



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/14477/2014

THE IMMIGRATION ACTS

**Heard at: Field House
On 24 September 2015**

**Determination Promulgated
On 19 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MR JONATHAN CORNELIUS HILL
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Clarke, Counsel Senior Presenting Officer

For the Respondent: Ms N Atreya of Counsel

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of South Africa born on 13 June 1967. However, for the sake of convenience, I shall continue to refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant's appeal to the First-tier Tribunal was against the decision of the respondent dated 3 March 2014 to refuse his application for indefinite leave to remain on the basis of 10 years continuous lawful residence and pursuant to Article 8 of the European Convention on Human Rights.
3. A Judge of the First-tier Tribunal, Chapman allowed his appeal. First-tier Tribunal Judge Carruthers in a decision dated 11 May 2015 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge erred in law when finding in the appellant's favour on the question of family life existing in this country. It was also concluded that there was a flawed approach to the appellant having a normal private life built up over times when his situation in the United Kingdom was precarious and in the Judge's application of the "near miss" principle that was disapproved in **Miah [2012] EWCA Civ 261**.
4. Thus the appeal came before me.

First-tier Tribunal's Findings

5. The First-tier Tribunal allowed the appellant's appeal, concluding, in summary, this was an application made by the appellant for leave to remain based on the 10 year residency route set out in the Immigration Rules. The appellant expected that as he had lived in the United Kingdom since 2001, his application would be granted simply because of that long residence. As a result, his application did not seek to provide any information about his private or family life, as it has subsequently emerged during the course of this appeal. The respondent simply dealt with the application on the basis of long residence and did not explore the appellant's family life to the extent that a child was involved and no enquiry was made.
6. The respondent states that there were breaks in lawful continuous residence because the appellant had made three applications for leave to remain out of time. The appellant did not seek to challenge that those applications were made out of time but gave explanations for why they were late. On a balance of probabilities his applications were made out of time and the appellant's lawful leave to remain started in July 2005. The appellant therefore did not satisfy the 10 year residency route, at both the date of the decision or the date of hearing and does not meet the requirements of paragraph 276B of the Rules. As his residence was less than 20 years, the only subparagraph applicable was 276 ADE (vi), but the respondent did not consider there to be significant obstacles to the appellant's integration into South Africa. This was because the appellant's sisters have recently visited the family there. The appellant lived in South Africa for 34 years before coming to the United Kingdom and accepts that, if he was returned he could maintain contact with family and friends through visits, and there are other modern communication means of

maintaining private life contacts. Therefore the appellant does not meet the requirements of paragraph 276 ADE

7. In respect of Article 8 of the European Convention on Human Rights, the appellant has established a family life in the United Kingdom, particularly with regard to his sister, Desiree, who is also the grandmother of Alicia. The evidence as a whole shows that Alicia's mother had difficulties with her two children Nicola and Natalie when they were in their teens. When Natalie became pregnant, the appellant was asked to step in to help. He supported Natalie and her partner whilst she was pregnant and Alicia as she was growing up. The appellant also supported his nephew, Kenan, who lived with him so that he could continue his schooling when his parents moved away. He is variously described as a parent, uncle, grandparent et cetera. He remains a strong father figure to the whole family. In the circumstances of this case, there were elements of dependency beyond the normal emotional ties and family life, such as to engage Article 8, existed.
8. The issue of the relationship with Alicia is much more complicated. Evidence from the appellant's family, and other witnesses is credible and significant in supporting the claims the appellant has made regarding the parental role he has played in Alicia's life. The evidence is confirmed by the evidence of Ms Brown, the independent social worker. She is an independent witness with the great deal of experience in such matters, and she was satisfied about the appellant's role in Alicia's life. There is nothing in her evidence to suggest that the appellant's claim and that of his family is not true. If she had any concerns and contraindications, the social worker would have investigated. The difficulty with her report is that (i) there is little by way of objective information taken into account in reaching her conclusions, because almost the entire report is based upon what the appellant told her and (ii) Miss Brown was not aware of the contrary findings of the Children Services assessment which took place in June 2013 which presents a totally different picture of Alicia's life in June 2013 to the one presented by the appellant and his witnesses. The same problem exists with that report in that the views of the appellant and of his family has been sought but she has not sought the views of Alicia's mother regarding the counter allegations made by her. Setting aside Alicia's mother's allegations, the assessment, contrary as it is to other evidence, still does provide some confirmation that the appellant provided considerable practical support in Alicia's upbringing, such as, for example taking her to school. When I also take into account the unchallenged evidence from Alicia's school of the appellant's involvement there since the date of that assessment, this evidence is preferred and the overall evidence of the appellant and all of his witnesses to the assessment made by Children Services over that very short period of time in May 2013.
9. "Taking the evidence as a whole, I am satisfied that the appellant has played a significant role in Alicia's life since she was born. I find it likely that there have been periods, such as when Children Services were involved, that Alicia's mother has attempted to take more responsibility

than at other times, that for the majority of the time, the appellant has been actively and positively involved in her upbringing. I considered this to be more than the normal emotional ties between granduncle and grandniece and that therefore Article 8 family life is engaged in this regard too”.

10. As to Alicia’s best interest, given the nature of the evidence, “I am not able to determine exactly what course is in Alicia’s best interests in the future. That will be for others such as Alicia’s mother, her family and possibly Children’s Services to determine. The preponderance of evidence in this case leads me to the conclusion that it would not be in Alicia’s best interests that the appellant is removed from her upbringing altogether, and that he should continue to have some role in her life. I do not reach any specific conclusions about what that role should be. In reaching these conclusions regarding Alicia, I have considered matters that have caused me more than a little concern. Firstly, as some of the issues raised about the appellant’s behaviour referred to in the Children Services assessment. Secondly, is that Alicia’s mother has not had any input into these proceedings. The weight I have given to these concerns is reduced, however, because I am satisfied that several opportunities have been given to the mother to contribute; the appellant was willing to engage with the authorities to resolve the position regarding Alicia; and, most importantly, there is no suggestion that any harm has befallen Alicia. Indeed, despite the uncertainties, she appears to be doing well. I am also satisfied that once the stress and uncertainty that goes with his appeal are reduced, then it is likely that Alicia’s future will become more settled, and that the appellant’s role clarified”.
11. The appellant’s private life established UK with limited leave as a student, and he did not have a legitimate expectation of being given indefinite leave to remain. “However, I also bear in mind that on each occasion he applied for leave even when he did so out of time, he was granted leave to remain. With hindsight, the 10 year residence was not established because of the out of time applications, but the appellant was not made aware of this until his most recent application was refused. It was not made in issue in previous applications, and subjectively, he considered it reasonable that his history was not been counted against him”.
12. Consideration has been given to s117B (4) and (5) say that little weight should be given to a private life established when a person is in the UK unlawfully and when the person’s immigration status is precarious. I have taken this into account in weighing the factors concerning the appellant’s private life. This consideration does not extend to family life.
13. The final question under **Razgar**, therefore is whether the refusal to give leave is proportionate to the legitimate aims pursued. “On the one side of the proportionality evaluation, I must take into account the fact that the appellant does not meet the requirements of the Immigration Rules. The rules set out what the respondent considers other requirements for entry

into the UK and leave to remain. They have been approved by Parliament and therefore a factor to which I must attach significant weight”.

14. “On the other side of the proportionality evaluation in this matter, there are also a number of factors: the appellant’s family life in which I have found that to be more than normal emotional ties; his substantial private life; the best interests of Alicia, with whom he has a very close and supporting relationship; the reasons why he has failed to secure the 10 year residency route under the rules; the proximity of that 10 year route been established even on the respondent’s calculations of lawful continuously”.
15. The cumulative effect of all the factors in favour of the appellant remaining in the UK outweigh the significant weight I have attached to the legitimate aims and the respondent’s decision is not proportionate to the legitimate aims pursued. The appeal was allowed on human rights grounds.

The grounds of appeal

16. The respondent in her grounds of appeal states the following which I summarise. The first ground of appeal is making material misdirection of law in concluding that the appellant has developed family life with his wider family members, and there is the existence of “more than normal emotional ties”. This conclusion is based on interactions the appellant had with these two sisters, Desiree, her children (Nicola and Natalie), his great-niece Alicia, and his nephew Keenan although the findings focus on Alicia’s interactions with the appellant. The Judge further concludes that it would not be in the best interests of Alicia to have the appellant removed from her upbringing altogether and that he should continue to have some role in her life but reaches no specific conclusions on what that role should be. This is a flawed approach and fails to lawfully engage with what constitutes family life beyond normal emotional ties and whether such ties remain extant. The evidence appears to hinge on a period of time when the appellant took a supportive role, but does not suggest that the role remains ongoing or that others could not assist in a similar capacity. The Judge refers to the care of Alicia being something for others including Alicia’s mother, her family and possibly Children’s Services to determine, rather than the appellant having an enhanced role or view in such matters.
17. There respondent asserts that neither blood ties nor the concern affection that ordinarily go with them are, by themselves or together, are enough to constitute family life within the meaning and purpose of Article 8. The appellant has shown concern and affection for his nieces and nephews and great-niece but this does not establish that his interactions are within the meaning and purpose of Article 8. The Judge refers to relationships that will beyond normal emotional ties, does not resolve the evidence that suggests the appellant’s interactions have been fractious at present, nor why the appellant’s past involvement now informs the

present relationship which, on the evidence, has diminished considerably. This is not a case of family life beyond normal emotional ties.

18. The Judge refers to the appellant substantial private life which he said has been particularised by a considerable amount of evidence and includes relationships with his wider family, friends and neighbours and in the church and the community as a whole. However, private life should be viewed through the appropriate prism which is forged at the time and the appellant was precariously present in the UK, could not hold a legitimate expectation of its continuation and there is nothing to suggest an inability to form a comparable private life in South Africa. Although the Judge states that little weight is to be afforded to private life that is acquired during a period of precariousness, but fails to then adopt such a position in concluding that the appellant's private life is substantial
19. The Judge erred in relying on the 10 year residency route under the Rules and the proximity of the 10 year route being established even on the respondent's calculation of lawful continuously. This is being deemed a factor in the appellant's favour in the overall proportionality assessment clearly represents a "near miss" argument of the kind warned against by Lord Justice Stanley Burton in **Miah** and others. The Judge failed to appreciate that the appellant did not meet the Immigration Rules and therefore cannot add substance to his fundamentally ordinary claim under Article 8.

The hearing

20. I heard submissions from both parties as to whether there is an error of law in the determination of the First-tier Tribunal. Mr Clarke on behalf of the respondent argued that in four months the appellant would have satisfied the 10 year rule.

Decision on the error of law

21. Having considered the determination as a whole, I find the Judge's consideration of the appellant's appeal in respect of Article 8 is materially flawed. The Judge accepted that the appellant does not meet the requirements of the Immigration Rules and then went on to consider Article 8 of the European Convention on Human Rights and allowed the appeal on the basis of the appellant's family life, with his sisters with his sisters and grandniece Alicia, and his private life in the United Kingdom.
22. It was made clear in **Gulshan [2013] UKUT 00640 (IAC)** that the Article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the Immigration Rules. In this case the Tribunal has failed to identify why the appellant circumstances are so compelling that they amount to compelling and exceptional circumstances to be granted leave to remain outside the Immigration Rules.

23. The Judge ostensibly based his decision on the best interests of the appellant's grandniece, Alicia. Although the Judge recognised that Alicia has a mother and family who can take care of her including Children Social Services still found that the appellant has a role in her life, without defining what that role is. Therefore, the Judge's finding that it is the appellant who will take care of Alicia in the future is without any evidential basis whatsoever. It is not clear upon which evidence the Judge found that it is the responsibility of the appellant to look after Alicia even when she has a mother and other extended family who can look after her. This is especially so since Alicia's mother had precluded the appellant from having contact with Alicia and the negative report by Children's Services on the appellant. In light of this evidence, there was no basis whatsoever for the Judge's finding, that the appellant has more than emotional ties with Alicia or that he would have a role in her life, in the future. The Judge essentially allowed the appellant leave to remain in this country on his speculation that the appellant might have continued contact and care of Alicia. The Judge failed to take into account that the appellant has no legal parental role in Alicia's life and he is merely the granduncle who may have had some role in her life in the past albeit against Alicia's mother's approval. The evidence does not support Judge's finding and the finding is perverse.
24. The Judge also took into account for the purposes of Article 8 that as the appellant had almost fulfilled the 10 year continuous lawful residence rule. In **Patel & others v the Secretary of State for the Home Department [2013] UK SC 72**, it was held that the prospect of a student now succeeding under Article 8 where he or she could not meet the Immigration Rules is remote. The appellant either satisfies the Immigration Rules or he does not. In this case the appellant did not meet the requirements of the Immigration Rules for leave to remain.
25. The Judge also found that the appellant developed a private life in this country while his immigration status was precarious but nevertheless found the appellant had a private life which would be breached and in the circumstances it is not proportionate to exclude him. This is a perverse finding which is not sustainable on the evidence.
26. Having considered the determination as a whole I conclude that the Judge erred in law in his evaluation of the appellant's appeal pursuant to Article 8 and I therefore set aside the decision in respect of Article 8. The appellant does not meet the requirements of the Immigration Rules in any event.
27. Mr Clarke accepted at the hearing that in four months' time the appellant will have 10 years continuous lawful residence in the United Kingdom. The appellant therefore will be free to make another application but this does not impact my findings that the determination is materially flawed in law. It therefore follows that the respondent's appeal is allowed.

DECISION

The Secretary of State's appeal is allowed.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

The 18th day of October 2015