



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/00154/2014
IA/00155/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 23 September 2014
Prepared: 10 October 2014

Determination Promulgated
On: 22 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS JHAMELIA SHERICA ANNE JACKSON
JHAMANI LAVONNA JACKSON
NO ANONYMITY DIRECTION MADE

Respondents

Representation

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondents: Ms J Norman, counsel (instructed by Immigration Advice Service (Hounslow))

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the secretary of state and the respondents as "the claimants."
2. The claimants are nationals of Jamaica, born on 3rd May 1988 and 12th July 1993 respectively. They are sisters. Their applications for a variation of leave to remain were refused by the secretary of state on 29th November 2013 as she was not satisfied that they met the requirements "of the Article 8 rules".

3. In a determination promulgated on 22nd July 2013, the First-tier Tribunal Judge allowed their appeals both under the Immigration Rules and on human rights grounds.
4. On 12th August 2014, First-tier Tribunal Judge R A Cox granted the secretary of state permission to appeal. He noted that their appeals were against the secretary of state's decision to refuse to vary leave to remain on family and private life grounds, and to remove them under s.47 of the 2006 Act.
5. In granting permission to appeal, he found that the grounds disclosed an arguable material error of law. The grounds contended that the Judge misdirected himself in respect of paragraph 276ADE(vi) of the rule and/or failed to give adequate reasons for finding that the claimants had no ties to Jamaica.
6. Further, the Judge had undertaken a cursory Article 8 assessment, had not considered the **Gulshan** criteria and had not given adequate reasons for finding that removal would be disproportionate.
7. Judge Cox stated that although he could understand the sentiments expressed by the Judge at [19], he "feared" that the grounds were "certainly arguable" as there was a lack of structure, clarity and adequacy of reasoning in the determination.

The background to the appeal

8. At the hearing before the First-tier Tribunal the claimants and their parents provided statements which they adopted in evidence. Although the claimants were no longer minors, they were not living independent lives as they lived with them. They depended on their parents "for everything." [10]
9. They had returned to Jamaica only once in nine years, for two weeks in 2010 and only had an 85 year old grandmother who was not able to assist them in any way.
10. They were actively involved in their local church. The elder is on a teaching support placement at a primary school and hopes to pursue a career as a teacher. The younger hopes to study Economics at university.
11. They left Jamaica "long time ago" and have several friends here. There is also a community with whom they have a close relationship. Their father is working in the UK and they can be supported without any need for public funds. They are a close family and rely on their parents for emotional guidance and support. They have two paternal uncles and aunts here as well as cousins and other family members.

12. The second claimant confirmed that they still had two grandmothers in Jamaica and also her aunt, but they have not spoken recently [11]. They had not discussed what their parents would do if they had to return. The parents confirmed that when they came to the UK, they gave their house to the grandmother.
13. The mother said that she had been back three times. She had however been away from Jamaica now for 12 years and there was nothing for them there now, whereas here she has a job.
14. "The father" confirmed that "his daughter" had lived in the UK longer than he had, as he only came in 2007, but were they to return, he would not go with them as he would need to be able to support them financially. However, if he were to remain in the UK it would be difficult for him to offer much meaningful support of any other kind.
15. The Judge had regard to paragraph 276ADE of the rules. He also stated that the standard in relation to human rights is whether there is a real risk of a breach arising [13-14].
16. He referred to the amendment to the Immigration Rules where a detailed list of factors had to be taken into account when determining the issue of proportionality under Article 8. The UKBA maintained that these factors are those already identified within current statute law and case law, and that it will only be in "genuinely exceptional circumstances" that the refusal of leave and removal from the UK would breach Article 8 [15].
17. The Judge considered Article 8 outside the rules. He referred to the **Razgar** steps. He found that the decisions in respect of the claimants and their parents produced a "rather odd situation" [19]. The mother chose as an adult to visit the UK and was permitted to remain to study. She had no legitimate expectation of being allowed to remain permanently but was permitted to do so. When she was granted ILR, she had spent the greater part of her life in Jamaica.
18. The claimants were minors when their mother decided to bring them to the UK. Now they were aged 26 and 21 and the younger daughter has spent almost half her life here and the two of them have returned only once, for a fortnight. Their father has been here for less than seven of his 52 years but has been given leave as a spouse. [19]
19. He stated that had the claimants by now made their way in the world as independent adults here or in Jamaica, the situation referred to at paragraph 19 would not appear quite so strange. However, the position is that they are still living with their parents and both are engaged in studies and are undertaking voluntary work in the community which is highly valued.

20. Those closest to them chose to come to the UK having spent the majority of their lives in Jamaica, and have been allowed to remain, whilst they cannot be regarded as having decided to come here and have spent a large part of their formative years here, have been denied the opportunity to remain.
21. The Judge referred to their father's employment, stating that there is nothing to suggest that the claimants have ever been reliant on public funds. He had a basic salary of £11,715 per annum. It would "seem unlikely" that there is a public interest in removing them on 'public funds grounds' [20]. They have always been here lawfully and are of good character. There is no strong case "on other grounds" [20].
22. The parents are well established here. They have leave to remain which "will be pretty meaningless" if they feel obliged to leave the UK to continue their family life as it now is and to give the claimants the full level of support that they are presently able to provide [20].
23. The Judge found that while the claimants may still have grandmothers and an aunt to whom they can turn for some help in Jamaica, they are not family members with whom they have ever lived. Further, if required to return to Jamaica, it would appear likely that they may face real difficulty trying to persuade an entry clearance officer to grant them a visit visa to visit their parents in the UK, having regard to the difficulties of their current applications to remain here. This will be likely to be present for some years to come [20].
24. In the circumstances, the Judge found on the facts that the circumstances of the claimants are very unusual and the situation is one which he concluded could and should have resulted in a grant of leave on the basis that they have to all intents and purposes lost significant ties in Jamaica and the circumstances are exceptional and compassionate [21]. The case of the younger claimant is particularly strong as she left Jamaica just one week after her 12th birthday. Allowing her to remain with her parents would "only add to the strength of the case" for allowing her elder sister to remain.
25. The Judge then stated that "whether or not I am right in law to find as I have in respect of the facts on Article 8 inside the rules, I find that there is a strong arguable case for allowing the appeals outside the rules on Article 8 grounds." [21]
26. The claimants are young, single adult women who have always lived with one of their parents. They are not yet independent, nor are they likely to be in the near future given their plans for further study. They have lived in the UK now for nine years, returning only once for a short visit. Their life, activities, friends and immediate family are in the UK. They are of good character in terms of both criminal law and their immigration history, and are serving their community by their voluntary work and their example as Role Models [21].

27. He found that it was accordingly difficult to see what useful purpose would be served by uprooting them from the life they have been allowed to develop here by the secretary of state following the decision of their parents to bring them here. It would be disproportionate and unreasonable to expect them now to leave the UK.
28. Accordingly, the decisions of the secretary of state were not in accordance with the law and the applicable immigration rules.
29. Mr Jarvis on behalf of the secretary of state relied on two grounds, contending that the Judge had made material errors in law. With regard to the immigration rules, although not explicitly stated, the Judge has “seemingly allowed the appeal pursuant to Rule 276ADE(vi). The Judge had noted that the appellants have grandmothers and an aunt who reside in Jamaica.
30. He has however not considered how these familial relationships amount to no ties to Jamaica for the purpose of paragraph 276ADE(vi). Nor has the Judge considered the applicable guidance in the case of **Ogundimu (Article 8 – New Rules) Nigeria [2013] UKUT 60 (IAC)**. In the light of their relatives who still reside in Jamaica, they have sufficient ties so as not to engage the rule.
31. The second ground relates to Article 8. The Judge had undertaken “a cursory Article 8 assessment” amounting to a single paragraph [21]. He has not considered their respective positions against the criteria outlined in **Gulshan**. In addition, he has given inadequate reasons why the “proportionality” should be exercised in favour of the claimants.
32. Mr Jarvis submitted that the Judge accepted at paragraph 20 that the claimants may still have grandmothers and an aunt to whom they can turn for some help in Jamaica, albeit that they are not family members with whom they have ever lived.
33. The Judge failed to have regard to the decision in **Ogundimu**, supra. In particular, there was no regard given to paragraph 124 and 125. There the Tribunal noted that the phrase “no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK” is not exclusive to paragraph 399A of the rules, but is also used in paragraph 276ADE in the context of the requirement to be met by an applicant for leave to remain based on private life in the UK when such a person has lived here for less than 20 years.
34. From paragraphs 123 onwards, the Tribunal referred to the natural and ordinary meaning of the word “ties”. That imports a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to her country of origin.

35. The Tribunal recognised that the text in the rules “is an exacting one” [124]. Consideration of whether a person has “no ties” to such a country must involve “a rounded assessment of all the relevant circumstances and is not to be limited to “social, cultural and family” circumstances. In **Ogundimu** itself, the Tribunal found that he was a stranger to Nigeria. His father may have had ties, but those are not ties of the appellant himself, or any ties that could result in support to the appellant in the event of his return to Nigeria. After 22 years' residence in the UK, it would be “unjustifiably harsh” for the appellant, then aged 28, to return.
36. At paragraph 125, the various circumstances relevant to the assessment of such a person's ties to the country to which he would be required to go must include but are not limited to: the length of time he has spent in the country to which he would be returned; the age that he left that country; the exposure he has had to the cultural norms of that country; whether that person speaks the language of the country; the extent of the family and friends that person has in the country to which he is being removed; and the quality of the relationships he has with those friends and family members.
37. Mr Jarvis thus submitted that the Judge did not adopt the proper approach referred to in **Ogundimu** in assessing the paragraph 276ADE conclusions. A holistic consideration had not been undertaken. There was in any event a finding that the claimants had grandmothers and an aunt to whom they could turn for some help in Jamaica. The nature of the relationships was not properly assessed. They speak the language. The fact that one of the claimants left when aged 12 meant that a substantial part of her early life had been lived in Jamaica.
38. The finding at paragraph 21 that they had lost significant ties in Jamaica was factually incorrect. A proper assessment had not been carried out as required. The Tribunal has acknowledged that the rule is “an exacting one.”
39. With regard to the findings in respect of Article 8, the Judge appears to be engaging with **Gulshan** in stating that there is a strong arguable case for allowing the appeals outside the rules on Article 8 grounds [21]. However, the assessment of proportionality is “unlawful.” At paragraph 21, the Judge was considering the Article 8 claim on the basis that he might not have been correct in law to find for the claimants “on Article 8 inside the rules” [21].
40. The Judge had however failed to recognise or take into account that the appellants had not succeeded under the rules.
41. Mr Jarvis referred to and relied on the decision of the Court of Appeal in **Huleemudeen v SSHD [2014] EWCA Civ 558**. At paragraph 47, Lord Justice Beatson stated that the passages from the judgments in the cases of **Nagre [2013] EWHC 720 (Admin)** and **MF (Nigeria) [2013] EWCA Civ 1192** appear to give the

rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights. Even if it is correct to characterise the relevance of the rules as only a starting point, the single reference in the First-tier Tribunal's decision to "apparent harshness" did not in his judgment suffice.

42. Lord Justice Beatson stated that he did not consider that it is necessary to use the term "exceptional" or "compelling" to describe the circumstances, and it will suffice if that can be said to be the substance of the Tribunal's decision. Here, the First-tier Tribunal gave no explanation of why this is so, or identified particular features of Mr Huleemudeen's case which justified considering proportionality outside the rules.
43. Mr Jarvis submitted that the Judge here has engaged in "an old Article 8 assessment" using the **Gulshan** terminology.
44. In **Huleemudeen**, it was accepted that, at least in the Court of Appeal, in the light of the authorities, it is necessary to find "compelling circumstances" for going outside the rules.
45. In the claimants' appeal before the First-tier Tribunal Judge, the Judge stated at paragraph 21 that it was difficult to see what useful purpose would be served by uprooting them from the UK. He referred to their lack of previous convictions and good character. In the circumstances he found that their removal would be disproportionate and unreasonable.
46. Mr Jarvis submitted that that was 'an unlawful approach' following **Nasim and others (Article 8) [2014] UKUT 25 (IAC)**. At paragraph 27, the Tribunal there stated that the only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration control.
47. It is evident from paragraph 21 that the Judge "over emphasised" their private life. Accordingly, he took into account irrelevant matters at paragraph 21.
48. The claimants had had no expectation of being allowed to remain in the UK so as to allow them to succeed outside the rules where they would not have been able to do so under the rules.
49. He submitted that this was one of those cases where it would be wholly justified for the case to be remitted back to the First-tier Tribunal to consider the applicable issues properly.

50. On behalf of the claimants, Ms Norman (who did not represent the claimants before the First-tier Tribunal) contended that the secretary of state's grounds amounted to an attempt to appeal a decision with which she does not agree.
51. She submitted that the ground relating to paragraph 276ADE relied on seeks to require the Tribunal to look at the findings in a vacuum. It was necessary to look at the totality of the evidence. There is no reason to suggest that the Judge did not have the proper application of the rules in mind. She referred to paragraphs 12-17, where the appropriate rules are identified, including paragraph 276ADE.
52. With regard to Article 8, he referred to the need to have regard to Article 8 outside the rules in genuinely exceptional circumstances only [15]. He went on to direct himself appropriately with regard to Article 8 and paragraph 16 and 17. He then made findings in accordance with the approach he identified.
53. She submitted that he has made a comprehensive and concise finding. The Judge has "to all intents and purposes" given effect to **Ogundimu**, supra. He has properly applied paragraph 4 of the headnote.
54. He was entitled to arrive at the findings that he did. He found, despite the fact that there were two grandmothers available, that the claimants have lived here for a long time.
55. She therefore submitted that there had been a proper assessment for the purposes of paragraph 276ADE of the rules.
56. Ms Norman accepted that it was evident from the skeleton argument produced to the First-tier Tribunal Judge that there had been no reference at all to the decision in **Ogundimu**. The skeleton in fact concentrated on Article 8, contending that the claimants have provided evidence regarding their circumstances which amount to exceptional and compassionate circumstances in order to be granted leave outside the rules on a discretionary basis (paragraph 23). There were insurmountable obstacles for them and their parents to enjoy family life outside the UK [24].
57. The skeleton referred to the UKBA policy guidance and it was not necessary for the Judge to have cited it. He "took the correct path in any event" even though not citing or having regard to **Ogundimu**.
58. Whilst it is correct that he "did not show all the workings" he ultimately came to the correct decision. They had lost significant ties.
59. With regard to the second ground of appeal, she submitted that the Judge had accepted that they met the rules. He did correctly direct himself at paragraph 17 with regard to the fifth question to be answered in **Razgar**, namely the issue of

proportionality. Accordingly, he did have this at the forefront of his mind at the time.

60. He found at paragraph 21 that the circumstances are exceptional and compassionate and has looked at whether this is a case outside the rules. He has given a “concise list of reasons” as to proportionality in favour of the claimants.
61. She submitted that although the claimants were not entitled to succeed simply on the basis that they had no convictions and were of good character, that could constitute a factor to be taken into account in considering the interest and policy of the secretary of state. A disproportionate weight was not given.
62. In reply, Mr Jarvis submitted that it had not been shown that the Judge has properly engaged with **Ogundimu**. There is a proper process which has to be adhered to, having regard to whether or not there are relevant ties for the purpose of paragraph 276ADE.
63. There was some support for the claimants in Jamaica, as found by the Judge. These were not merely remote or abstract links.
64. Insofar as the Article 8 in the alternative ground is concerned, Mr Jarvis again submitted that although the language of **Gulshan** may have been used, all the Judge did was to highlight matters on the claimants' side. In particular, he has not treated the rules as anything more than a starting point. Nor were the matters referred to in **Nasim** considered with regard to the public interest. This was completely left out of paragraph 21. The public interest is not weakened for the reasons set out at paragraph 21. The Judge had not been entitled to treat the Article 8 assessment as simply a free standing assessment.

Assessment

65. It is evident that the First-tier Tribunal Judge allowed the claimants' appeals under the Immigration Rules. He set out the relevant rules, namely paragraph 276ADE at paragraph 13 of the determination.
66. It appears from paragraph 21 that the Judge found that they had met the provisions of paragraph 276ADE under the rules, where he refers to “the facts on Article 8 inside the rules.” However, on the basis that that may not be correct, he considered the appeals on an alternative basis, namely on Article 8 grounds.
67. Insofar as the implicit findings under paragraph 276ADE are concerned, it is unfortunate that the Judge was not referred to the decision of the Tribunal in **Ogundimu**. I have had regard to the skeleton argument produced on behalf of the claimants, which is essentially restricted to a consideration under Article 8.

68. There was no analysis or reference to paragraph 276ADE. Nor was there any reference to the proper approach to paragraph 276ADE as set out in **Ogundimu**, which was a decision promulgated in 2013.
69. Accordingly, I find that the Judge has not conducted the necessary rounded assessment required as to all the relevant circumstances. The Tribunal there recognised that the text under the applicable rules is an exacting one. The factors and circumstances which must be considered in the rounded assessment are clearly identified at paragraph 125.
70. The Judge has found at paragraph 20 that the claimants do have grandmothers and an aunt to whom they can turn for some help in Jamaica, albeit that they are not family members with whom they have ever lived. The claimants are adults.
71. In the absence of such assessment, the Judge has not shown proper reasons as to why, to all intents and purposes, the claimants had lost significant ties in Jamaica, rendering their circumstances exceptional and compassionate.
72. There is, as noted by Judge Cox in granting permission, a lack of structure, clarity and adequacy of reasoning in the determination.
73. Insofar as the Article 8 assessment is concerned, the Judge has apparently had regard to the approach in **Gulshan** at paragraph 21.
74. However, for the reasons referred to in detail arising from the submissions of Mr Jarvis, the approach with regard to proportionality has been for the most part a consideration of the claimants' interests with a lack of proper attention and reasoning with regard to the secretary of state's proper interests.
75. Further, the reference to their good character; the fact that they have not committed offences and have not relied on public funds is simply to preclude the secretary of state from pointing to any public interest in respect of their removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, as a general matter that public interest factor can, in an appropriate case, result in the removal being proportionate in the circumstances.
76. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law.
77. I accordingly set aside the determination. There will have to be a fresh decision made.
78. Mr Jarvis has submitted (without any opposition from Ms Norman) that this is an appropriate case for remitting to the First-tier Tribunal for a fresh decision to be

made as there will have to be a complete re-hearing needing substantial fact-finding to take place.

79. I find, having regard to the Senior President's guidelines with regard to the remitting of cases, that it is appropriate for the appeal to be remitted. There will be substantial fact finding required where the parties will need to address the proper approach with regard to the immigration rules as set out in **Ogundimu**, supra.

Decision

The decision of the First-tier Judge involved the making of an error on a point of law and is set aside.

The claimants' appeals are remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made before another Judge.

The necessary administrative arrangements will need to be made.

Signed

Date 10/10/2014

C R Maller
Deputy Upper Tribunal Judge