



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18594/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 28 June 2018

Decision & Reasons Promulgated  
On 18 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT  
Appellant

v

KASHIF [J]

Respondent

**Representation:**

For the Appellant: Mr. C. Avery, Senior Home Office Presenting Officer

For the Respondent: Ms Glass, instructed by A2 solicitors

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**DECISION AND REASONS**

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1. The Respondent to this appeal, to whom I shall refer as the Claimant, is a national of Nigeria, born on 27.5.68. He arrived in the United Kingdom in June 2000 as a visitor and thereafter overstayed. He has two children: TN, born on 15.10.01 and TM born on 9.4.10, who suffers from sickle cell anaemia. On 6 May 2016, he made an application for leave to remain on the basis of his

private and family life in the United Kingdom. This application was refused in a decision dated 19 July 2016, on *inter alia* the basis that he did not meet the suitability requirements because between 7 October 2003 and 5 February 2015, he amassed six convictions for thirteen offences.

2. The Claimant appealed and his appeal came before First tier Tribunal Judge Griffith for hearing on 20 December 2017. In a decision and reasons promulgated on 12 January 2018, the Judge allowed his appeal on human rights grounds.

3. The Secretary of State sought permission to appeal, in time, to the Upper Tribunal on the basis that the Judge had allowed the appeal against deportation and had erred in minimizing the Claimant's criminal behaviours and in failing to refer to the judgment in Chege [2016] UKUT 187 (IAC) and in failing to identify anything exceptional about the family's situation that would outweigh the public interest in his removal and in placing insufficient and inadequate weight on the Claimant's poor immigration history and criminal behaviour.

4. Permission to appeal to the Upper Tribunal was granted in a decision dated 29 April 2018 by Judge of the First tier Tribunal Hollingworth on the basis that it was arguable: (i) the Judge has set out an insufficient analysis of the persistent nature of the Claimant's offending; (ii) the proportionality assessment has been affected and (iii) the Judge attached insufficient weight to the delay by the Claimant in attempting to regularize his status and had not been wholly law abiding during his stay in the UK and had set out an insufficient analysis of the degree of risk posed by the Appellant.

#### *Hearing*

5. At the hearing, Mr Avery accepted that this was not a deportation appeal and the grounds of appeal were erroneous in this respect. He submitted that the grounds come down to how the Judge treated the Claimant's criminal history and that the decision in Chege [2016] UKUT 187 (IAC) is concerned with persistent offending in the context of a foreign national offender. The Judge sets out most of the history at [9] in particular the fact that he has six convictions for thirteen offences. The Claimant did not meet the suitability requirements due to his criminal history and it was not appropriate for him to be allowed to remain in the UK. Whilst Mr Avery acknowledged that most of the offences date back some way, there was a fairly recent offence in 2015 and the Claimant did not disclose all his convictions, which indicates he is not bothered about complying with the law. The Judge minimized his criminal history in assessing proportionality, particularly given that the Judge did not find that the Claimant met the requirements of Appendix FM of the Rules.

6. Mr Avery accepted that there had been a significant change in circumstances between the decision and the hearing in that the Claimant's wife and one of his children had obtained settlement and applied for British nationality. Whilst she accepted that the suitability requirements are mandatory, the Judge found they should not have been applied and so she could have gone on to give an indication as to whether or not the Claimant met the Rules. In respect of the proportionality assessment, the Claimant has not been law abiding whilst in the UK and has offences going back many years. He submitted that there had been a clear minimization of his criminal record and that the Judge had erred in failing to give proper weight to his criminal record. This gives the public interest a significant boost and the Judge has failed to give this proper consideration.

7. In her submissions, Ms Glass asserted that there was no material error in the decision of the First tier Tribunal Judge, which was to assess the proportionality of the Claimant's removal. The Judge points out that she was not assisted by the refusal decision, which contains no substantive consideration of the Claimant's circumstances: the interference with the family life, section 55 of the BCIA 2009 and his British wife and children. She submitted that the Judge had conducted a very careful analysis at [48] and makes reference to the fact that it is finely balanced and had had regard to section 117B of the NIAA 2002, the Claimant's history and his family life.

8. She submitted that the Judge was very aware of the fact that the Claimant is a national of Nigeria, with two children, one with sickle cell anaemia. It is very clear from the decision of the former President in Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC) that the medical health of a child is a weighty matter, albeit it is not paramount, it is clearly a relevant factor. The Judge set out the history of the Claimant's offending at [4] and the fact that he had 8 weeks imprisonment. In respect of Chege [2016] UKUT 187 (IAC) the Judge analysed his history of offending in great detail at [16] [22] and [24]. The length of time in respect of deportation is 12 months, however, this is 8 weeks. Clearly this analysis has been undertaken at [28]. At [33] the Presenting Officer accepted that the offences were historic. At [39] the Judge found that the Claimant had not been in trouble for 10 years apart from 2015, which was the Claimant moving his cousin's car, set out at section 6 of application form which records that on 5.2.15 the Claimant was convicted of driving with excess alcohol in respect of which he was sentenced to 18 months disqualification and 100 hours community service.

9. Ms Glass submitted that it is clear from [48] that the judgment is finely balanced, given that the Claimant was an offender in the past. The Judge considered in respect of section 55 of the BCIA 2009 that this must be taken into consideration along with section 117B and considered whether it would be unduly harsh to expect his daughter to relocate to Nigeria: see also [45]. The Home Office had failed to provide a proper analysis of the circumstances.

At [47] the Judge recorded that the Claimant does speak English and is not in receipt of public funds. She found on the evidence that the public interest does not require his removal.

10. In reply, Mr Avery submitted that it is the analysis of the Claimant's offending that is the issue. In a matter where someone is a criminal offender then the Secretary of State's position is that the public interest carries significant weight. He submitted that the Judge had provided very sketchy reasoning in respect of the public interest and suitability requirements and there is no real indication that the Secretary of State's position had been accorded weight. If there is an error in the Judge's assessment of the evidence there has to be a concern that if she states that it is finely balanced but has not balanced the issues properly then the conclusion is likely to be wrong and the balance has not been properly struck.

11. I reserved my decision, which I now give with my reasons.

### *Findings*

12. The assertion by the Secretary of State that the First tier Tribunal Judge erred in failing to have regard to the decision in *Chege* [2016] UKUT 187 (IAC) I find is misconceived, given that the basis of the refusal decision of 19 July 2016 was with regard not to S-LTR 1.5 but to S-LTR 1.6 viz *"the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5) character, associations or other reasons make it undesirable to allow them to remain in the UK."* Thus no error of law is established in this respect, given that it was not the position of the Secretary of State that the Claimant is a "persistent offender" and I find that the Judge correctly set out that position at [38] of her decision.

13. The Judge also correctly found at [38] that the burden of showing that it is undesirable to allow the Claimant to remain in the United Kingdom is on the Secretary of State. She then proceeded to analyse the Claimant's history of offending at [39]-[40] and took into consideration the fact that the Presenting Officer acknowledged that most of the offences apart from the 2015 incident, are now historic. The Judge went on to find: *"the offences are all low level and I am not satisfied that, individually or cumulatively, they amount to conduct that makes the appellant's presence in the UK undesirable. I am not satisfied, therefore, that the respondent has discharged the burden on her to show that the appellant does not meet the suitability requirements for limited leave to remain as a partner."*

14. I find no error of law in the approach by the First tier Tribunal Judge, not least because it appears that the Presenting Officer, whose submissions are recorded at [33]-[34] *"acknowledged that the offences were mainly driving offences and to a degree were historic ..."* clearly did not argue the point strongly. I find that the Respondent's challenge in this respect amounts to no more than a

disagreement with the findings of fact, which were open to the Judge on the evidence and submissions before her.

15. I further find that it was open to the Judge to rely on the material change in circumstances since the decision and that is that the Claimant's wife had been granted ILR and she and the second child had applied for British citizenship, the older child already having been recognised as a British citizen. This was also expressly acknowledged by the Presenting Officer in his submissions at [33] and at [34] he expressly declined to argue that it would be proportionate for the children to go to Nigeria, given that they had both been born and raised in the UK and in light of the second child's medical condition. Thus I find it was open to the Judge to find as she did at [46] that the Claimant at the date of hearing met the suitability and eligibility requirements of the Rules and that this was a factor relevant to the consideration of proportionality.

16. It is further clear that the Judge had regard to the public interest considerations set out in section 117B of the NIAA 2002 at [47] and [48], finding that the Claimant spoke English and although he was not financially independent as an individual, he was not in receipt of public funds as he was financially supported by his partner. She took into account the fact that the Claimant entered into his relationship and had two children in the knowledge that he could be removed at any time and that he delayed considerably in seeking to regularize his stay and had not been law abiding.

17. Against this, the Judge balanced the fact that it would not be reasonable to expect the children to leave the United Kingdom and gave sustainable reasons for this finding at [45]. This is clearly right, given that the oldest daughter, who was born in the United Kingdom on 15.10.01 and is British is 16 years of age and her younger sister is 7 years of age and settled in the UK. Whilst neither party appears to have drawn either the judgment of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 to the Judge's attention nor the Home Office policy to the effect that: "*once the seven years' residence requirement is satisfied, there need to be 'strong reasons' for refusing leave*" the Judge effectively put this test into practice in her consideration of the proportionality of the Claimant's removal from the United Kingdom. This judgment has since been expressly endorsed by Mr Justice Lane, the President of the Upper Tribunal in MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) which held at [33]-[34]:

33. *On the present state of the law, as set out in MA, we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining."*

18. I find that, when conducting the proportionality balancing exercise the Judge was clearly mindful of the Claimant's poor immigration history and

criminal behaviour, but the weight that she attached to these considerations was ultimately a matter for her. This is not a case where the Judge failed to take account of any of the material factors relied upon in support of the public interest in removing the Claimant as it is clear that she did and her conclusion that the public interest did not require removal of the Claimant was open to her on the evidence before her and I find is a sustainable conclusion.

*Decision*

19. I find no error of law in the decision of First tier Tribunal Judge Griffith, which is upheld.

*Rebecca Chapman*

Deputy Upper Tribunal Judge Chapman

16 July 2018