



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03360/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 July 2018

Decision & Reasons Promulgated
On 30 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ROCHELLE FERNANDOPULLE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. D. Coleman, Counsel instructed by Carmelite Law Practice
For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Harris, promulgated on 18 December 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to allow further leave to remain on human rights grounds.
2. Permission to appeal was granted as follows:

"The fourth appellant is the adult daughter of the first two appellants and the sister of the minor third appellant. It is at least arguable that the judge made a material error of law in that having allowed the appeals of the parents and sibling that the accepted

and continuing family life between the family members made removal of the appellant disproportionate. She came into the UK as a minor at age 16 and went through secondary education and university. She is now an adult, aged 26. It is arguable that whilst little weight should be given to her private life, developed whilst her immigration status was precarious, the same does not apply to her family life”.

3. The Appellant attended the hearing together with her parents. I heard submissions from both representatives following which I reserved my decision.

Error of Law

4. The appeals before the First-tier Tribunal were in respect of the Appellant (referred to in that decision as the fourth appellant), her parents (the first and second appellants), and her sister (the third appellant). The appeals of her parents and her sister were allowed and her appeal was dismissed.

5. At [56] the Judge finds that the Appellant “remains sufficiently part of the family unit for there to be family life between her and the other appellants within the meaning of Article 8”. At [57] he finds that the decision amounts to an interference with her right to respect for family life. The Judge then goes on to consider whether the interference is proportionate. He considers section 117B of the 2002 Act. At [63] he states that he gives little weight to her private life established when her immigration status had been precarious. At [64] and [65] he covers matters relating to her private life - her friends, her ability to relocate to Sri Lanka and her ability to find work.

6. The Judge considers the Appellant’s sister at [66]. He states:

“I can accept that the fourth appellant is close to her sister and that it is in the best interests of the third appellant for the fourth appellant to remain in this country. It will be distressing and disruptive for the third appellant to cease having the constant company of the fourth appellant. However, the weight I attach to this is limited by the fact that parental care is provided and will continue to be provided to the third appellant by the first and second appellants. Although the fourth appellant describes herself as a surrogate mother to the third appellant, there is no satisfactory evidence to show she has ever had to step into a parental role because of any absence or deficiency on the part of the first or second appellant.

7. At [67] he returns to considering the Appellant herself and aspects of her private life. At [68] he finds:

“Weighing up the matters before me concerning the fourth appellant, I find relocating away from her family to Sri Lanka will be upsetting and tough for her but, when weighed against the public interest in her removal, not so severe as to establish compelling circumstances making the decision of the respondent disproportionate.”

8. In paragraphs [56] to [69] there is no reference to the Appellant’s family life beyond a finding that she has one, and that the decision will be an interference in it. There are no findings as to whether or not interference in this family life is proportionate. The

emphasis is on the Appellant's private life, not on her family life or the other members of her family.

9. The only consideration of other members of her family and the Appellant's relationship with them is at [66]. However, there is no consideration here of the family life between the Appellant and her parents, only a brief consideration of the impact on her sister. I find that this is an insufficient consideration of her family life.
10. The Appellant's sister's appeal was allowed on the basis that it was not reasonable to expect her to leave the United Kingdom. Her parents' appeals were allowed as there were compelling circumstances which made the decision in respect of them disproportionate. The Judge found, with respect to the family as a whole, that there were compelling circumstances. It was her sister's best interests in remaining in the United Kingdom which constituted compelling circumstances in terms of family life together with her parents. However, the Judge did not consider the same compelling circumstances when considering the situation as it related to the Appellant, despite his finding that it was in the best interests of her sister for the Appellant to remain in the United Kingdom. He limited the weight he attached to the best interests of her sister in the Appellant's remaining in the United Kingdom because parental care would be provided for her sister. However, he did not consider the family life between the Appellant and her sister, and how this would be affected, or give any weight to this.
11. At [68] the Judge considers only the upsetting and tough circumstances of the Appellant and weighs these against the public interest in her removal. He finds that relocation will be "upsetting and tough" for her, but not so severe as to establish compelling circumstances. However, he does not consider here the acknowledged distress and disruption caused to her sister and whether this is enough to establish compelling circumstances.
12. I find that there has been an inadequate proportionality assessment with regards to the family life of the Appellant, with particular regard to the Appellant's relationship with her sister. Given that there is no one factor which is more important than the best interests of a child, and given that the Judge found that was in the best interests of the Appellant's sister for the Appellant to remain in the United Kingdom [66], I find that he has failed to explain what it is that is significant enough to overcome this.
13. In relation to the public interest and the immigration situation of the Appellant, he acknowledges at [67] that she is not to blame for the "predicament" in which she finds herself. She came to the United Kingdom when she was a minor, and has always had leave to remain, albeit precarious. Section 117B(5) does not apply to family life, only to private life. There is no requirement on the Judge to give little weight to her family life because it was established when her leave had been precarious.
14. I find that decision involves the making of a material error of law in the failure to carry out an adequate proportionality assessment in relation to the Appellant's family life.

Remaking

15. I adopt the finding of the First-tier Tribunal that the Appellant has a family life with her parents and sister sufficient to engage the operation of Article 8 [56]. There was no challenge to this finding by Ms. Isherwood. I find, as found by the First-tier Tribunal at [57], that the Respondent's decision would interfere with this family life.
16. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
17. In assessing the public interest I have taken into account my consideration of the error of law set out above. I have also taken into account section 117B of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest.
18. I adopt the findings of the First-tier Tribunal in relation to sections 117B(2) and 117B(3) [61] and [62].
19. Section 117B(4) does not apply as the Appellant has always had leave to remain. Section 117B(5) does not apply to private life. Section 117B(6) is not relevant.
20. I have considered the family life of whole family when considering whether it is proportionate to remove the Appellant. I find that the Appellant lives with her parents and sister. At [56] the Judge finds that the Appellant lived in student accommodation while a student, but she remains living with her family. In his witness statement, her father said that the Appellant came home every Friday to live with the family when she was doing her studies. I find that she is not living an independent life, and is an integral part of the family unit.
21. At [66] the Judge finds that the Appellant's sister has had the Appellant's "constant company" indicating the strength of their relationship. In his witness statement, her father stated that the bond between the two sisters was "very strong". He said that they did not wish to live apart yet. I find that this is reflected in the Judge's finding at [66]. I adopt the finding of the First-tier Tribunal that it is in the best interests of the Appellant's sister for the Appellant to remain in the United Kingdom [66].
22. I find that there is no one thing in the Appellant's case which should be given more weight than the best interests of her sister. I find that it is in her sister's best interests that the Appellant remain in the United Kingdom. It was found in the First-tier Tribunal that it would be "distressing and disruptive" for her sister were the Appellant

to leave the United Kingdom [66]. There is nothing before me to suggest that this distress and disruption for a child is necessary in the public interest. I find that there is nothing adverse in the Appellant's immigration history. She was brought to the United Kingdom as a minor. She has always had leave to remain. There is no history of any criminality. She speaks English and is economically independent.

23. Taking into account all of the above, I attach greater weight to the Appellant's family life, in particular her relationship with her sister, who is a minor, and her sister's best interests. I find that the balance comes down in favour of the Appellant, and the best interests of her sister in maintaining family life with the Appellant. I find, in carrying out the balancing exercise required, that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights, and those of her parents and sister, to a family life under Article 8 ECHR.

Notice of decision

24. The decision of the First-tier Tribunal involves the making of a material error of law in relation to the Appellant. I set the decision aside insofar as it relates to her. For the avoidance of doubt, insofar as it relates to her parents and sister, the decision of the First-tier Tribunal stands.
25. I remake the decision allowing the Appellant's appeal on human rights grounds, Article 8.
26. I do not make an anonymity direction.

Signed

Date 25 July 2018

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. Fee awards were made in respect of the appeals of the Appellant's parents and sister, and on the basis of those findings I have allowed the Appellant's appeal. In the circumstances, I have decided to make a fee award of any fee which has been paid or payable.

Signed

Date 25 July 2018

Deputy Upper Tribunal Judge Chamberlain