



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number IA/14019/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9 September 2015

Decision and Reasons Promulgated
On 12 May 2016

Before

Deputy Judge of the Upper Tribunal Bagral

Between

Secretary of State for the Home Department

Appellant

and

Karim Mohammed Ahmed Abbas Morsi
(No anonymity order made)

Respondent

Representation:

For the Appellant: Mr. E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms. A. Nizami, of Counsel, instructed by Good Advice UK

DECISION AND REASONS

Background

1. The Secretary of State for the Home Department (hereafter “the Secretary of State” appeals with permission against the decision of Judge of the First-tier Tribunal C Ferguson promulgated on 2 March 2015 allowing the appeal of Mr Morsi (hereafter “the claimant”) against the decision of the Secretary of State refusing his application for Indefinite Leave to Remain (“ILR”) and a decision to remove him pursuant to section 47 of the Immigration Asylum and Nationality Act 2006.

2. The claimant is an Egyptian national born on 1 August 1990. He entered the UK on 31 December 2001 (aged 11) with entry clearance conferring leave to enter as a visitor with a view to obtaining medical treatment. On 2 January 2002 the claimant was listed as a dependent on his parents' asylum claim which was refused on 28 February 2002 and appeal rights were exhausted on 8 July 2004. The claimant's parents returned to Egypt in 2005 and the claimant remained in the UK with his sister and brother. The claimant's sister is a British citizen and his brother is the spouse of an EEA national. The claimant was financially supported by his siblings. The claimant's father subsequently died in 2010 and contact with his mother was limited.
3. On 6 March 2009 the claimant submitted an application for ILR on the basis of the Secretary of State's seven year child concession. That application was refused on 3 March 2014. In refusing the application the Secretary of State referred to the claimant's failure to substantiate his continuous residence in the UK since 2001 and thus could not benefit from the concession. The application was also refused with reference to paragraph 276ADE of the Immigration Rules. The Respondent further considered that there were no exceptional grounds to warrant a grant of leave outside of the Rules.
4. The claimant appealed to the First-tier Tribunal (IAC).
5. The Judge heard evidence from the claimant and his siblings. He accepted the credibility of that evidence and he was satisfied that the claimant had lived in the UK continuously since entry [21]. The Judge found that the claimant did not meet the requirements of paragraph 276ADE of the Immigration Rules and proceeded to consider Article 8 ECHR. The Judge found that the claimant shared a close bond with his siblings and noted that he had spent his formative years of childhood living in the UK and had attended school. The Judge also noted the claimant had not lived in Egypt since he was 11 years old and would find it difficult to reintegrate into life there [27]. The Judge thus answered the first four questions posed in **Razgar [2004] UKHL 27** in the affirmative and the issue thus was confined to that of proportionality [27-29].
6. The Judge had regard to the public interest considerations set out in s.117B of the Nationality, Immigration and Asylum Act 2002 (hereafter "the 2002 Act") and noted the claimant spoke English, but he did not know whether he would be financially independent. He took account of the fact that the claimant had developed a private life whilst he had been in the UK unlawfully, but noted that for most of that time the claimant was a minor [30]. The Judge found that the claimant had been living in the UK for more than 13 years and had developed strong family ties with his siblings who were lawfully resident in the UK. The Judge took into account the claimant had attended school in the UK for three years and had developed many friendships. He had not seen his mother since 2005 and had little contact with her and had no other social or family ties to Egypt. The Judge made reference to the claimant's good character and took account of the delay in processing the application, noting that at the date of application, he was 18 but was now 24. The Judge accordingly found that

the interference with family and private life was not proportionate and allowed the appeal under Article 8 of the ECHR [33-34].

7. The Secretary of State applied for permission to appeal. In the grounds of appeal it was contended that the Judge failed to identify why the claimant's circumstances would lead to an unjustifiably harsh outcome and why any dependence between the claimant and his siblings was above the normal emotional ties. The Judge failed to give little weight to private life developed when the claimant's status was precarious and considered the issue of delay as determinative of the claim.
8. Permission to appeal was granted by the First-tier Tribunal on 27 April 2015, the Judge granting permission observing that it was arguable that the Judge failed to give sufficient weight to the terms of s.117B of the 2002 Act and did not follow the Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin approach.

Consideration and Conclusions

9. At the hearing, on behalf of the Secretary of State, Mr Tufan in amplifying the grounds introduced a point that was not argued in the grounds and upon which permission to appeal had not been granted. There was no application to vary the grounds of appeal. In essence, he took issue with the Judge's factual findings at [21] which he submitted were not sufficiently reasoned. As this is a fundamentally different ground of appeal for which permission to appeal has not been granted the Tribunal has no jurisdiction to consider it. Nevertheless, I see no error in the Judge's consideration of the evidence which he found credible for the reasons that he gave at [21]; conclusions which were open to him and that have not been shown to be irrational or perverse.
10. It also equally clear when reading paragraph [27] in conjunction with [31] that the Judge's rationale in concluding that the claimant "would find it difficult to reintegrate into life there" was based on his findings of the claimant's close connections to the UK compared to having "no social or family ties in Egypt" other than his mother who he had not seen 2005 and with whom he had little contact. The point made in the grounds that the claimant "may be downplaying the level" of contact which could be resumed on return and "there is no evidence that his mother would be unwilling to support him upon return" simply seeks to reargue the case on its merits rather than identifying an error of law. Similarly, reference in the grounds to the Judge's failure to address whether there would be "very significant obstacles to his integration" does not disclose an error as the Judge was not required to consider this test in her consideration of Article 8 outside of the Rules.
11. The Secretary of State's grounds in support of the application for permission to appeal plead inter alia, with particular reference to the cases of Gulshan, Nagre and Kugathas v SSHD [2003] EWCA Civ 31, that the Judge failed to identify any dependency between the claimant and his siblings "above normal emotional ties" and failed to identify compelling circumstances or exceptional circumstances that warranted a grant of leave outside the Immigration Rules.

12. Before the issue of proportionality is reached the Judge must consider the question of whether in fact family and private life has been established. In this regard the grounds of appeal challenge the Judge's decision on the basis that he did not identify any dependency between the claimant and his siblings "above normal emotional ties". I am satisfied that this is without merit. Whilst the Judge made no finding on whether there was family life between the claimant and his siblings, it is clear that he had the relationships in mind as it is implicit in the Judge's finding that there was an interference with the rights engaged that she was satisfied the claimant had an established family and private life [27]. The evidence which the Judge accepted clearly rationally supported a finding of family life within the meaning of Article 8. The Judge accepted the claimant's evidence that he had lived with his brother and/or sister since 2005 and was practically raised by them and, provided financial support [16]. He referred to the close family bond between the claimant and siblings with whom the claimant had "developed strong family ties" [27 & 31]. That evidence was sufficient to support a finding of family life between the claimant and his siblings which is not vitiated by the absence to refer to the phraseology in the grounds of "above normal emotional ties". I am reinforced in this conclusion by reference to the guidance in the case of **Ghising (family life-adults-Gurkha policy) [2012] UKUT 00160 (IAC)** as approved by the Court of Appeal (as to its analysis of family life) by the Court of Appeal in **R (Gurung) v SSHD [2013] 1 WLR 2456**. Application of these authorities to the evidence does not in my view indicate error by the Judge in his analysis.
13. The grounds of appeal challenge the Judge's decision on the basis that he did not give weight to those factors set out in s. 117B of the 2002 Act. I am satisfied that this is also without merit. The Judge clearly states at [30] that she has considered the provisions and, indeed, earlier in his decision set them out in full [10]. Whilst he does not identify the specific considerations set out in s.117B(5), he clearly had them in mind and clearly factored them in when he noted that the claimant's private life had "been developed at a time when he was not in the country lawfully...". The Judge noted that the claimant spoke English reflecting the provisions of s.117B(2), but that acknowledgement does not necessarily indicate that the Judge attached undue weight to this factor and treated it as a determinative factor in the claimant's favour. Further, whilst the Judge's use of language in stating that, "I do not know whether he would be financially independent" does not properly give effect to the wording in s.117B(3) which is expressed in the present tense, I am not satisfied that this is a material error that would affect the outcome of the decision as the accepted evidence before the Judge was that the claimant was financially supported by his siblings.
14. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. I am satisfied that the Judge in his proportionality assessment has taken into account all the factors relevant to the public interest.
15. In this case the public interest also required the Judge to factor in the Secretary of State's delay in processing the claimant's application. The delay was a period just shy

of five years. The submission in the grounds that the Judge treated the delay as determinative of the question of proportionality is without merit. In a balanced approach to the issue the Judge took account of the delay only to the extent “that he [the claimant] is bound to have developed a more established private life in the UK during that time” [33]. There is no identifiable error in that approach.

16. Mr Tufan suggested that having found that the claimant did not meet the Rules no separate assessment was required under Article 8. I am satisfied that this is not a completely fair reflection of the law. It is now generally accepted that the new Immigration Rules do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

“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 life 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. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules.”

17. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

“64. ... there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules.”

18. However more recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

“In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of “very compelling reasons” (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State’s formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. “

19. The Judge in a focused and balanced decision analysed the evidence and concluded that these amounted to compelling circumstances that warranted a grant of leave outside the Rules. That was the correct test to apply and he was entitled to reach this conclusion having taken into account all of the relevant evidence.

20. I am therefore satisfied that the Judge's decision when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

Notice of Decision

21. The decision of the First-tier Tribunal contains no errors of law and stands.
22. The claimant's appeal remains allowed.

Deputy Judge of the Upper Tribunal Bagral

Dated