Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31894/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 August 2014	**On 11 September 2014**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MEE JACQUES ARLET DHOORAH

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Presenting Officer
For the Respondent: Mr N Butt, SHN Solicitors

DETERMINATION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer herein to Mr Dhoorah as 'the claimant'.

2. The claimant is a citizen of Mauritius born 23 May 1960. He entered the United Kingdom on 16 July 1994 as a visitor. Leave to remain was subsequently conferred on him until 31 January 1996, as a student. He has remained unlawfully in the United Kingdom thereafter.

3. On 23 August 2013 the claimant applied for leave to remain on Article 8 ECHR grounds. This application was refused by the Secretary of State in a decision dated 2 September 2013. On the same date a decision was made to remove the claimant from the United Kingdom. The claimant appealed this decision to the First-tier Tribunal and this appeal was allowed by First-tier Tribunal Judge Abebrese "under the

European Convention on Human Rights" in a determination promulgated on 6 June 2014.

4. Judge J M Holmes granted the Secretary of State permission to appeal to the Upper Tribunal by way of a decision dated 4 July 2014:

> "2. It is arguable, as identified in the grounds, that the judge adopted a 'near-miss' approach to the appellant's failure to meet the requirements for a grant of leave on the basis of long residency. The appellant did not meet the requirements of the Immigration Rules for such a grant, he had enjoyed only one year's lawful residence in the UK and if he lived with his sister, a Mauritian citizen who regularly travelled to Mauritius to visit family he arguably could not show a loss of his ties to that country. Arguably the judge failed to give adequate weight to the respondent's identification of where the boundaries might lie for a grant of leave, and either there were no personal circumstances that meant the decision to refuse leave was disproportionate, or the judge failed to give adequate reasons for his decision that there were having adopted a flawed approach to the factual background to the Article 8 appeal."

5. Thus the appeal came before me.

Error of Law

6. Turning first to the First-tier Tribunal's determination, it appears, although it is not entirely clear, that the judge accepted that the claimant had lived with his sister in the United Kingdom since his arrival and that his sister currently provides him with £50 per week. The claimant also has other siblings in this country but he does not have much contact with them. The claimant's sister visits Mauritius on a regular basis. In relation to the application of the Immigration Rules the First-tier Tribunal Judge concluded:

> "12. The Tribunal finds on the evidence and the law that the appellant has not satisfied the provisions within the Rules regarding paragraph 276ADE as he falls short of the twenty years' continuous residence and he has does have social and cultural ties still in Mauritius albeit limited as he has not on the evidence visited that country since his arrival in this country in 1994."

7. The judge then immediately turns to a consideration of Article 8 outwith the Rules setting out the now well-known passages from Lord Bingham's judgment in Razgar. In paragraph 13 of his determination the judge concludes that the interference that would be caused to the claimant's private and family life in the United Kingdom by his removal would have consequences of sufficient gravity to engage Article 8. The judge further concludes, in paragraph 14 of the determination, that interference with the claimant's Article 8 rights would be in accordance with the law. Turning to the issue of proportionality, the judge said as follows:

> "15. The Tribunal also finds on the evidence that the appellant that the decision of the respondents is one that it is in the interest of a democratic society as the appellant has been in this country and appears on his own evidence to have made a poor contribution to society. He has not worked for long periods and is financially

supported by his sister, Ms Thomas and her family. It is in the public interest that in such instances where the appellant has a precarious immigration background that the respondents seriously consider removal options. The appellant on the other hand has established a private life in this country where he does have strong roots formed over a long period of time and this should also be recognised.

16. The Tribunal finds on the evidence that the removal of the appellant on balance based on his length of residence in this country and private and family life would make a removal disproportionate. The important factors here are the following. The appellant at the time of the decision had resided in this country for a period of nineteen years and ten months, he has not returned to Mauritius since his arrival in 1994. He has spent the majority of his life in his country of birth but one should also not underestimate the period of time he has been in this country and the foundations which he has formed here. The appellant's sister Ms Thomas has closer contact with the members of the family in Mauritius even I am of the view that the appellant has not completely cut himself off from them and he would still have maintained a limited amount of cultural and social ties in that country. On balance the Tribunal finds on the evidence that it would be disproportionate to remove the appellant from this country after such a lengthy period in the United Kingdom."

8. Before me Mr Butt submitted that the First-tier Tribunal had given clear, cogent and compelling reasons as to why it would be disproportionate to remove this particular claimant from the United Kingdom. Mr Walker submitted that the contrary was true of the determination i.e. that the reasons given by the First-tier Tribunal were wholly inadequate and it was, in reality, being said that because the claimant nearly met the Rules he ought not to be removed. There are not, he argued, any features of the claimant's case which were capable of leading to the conclusion that his removal would be disproportionate.

9. In my conclusion the First-tier Tribunal's determination is vitiated by a number of legal errors that lead me to set it aside.

10. The First-tier Tribunal properly found that the claimant could not meet the requirements of the Immigration Rules. The claimant has not sought to lodge an appeal to the Upper Tribunal against such decision. The Tribunal thereafter went on to consider whether the claimant's removal would breach his Article 8 ECHR rights outwith the confines of the Rules. In Nagre v SSHD [2013] EWHC 720 Sales J set out a helpful approach to such a consideration (approved by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192):

"29. …The new Rules do provide better explicit coverage of the factors identified in case law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are

> compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave…
>
> 30. …If, after the process of applying the new Rules and finding that the claim for leave to remain under them fails, the relevant official or Tribunal Judge considers it is clear that the consideration under the Rules has fully addressed any family or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules…"

11. It is important to recognise that proportionality in an Article 8 assessment must, in the new regime after 9 July 2012, be considered in the context of the particularised public interest as set out in the Immigration Rules. There is a compelling public interest in refusing permission to enter or leave to those persons who have failed to establish a right to remain under the Rules.

12. In my conclusion the First-tier Tribunal failed to properly direct itself to the relevant public interest. The only place within the determination where the public interest is purportedly identified is in paragraph 15, where the judge says:

> "It is in the public interest that in such instances where the appellant has a precarious immigration background that the respondents seriously consider removal options."

This though is not a proper reflection of the public interest in play in this case, in particular it cannot be said to fairly reflect the weight to be attached to the public interest. This error of itself is sufficiently serious to require me to set aside the determination. It is clearly an error which, in my conclusion, undermines the entirety of the First-tier Tribunal's assessment of the issue of proportionality because absent a proper consideration of the weight to be attached to the public interest the First-tier Tribunal cannot be said to have properly determined where the balance lies in this case. What is apparent is that the First-tier Tribunal undertook a freewheeling analysis of Article 8 unencumbered by any consideration as to the weight to be attached to the public interest as particularised in the Immigration Rules.

13. This conclusion is supported by the terms of paragraph 16 of the determination, where the Tribunal identifies the length of the claimant's residence in the United Kingdom, i.e. nineteen years and ten months, as being the predominant feature leading to its conclusion that the claimant's removal from the United Kingdom would be disproportionate to the legitimate aim pursued. The public interest, as particularised in paragraph 276ADE of the Immigration Rules, identifies 20 years' residence prior to the date of application as being the relevant threshold, not 19 years 10 months.

14. For these reasons I set aside the determination of the First-tier Tribunal.

Re-making of decision

15. I directed at the hearing that I would re-make the decision on Article 8 for myself. Neither party sought to persuade me otherwise, nor did either party wish to make any further submissions.

16. It is for the claimant to demonstrate, on the balance of probabilities, both the relevant factual matrix and that Article 8 is engaged. It is for the Respondent to justify any interference with an engaged right.

17. The First-tier Tribunal concluded that the claimant has both a private and family life in the United Kingdom. These findings have not been the subject of challenge and, consequently, I do not depart from them. The extent of the claimant's private life is not readily identifiable from the papers before me, but it is clear is that he arrived in the United Kingdom in 1994 and has lived here ever since. His witness statement identifies that during his time here he has worked "on and off" as a car washer, although not since December 2012. It also identifies that he has relatives and has friends here, is now in good health despite previously having had a liver problem, and that he has had casual relationships but nothing more serious. I have taken full account of the evidence given in this regard.

18. As to the claimant's family life, the First-tier Tribunal accepted that the claimant has lived with his British citizen sister since his arrival, during which time she has provided financial support to him. The papers disclose little else relating to the nature of this relationship.

19. The First-tier Tribunal found that the consequences of the claimant's removal would be sufficiently serious so as to engage article 8. Again, this is a conclusion which has not been the subject of challenge and one that I do not go behind.

20. Turning to the core issue in this appeal, that of proportionality. It is the Respondent's case that the claimant's removal can be justified in pursuance of the economic well-being of the country and, more particularly, the maintenance of immigration control.

21. The claimant does not meet the requirements of the Immigration Rules, for the reasons set out by the First-tier Tribunal. Before me Mr Butt argued that the claimant has no connections to Mauritius and that the First-tier Tribunal's conclusions to the contrary are flawed. I see no reason to exercise my discretion to re-open this issue. This decision of the First-tier Tribunal, made in relation to the Immigration Rules, is one that the claimant could have sought to appeal, but he chose not to.

22. In any event, had I been required to re-determine this issue for myself I would have come to exactly the same conclusion as the First-tier Tribunal. Although the claimant had, as of the date of his application for leave, lived outside of Mauritius for approximately 19 years, having taken into account the guidance given on this issue in Ogundimu [2013] UKUT 60, I do not accept that it has been demonstrated that the claimant has 'no ties' to Mauritius. He has family there, his sister with whom he lives regularly visits the country, and the claimant lived the first 34 years of his life there.

23. Moving on, there is a compelling public interest in refusing permission to remain to those persons, such as the claimant, who have failed to establish a right to remain under the Immigration Rules. Although the claimant has been in the United Kingdom, now, for over 20 years, a matter I have taken full account of, for the majority of this time his stay has been unlawful.

24. The evidence as to the extent of claimant's private and family life, developed during his lengthy unlawful stay here, is limited, as I have already set out above. The claimant's relationship to his sister is no doubt important to him and I have taken full account of this. He also has other relatives in the United Kingdom with whom he has contact, such relationships forming a part of his private life here, as does his relationships with his friends. There is no evidence before me as to what impact the claimant's removal would have on his UK-based family members and friends, although one would expect his sister to be upset by such an event. There is also no evidence before me that would lead me to conclude that the claimant could not re-integrate back in to Mauritian society upon his return there. Although the claimant has limited ties to Mauritius, he does have relatives living there and his sister has also retained connections.

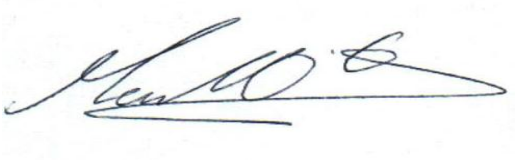
25. Looking at the evidence before me as a whole, I find that there are no compelling circumstances not sufficiently recognised under the Rules that would lead me to conclude that it would not be proportionate to remove this claimant to his homeland. The public interest in removing persons who remain in the UK unlawfully and do not meet the requirements of the Immigration Rules is ample justification, on the facts of this particular case, for the claimant's removal to Mauritius. In my conclusion there is nothing in the facts of this case, as presented, which come anywhere close to leading me to conclude that the claimant's removal would be a disproportionate interference with his private and family life in the United Kingdom. For this reason I re-make the decision by dismissing the appeal brought on Article 8 ECHR grounds.

Decision

For the reasons given above:

(i) The decision of the First-tier Tribunal is set aside;
(ii) Having re-made the decision for myself, I dismiss the claimant's appeal on all grounds.

Signed:



Upper Tribunal Judge O'Connor
Date: 5 September 2014