



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/09464/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 24 May 2018

Decision & Reasons Promulgated  
On 14 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARCIA ALVERIE THOMAS  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms K. Pal, Home Office Presenting Officer  
For the Respondent: Mrs. G. Narh, Push Legal Services Ltd.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Harris, promulgated on 16 October 2017, in which he allowed Ms Thomas' appeal against the Secretary of State's decision to refuse to grant leave to remain on human rights grounds.
2. For the purposes of this decision I refer to Ms Thomas as the Appellant, and to the Secretary of State as the Respondent, reflecting their positions as they were in the First-tier Tribunal.

3. Permission to appeal was granted as follows:

“The grounds argue failure by the Judge to appreciate that since at the date of application and decision the Appellant’s child was neither a British citizen nor a child who had been in the UK for 7 years, the application could not succeed under paragraph EX1. This as a matter of law appears to be correct.

There is therefore an arguable error of law disclosed by the application.”

4. The Appellant attended the hearing. I heard submissions from both representatives on the error of law. I then stated that the decision involved the making of a material error of law, and I set the decision aside to be remade. I heard submissions from both representatives on the remaking, and reserved my decision. I have taken into account the documents in the Appellant’s bundle (39 pages).

**Error of law**

5. I find that the Judge erred in considering whether paragraph EX.1 applied in the Appellant’s case as, at the date of the application, the Appellant’s child was not a British citizen, nor had she been in the United Kingdom for a period of seven years. I find that the Appellant’s child had entered the United Kingdom with indefinite leave to enter as the dependent child of her father, a British citizen. However, having indefinite leave does not make her a qualifying child for the purposes of paragraph EX.1.

6. It is not clear what concession or otherwise is referred to at [14]. Neither representative could point to any concession made. In any event, even if the Appellant’s daughter were to be treated as a child, the Judge did not explain why she was a “qualifying child” for the purposes of paragraph EX.1. At [12] he found that she had not left the United Kingdom since February 2011. Neither at the date of application, decision or hearing had she been in the United Kingdom for a period of seven years.

7. Therefore I find that the judge erred in law when he considered whether paragraph EX.1 applied. I set the decision aside to be remade.

**Remaking**

*Immigration rules*

8. I find that the Appellant cannot meet the requirements of Appendix FM for leave to remain as a parent. Although the Respondent accepted that she met the suitability and eligibility requirements, as I have found above, paragraph EX.1(a) of Appendix FM did not apply. It was not argued before me that paragraph EX.1(b) applied in respect of any partner.

9. In relation to private life, the Respondent considered that the Appellant did not meet the requirements of paragraph 276ADE. It was argued before me that the Appellant

had a private life in the United Kingdom, but it was not specifically submitted that paragraph 276ADE(1)(vi) applied. I find that, at the date of application, the Respondent accepted that the Appellant had been in the United Kingdom for 15 years. She was 44 years old as at the date of application. It was considered by the Respondent that there were no significant obstacles to her integration into Jamaica. She was 28 years old when she entered the United Kingdom and would have significant cultural and social ties there.

10. There is no evidence in the Appellant's witness statement to suggest that there would be very significant obstacles to her integration into Jamaica, and I find on the balance of probabilities that the Appellant does not meet the requirements of paragraph 276ADE(1).

*Article 8 outside the immigration rules*

11. I have considered the Appellant's appeal under Article 8 outside the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. I find that the Appellant has a private and family life in the United Kingdom sufficient to engage the operation of Article 8.
12. In relation to her family life, I find that although her daughter is now an adult and is 20 years old as at the date of the hearing before me, the case law is clear that family life does not automatically cease when a child turns 18. I have also taken into account the case of Kugathas [2003] EWCA 31. I find that the Appellant's daughter came to the United Kingdom in 2011 in order to live with her mother. I find that she lived with the Appellant until 2015, when she moved to live with her father due to accommodation issues. I find that the Appellant is separated from the father of her daughter, but that they share parental responsibility for her as shown by the letter from the Appellant's daughter's father (page 12-13) and the witness statements of the Appellant and her daughter. I find that the Appellant's daughter is still in full time education and has not formed a new family of her own. I find that the Appellant sees her daughter frequently and has a strong emotional bond with her. I find that family life with her daughter has not ceased just because her daughter turned 18.
13. In relation to her private life, as at the date of the hearing before me the Appellant has been in the United Kingdom for almost 18 years. I find that she has built up a private life during this time. I find that the decision would interfere with her family and private life.
14. 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.

15. In carrying out the proportionality exercise, I have taken into account my findings above in relation to the appeal under the immigration rules. I have also taken into account section 117B of the 2002 Act, insofar as it is relevant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest.
16. I find that the Appellant speaks English (117B(2)). I do not have any evidence as to her financial situation (117B(3)). I find that she has worked and paid taxes in the past, as indicated in the letter at page 34.
17. Sections 117B(4) and 117B(5) provide that little weight is to be given to a private life established when a person is here unlawfully or when leave is precarious. I have carefully considered the Appellant's immigration history. I find that the Appellant came to the United Kingdom as a visitor in September 2009. Her leave was subsequently extended and she had further leave to remain as a student until 14 January 2004. She made an application in February 2004 which was refused on 14 January 2005. In her witness statement she states that further representations were made to the Home Office [3]. She states that she did not hear anything from the Respondent until they sent her a letter under the legacy scheme dated 15 March 2011 requesting further documentary evidence [4]. This letter is found at pages 32 and 33 of the Appellant's bundle. At page 34 is a response to this letter from Blooming Fields Legal Services. It is erroneously dated March 2010 but refers to the Respondent's letter of March 2011. She said in her witness statement that she had no response to this despite chase up letters from her previous representatives and her MP.
18. The letter from the Respondent dated 15 March 2011 states:

"Your case is in the backlog of old applications that the UK border agency is in the process of concluding."

I find that this letter corroborates the Appellant's claim that further representations were made in 2005. I find that her case was outstanding, and the Respondent had failed to deal with it. I find therefore that the Appellant was not here unlawfully, but that her case was outstanding with the Respondent, and that it formed part of a backlog in 2011. I therefore do not agree with the Respondent's submissions that the Appellant was here unlawfully from January 2005 until February 2013, given the contents of the Respondent's own letter of March 2011.

19. The Appellant states that she made a fresh application in June 2013 under Appendix FM. She states that this was refused on 29 August 2013. The reasons for refusal letter indicates that there was no right of appeal against this decision. In her witness statement she says that a letter was sent to her by the Respondent on 8 August 2013 asking for documentary evidence in connection with this application, but she did not

receive it. Following the refusal, her representatives made a subject access request and it was apparent that the Respondent had sent the letter of 8 August 2013 to her previous representatives although the Appellant's current representatives were on file.

20. The Appellant then received a notice of liability for removal in September 2015, some two years later. Representations were made on 8 October 2015, but there was no response. The Appellant was served with a notice to report fortnightly starting on 10 February 2016, which she has been doing since. On 26 February 2016 when she went to report she was advised that her application had been refused in November 2015 although neither she nor her representatives were aware of this.
21. Following this, the Appellant's representatives made a complaint to the Respondent, and the Appellant requested her MP to chase it up. Following the complaint she received a refusal letter with a right of appeal which is the subject of this appeal.
22. Although I do not have comprehensive corroborative evidence in the form each and every letter sent by the Appellant or her representatives, I do have the letter of March 2011 which clearly states that the Appellant's case forms part of a backlog of older applications which the Respondent had not concluded. I find that the Appellant has been attempting to regularise her stay for some considerable period of time. Further, I find that although the Respondent refused her application in August 2013, a decision that had no right of appeal, no attempt was made at that stage to remove the Appellant, and she was only served with a notice of liability to removal two years later. She then made further representations, but received no response except to summon her to report, which I find that she has been doing.
23. I find that the Respondent's conduct is very relevant to the weight to be given both to the Appellant's private life, and to the public interest in maintaining effective immigration control. The Appellant has been in the United Kingdom now for almost 18 years, a very considerable period of time. She had leave as a student until 2005. She then had an outstanding application with the Respondent which the Respondent did not seek to address until March 2011. Despite the Appellant replying to this letter, the Respondent did not deal with her case, and she made a fresh application in 2013. I find that throughout her time in the United Kingdom the Appellant has been in contact with the Respondent.
24. I also find that it is relevant that the Respondent made no attempt to remove the Appellant from the United Kingdom during this time, and in particular even after the application in 2013 was refused. He did not serve any notice of liability to removal until September 2015. I find that this also indicates that the Appellant's presence is not considered contrary to the aim of maintaining effective immigration control as the Respondent has not seen fit to try to remove her. I attach greater weight to her private life due to the Respondent's conduct in dealing with her case.
25. Paragraph 117B(6) does not apply.

26. I find that the Appellant's daughter is now a British citizen. I find that the Appellant has a strong relationship with her. I have made findings above in relation to their family life [12]. Although her daughter is 20 years old, I find that the Appellant still has strong parental relationship with her. I find that the Appellant's daughter came to the United Kingdom in order to reside with her mother. Parental responsibility was shared with her father who is a British citizen living in the UK.
27. I have considered the Appellant's daughter's witness statement when considering the effect of the Appellant's removal on her daughter. I find that her father and mother both played an integral role in her upbringing. She states that her mother provides her with advice and moral support. She needs her mother in her life, and needs to be able to see her frequently. She states that her mother is her best friend and provides guidance in her relationship with the rest of the family. She states that most of the influences towards her success come from her mother, and that her mother keeps her motivated. She depends on her mother socially, emotionally and educationally. To remove her mother would disrupt her family life in the United Kingdom.
28. I have very carefully balanced the Respondent's legitimate aim of maintaining immigration control against the family and private life of the Appellant and her daughter, a British citizen. Her daughter is still in full-time education and has a strong relationship with the Appellant. I find that she depends on the Appellant and has very strong emotional ties with her. While I find that the Appellant's daughter could visit her in Jamaica, and maintain contact using modern methods of communication, this would not be a substitute for the physical presence of her mother, who has been present with her in the United Kingdom since she arrived as a child in 2011.
29. I have also taken into account the Respondent's conduct and delay in dealing with the Appellant's applications stretching back as far as 2005. I take into account that the Appellant has been here for almost 18 years, with leave as a visitor and student until 2005, and with pending applications since. I find that throughout that time she has maintained contact with the Respondent, trying to regularise her immigration status.
30. Taking into account all of the circumstances of the Appellant's case, I find that greater weight should be given to the Appellant's family and private life, especially given the very close bond that she has with her daughter. I find that less weight should be given to the Respondent's aims of maintaining effective immigration control given his conduct in dealing with the Appellant's case, and his failure to make any attempt to remove her. I find that there are exceptional circumstances in the Appellant's case as a result of both of these factors.
31. Taking into account all of my findings above, I find that the balance comes down in favour of the Appellant, and the decision is not proportionate. I find that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights, and those of her daughter, to a private and family life under Article 8.

32. I have not made an anonymity direction.

Notice of decision

33. The decision of the First-tier Tribunal involves the making of a material error of law. I set the decision aside to be remade.

34. The Appellant's appeal is allowed on human rights grounds, Article 8.

Signed

Date 13 June 2018

**Deputy Upper Tribunal Judge Chamberlain**