents' sides, including both sets of grandparents. Up until now, she will have been primarily focused on her immediate family, being her parents and then the wider family in the UK. She has been in the UK since her birth in January 2008, and is now only just 6. She would be able to resume her family life with her parents in Tanzania and start to build a private life there.

41. Whether or not she would be apart from the appellant depends on whether the appellant's wife decides to join him in Tanzania. Their daughter would plainly go with her. The appellant's wife has established a private life here and that would be interfered with were she to leave. Again however, she would be able to resume a private life in Tanzania. It would not be the same as her private life here but there is no reason to suppose that she would not be able to undertake Church activities there. No evidence was adduced to the effect that she would not be able to work in Tanzania or that the appellant would not be able to pursue his part-time studies there.

42. The appellant's wife has only ever been granted permission to stay on a temporary basis. She could not have had any expectation that her stay was anything other than temporary.

43. I do not accept that the fact of her being granted discretionary leave on two occasions weakens the Secretary of State's argument in favour of the proportionality of removal. Certainly up until December 2012 the appellant had leave to remain himself. The basis of the more recent grant of leave to the appellant's wife does not amount to an acceptance by the Secretary of State that the appellant himself should also be permitted further leave.

44. Although the appellant is not able to meet the requirements of the Immigration Rules, that fact alone is not the answer to the proportionality enquiry. Nevertheless, it is necessary to bear in mind that the Immigration Rules are an expression of the Secretary of State's view of where the public interest lies in cases which rely on private or family life. The appellant does not meet those rules in several respects, including in terms of the length of time that his daughter has lived in the UK which is expressed in E-LTRPT.2.2 (d) as "at least the 7 years immediately preceding the date of application" (which was 15 October 2012).

45. The appellant, his wife and daughter could reasonably be expected to live together as a family in Tanzania. The evidence does not establish that that would compromise the best interests of their daughter. Were the appellant's wife to decide to leave the UK with him that would undoubtedly have an impact on her and others in terms of her private life. However, the fact that she has leave to remain until 2016 does not mean that she, and the appellant, are unable to make the choice for her and their daughter to return to Tanzania with him.

46. Similarly, even if the decision is made for the appellant to return to Tanzania without his wife and daughter, that does make the respondent's decision a disproportionate one in Article 8 terms. It would be a decision that would only involve temporary separation but I accept that visits and communication from afar is no substitute for a full family life. Their separation, even if only temporary, would no doubt have an impact on their daughter in particular. Nevertheless, the appellant returning on his own would be a decision for the appellant and his wife to make. The making of that decision by them does not translate into a conclusion that the respondent's decision is a disproportionate interference with the appellant's, his wife's or their daughter's Article 8 rights. There is no analogy here with cases where there is a 'false choice' between staying in the UK and returning with the person who is required to leave. Here the appellant's wife only has temporary leave.

47. It is not difficult to understand why the appellant and his wife would prefer the family, and in particular their daughter, to remain in the UK. Nevertheless, considering all the circumstances I am satisfied that the respondent has established that the decision is a proportionate response to the legitimate aim pursued. Accordingly, the appeal under Article 8 of the ECHR, as well as under the Immigration Rules, is dismissed.

Decision

48. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek

24/02/14