IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01766/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2016	**On 1 February 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SULEIMAN HUSSEIN JAFFAR
(ANONYMITY ORDER NOT MADE)

Claimant

Representation:
For the Appellant: Ms Willcocks-Briscoe, Home Office Presenting Officer
For the Claimant: Ms P Glass, instructed by Freemans Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (a panel comprising First-tier Tribunal Judge A W Khan and Mrs L Schmitt JP) promulgated on 3 December 2014, in which it allowed the appeal of Mr Hussein (the "claimant") appeal against the decision of the Secretary of State (whom I refer to as the respondent as she was below) made on 5 September 2014 that he is a person to whom section 32(5) of the UK Borders Act 2007 applies as he is a foreign criminal.

2. The claimant is a citizen of Uganda who, it appears, was on 11 May 2005 granted indefinite leave to enter the United Kingdom as part of a family reunion exercise but in the false name of Ronald Kavumar. He did not, however, enter the United Kingdom in that name but in a different identity, Geoffrey Nakendo using a student visa. On 3 March 2008 he was granted a "no time limit" endorsement in his passport held in the name of Ronald Kavumar. The claimant's use of aliases came to the attention of the respondent and his leave was cancelled; his application for leave to remain on the basis of his residence here, and the family life established was refused. On 20 September 2013 he was convicted of offences of conspiracy, frauds and possession of false identity documents and was sentenced to 12 months' imprisonment, on account of which the respondent made the decision to deport him.

3. The appellant's partner, Ms Kaganda, is a British Citizen and they have two children who are also British Citizens, aged 4 and 3 years. Ms Kaganda has suffered from leukaemia since 2007, her condition becoming more acute and requiring a bone marrow transplant. She has been, on any view, extremely ill, and she has only recently started work again part-time. She is unable to travel to Uganda as she requires continuing complex monitoring and treatment in the United Kingdom; she is also unable to undergo immunisation rendering any travel to Uganda hazardous.

4. The First-tier Tribunal found that the claimant was in a relationship with his wife but [24] that the requirements of paragraph 399 (b) of the Immigration Rules could not be met as the claimant did not meet the requirement of paragraph 399 (b) (i) to have lived here for 15 years with valid leave prior to the date of decision.

5. The Tribunal also directed itself [19] whether the claimant met the requirements of paragraph 399(a) of the Immigration Rules, concluding [22] that this was not a case whether there was no other family member able to look after the family.

6. The Tribunal did, however, find [27] and [28] that it was not a realistic proposition for Ms Kaganda to go to live in Uganda, given her health problems, and it was not reasonable for her to relocate there.

7. After directing itself [29] – [33] as to the effect of sections 117A- 117D of the Nationality, Immigration and Asylum Act 2002, the Tribunal found:

   (i) That by virtue section 117C (5), Exception 2 applied [34] as the effect of deportation on the claimant's partner would be unduly harsh, it not being reasonable to expect he to go to Uganda with him;

   (ii) That the effect of deportation on his children would be unduly harsh as it w would mean a break up of family life, as it would be in the children's best interests to remain in the UK with their mother [34], [35];

(iii) That in this case the public interest was outweighed by the exceptional circumstances which exist [36]-[38]; and, accordingly, deportation would be disproportionate.

8. The First-tier Tribunal allowed the appeal under the Immigration Rules and on human rights grounds.

9. The respondent sought permission to appeal on the grounds that:-

(i) The Tribunal had erred in determining the appeal on the basis of a version of the Immigration Rules which had been superseded [1];

(ii) The Tribunal's conclusion that the effect of deportation on the claimant's partner and children would be unduly harsh was flawed, as little weight should be attached to a relationship which was formed while the claimant's immigration status was precarious [2] and there was no evidence to show that medical treatment would not be available in Uganda;

(iii) The Tribunal had erred in its finding that relocation would be unduly harsh as it had found relocation would be possible once the partner's condition had improved, and thus the choice over relocation was one the family made [3], and the best interests of the children could be met by remaining here with their mother;

(iv) The Tribunal had erred in finding that the circumstances were exceptional, and that any separation of the family was proportionate, the claimant's assistance being preferable was not sufficient [4]; and, thus, as the claimant did not meet the exceptions set out in paragraph 399 (a) and 399 (b), it would not be unduly harsh for partner and children to remain in the UK without the claimant;

(v) The Tribunal had erred in its approach to the public interest, wrongly starting from a neutral point rather than appreciating that the public interest is heavily in favour of deportation, and failed to take into account whether the appellant had addressed his behaviour [6];

10. On 14 April 2015 Upper Tribunal Judge Storey granted permission on all grounds.

Findings

11. It was agreed by both representatives that the Tribunal had, as is evident from their discussion of the relevant Immigration Rules at [19] and [24] in particular, had applied the previous version of paragraphs 398 and 399 of the Immigration Rules. The current version of the rules differs from the earlier provisions in a number of important respects.

12. That said, it is clear from the Tribunal's findings at [22] and [24] that they did not accept that the claimant met the requirements of paragraphs 399(a) of 399(b) of the Immigration Rules. It follows, therefore, that the appeal was allowed on the basis there were, as was found at [38],

exceptional circumstances do exist, having considered the effect of sections 117A-117D of the 2002 Act.

13. The current rules provide, however, at paragraph 398 as follows:-

> '…
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, *the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A* [emphasis added]'

14. In the circumstances, I am satisfied that the Tribunal misdirected itself materially in respect of the Immigration Rules, and that accordingly, the decision must be set aside. Despite the valiant submissions to the contrary, and not without some hesitation, I am not satisfied that it can properly be argued that the result would have been the same as the error is so fundamental to the conclusion reached.

15. In the circumstances, I am satisfied that the decision did involve the making of an error of law, and I set it aside. As it is now over a year since the findings of fact were made, I consider that it would be necessary for fresh findings of fact, and to receive new evidence regarding Ms Kaganda's medical condition, and the availability of relevant treatment in Uganda, if that is possible, as well as updating on the position of the children. Further account would need to be taken of any further offending by the claimant. In the circumstances, therefore, I consider that it would be appropriate to remit the appeal to the First-tier Tribunal for a fresh decision on all relevant issues.

Summary of conclusions

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside
2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues.

Signed Date: 28 January 2016

Upper Tribunal Judge Rintoul