



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

Appeal Number: IA/22056/2013

THE IMMIGRATION ACTS

Heard at Birmingham Upper Tribunal

On 17 April 2014

Determination

Promulgated

On 23 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MRS JACKLINE NAKAWUNGA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rutherford of Counsel

For the Respondent: Mr Smart, a Home Office Presenting Officer

**DETERMINATION AND REASONS FOR FINDING NO MATERIAL ERROR OF
LAW**

Introduction

1. The appellant is a citizen of Uganda. She appeals to the Upper Tribunal with the permission of First-tier Tribunal Judge Frances.

2. The appellant arrived in the UK on 2 January 2009 as a working holidaymaker. Her leave was due to expire on 1 December 2010. She was subsequently granted leave to remain from 8 March 2011 until 8 March 2013. On 6 March 2013 she applied for a variation of her leave to remain on the basis that she had started a relationship with one Selemani Safari Baha with whom she had a child, Aiden Selemani Baha, born on 18 March 2013.
3. The respondent rejected the application and on 21 May 2013 gave notice of removal by directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. In particular, the respondent considered whether the appellant had established a family life in the UK under Article 8 of the European Convention on Human Rights (ECHR) within the context of Appendix FM of the Immigration Rules but had concluded that the appellant's partner was not a British citizen living with the appellant in a relationship "akin to marriage" nor had they been living together for two years. Accordingly, the appellant had not established a family life in the UK of such character as was recognised by the Immigration Rules. In particular, her private life had not continued for twenty years as was required by the Rules as amended by Appendix FM. The respondent did not see any other basis for permitting the appellant to remain in the UK.

Proceedings before the Upper Tribunal

4. Following the First-tier Tribunal determination on 24 January 2014 grounds of appeal were lodged on 3 February 2014. In granting permission to appeal Judge Frances pointed out that the Judge of the First-tier Tribunal Stott ("the Immigration Judge") had dismissed the appeal without having proper regard to the guidance issued by the respondent. It was pointed out that the appellant's child was a British citizen and therefore relocation to Uganda appeared to be a disproportionate interference with the appellant and her child's family life. It was at least arguable that the Immigration Judge had failed to consider whether the appellant's return to Uganda would have the effect of depriving Aiden of his right to reside here.
5. Following the grant of permission on 13 February 2014 the respondent submitted a response under Rule 24 indicating that because the judge had found some family life here the respondent did not oppose the application for permission to appeal. The Tribunal was invited to determine the matter at a fresh hearing where oral evidence could be given to consider the strength of the Article 8 claim.
6. A notice was sent out on 26 February 2014 informing the parties of the hearing and requiring any fresh evidence to be the subject of a formal application otherwise it would not be considered by the Upper Tribunal.
7. At the hearing I heard submissions by both representatives. Mr Rutherford explained that the marriage between Mr Simpson and the appellant had

broken down in 2011. She had subsequently met her present partner, Mr Baha, a Tanzanian national with indefinite leave to remain. Aiden their son was a British citizen. It was accepted that the appellant had not yet divorced her former husband and had only cohabited with Mr Baha since 2012. It was also accepted that their period of cohabitation fell short of the two years required by the Rules. Indeed, it was accepted that the appellant could not come within paragraph E-LTRPT.2.3.

8. It was accepted that the appellant had the onus of showing that she was solely responsible for her child. The appellant and her child ought to be allowed to remain in the UK if they wished. There was a material error in the First-tier Tribunal's determination.
9. Mr Smart sought to withdraw the admission made in the respondent's Rule 24 response. In his view the Secretary of State was not bound by the contents of that notice. I was then referred to a case called **Carcubuk**. However, the reference I was given for that case (00TH01426) appears to be incorrect so I was unable to obtain a copy of that decision.
10. The respondent went on to explain that the decision was lawful. The appellant had rightly conceded before the Upper Tribunal that the Immigration Rules were not satisfied. I was also referred to paragraph 2 of the respondent's guidance, which indicates even where the respondent is required to consider a child's best interests there must be exceptional circumstances warranting the grant of leave outside the Rules. EX1 set out the criteria to be satisfied but I understood Mr Smart to say that those criteria were not met in this case because it would be reasonable to expect the child to leave the UK on the facts of this case. Mr Smart also referred to other recent case law including **Gulshan** [2013] UKUT 00640. In cases where the Rules did not apply it had to be shown that an unduly harsh outcome would be occasioned by failing to allow the application under the Immigration Rules. The thrust of the argument here by the appellant was that the appellant could not meet the Rules and that that was a justified basis for refusal. In any event the best interests of the child would be served by requiring the appellant to travel to Uganda with Aiden for her to apply for entry clearance there. There was nothing in **ZH (Tanzania)** [2011] 2 All ER 783 that contradicted that assertion. There was a reasonable test in EX1. Mr Smart also relied on a case called **Hayat**, which he was also unable to provide a copy of. However, I have been able to find a copy of that case, which is a decision of the Court of Appeal (EWCA Civ 1054). Paragraph 30(b) of that case suggests that those who enter the UK on a temporary basis would have no legitimate expectation that they would be allowed to remain. Family life would only be disrupted to a limited degree by a short period of return to Uganda to regularise the appellant's immigration status. Aiden could travel there with his mother, it was submitted.
11. On the other hand the appellant submitted that no proper assessment of the child's best interests had been carried out. The issue was: whether it

was reasonable for Aiden to have to return to Uganda with his mother? Mr Rutherford accepted that having a child in the UK did not represent a “trump card” when it came to being given leave to remain but the appellant had an expectation that she could remain in the UK as the parent of a child with British nationality. Overall the decision of the Secretary of State was disproportionate and the matter not properly reasoned by the Immigration Judge.

Discussion

12. The issue before the Upper Tribunal is whether the decision of the First-tier Tribunal contained a material error of law. The basis of the attack on the Immigration Judge’s decision is that the appellant has a child, Aiden, who was born on 18 March 2013. The appellant began her relationship with Mr Selemani in May 2011. That relationship began after the breakdown of her marriage to Mr Simpson, which formed the basis for her coming to the UK in the first place. They did not start living together until August 2012. The appellant claimed that by virtue of the birth of her son, who is entitled to British citizenship, she is entitled to remain in the UK outside the Immigration Rules.
13. A preliminary issue arises as to whether the Tribunal should allow the respondent’s apparent concession (in its Rule 24 response) to stand. That Rule 24 response is not particularly clear, as it appears on a first reading to be aimed at the grant of permission rather than the substantive merits of the issue presently before the Tribunal. Nevertheless, paragraph 3, by envisaging the need for an oral hearing, appears to accept that the First-tier Tribunal decision ought to be overturned.
14. Mr Smart applied to withdraw the concession made and I consider having regard to the fact that both parties came prepared to deal with the substantive issues in this appeal it would be just to permit the respondent to do so. It would be wrong to compel the Tribunal to a course of action regardless of the merits just because one of the parties appears to have made a concession. No reasons were given for that concession. It is not clear to me that it was properly made. I do not detect any material prejudice to the appellant in treating it as an error. Accordingly, the Upper Tribunal will proceed to deal with the substantive merits of this appeal.
15. The case law on Article 8 of the ECHR is now voluminous but I was particularly assisted by the case of **Hayat [2012] EWCA Civ 1054**, referred to by Mr Smart. In that case the Court of Appeal considered whether a short period of absence required to regularise immigration status within the UK would constitute a disproportionate interference with an applicant’s human rights. It was held that the Immigration Judge in the First-tier Tribunal had been right to dismiss the appellant’s appeal. That case concerned with a Pakistani national who unsuccessfully applied to the respondent for leave to remain as the partner of a points-based system migrant. The court reviewed the authorities and in particular **Chikwamba**

[2008] UKHL 40. That case concerned two Zimbabwean nationals, one of whom had indefinite leave to remain here by virtue of having established an asylum claim. There had been a long period of residence in the UK. Accordingly, in some ways, the case was stronger from the appellants' point of view than this case. It was clear that the father of the child could not return to Zimbabwe to apply for entry clearance due to his former asylum claim. The mother, however, retained her Zimbabwean nationality. It was held that the requirement that the mother should return to Zimbabwe and apply for entry clearance was merely procedural and in the circumstances was disproportionate. In **Hayat**, by contrast, the Court of Appeal held that a short period of family disruption was justified and interfered with the Upper Tribunal decision to the contrary.

16. The respondent's own guidance, which does not have the force of law, reinforces the requirements of the rules by providing for "exceptional circumstances" to be required before leave would be given outside the Immigration Rules. The expected course is for a foreign national to return to his own country and apply from there rather than calling on the respondent to exceptionally allow him to remain outside the Immigration Rules.
17. It was accepted before the Immigration Judge and before me that the appellant did not qualify under the Immigration Rules.
18. No issue seems to be taken in the grounds in relation to the manner in which the Immigration Judge set out the burden and standard of proof in paragraph 6 of her determination. She explained that the burden of establishing a private or family life in the UK rested on the appellants. Furthermore, the appellants had the burden of showing that the interference with their private or family life was of such gravity as to potentially engage Article 8. This was decided on the balance of probability. The burden then shifted to the respondent to show that it would nevertheless be unlawful to remove the appellant having regard to the wider public interest, including the need to control immigration and the level of public expenditure consequent thereon.
19. An attempt was made before the Immigration Judge to argue the ill-health of the appellant or potential ill-health of her child, Aiden, was a relevant factor to be taken into account in reaching her decision. However, this was not the subject of a specific grant of permission by First-tier Tribunal Judge Frances and neither advocate suggested to me that it was a factor the Upper Tribunal should take into account in finding a material error of law. In any event, the Immigration Judge appears to have dealt fully with this issue in her determination, for example at paragraph 16, where the Immigration Judge found as a fact that there was no material health risk to the appellant or her child consequent on their return to Uganda.
20. In this case, unlike in the case of **Chikwamba**, there was nothing in the past history of the appellant and her partner to prevent the child's mother

and/or possibly the father, travelling to Uganda to make an application for entry clearance there. The case had been fully argued before her but clearly she did not accept that there was “a lacuna” in the Immigration Rules. She had full regard to the potential consequences on the child of the appellant’s removal (see paragraph 8(c)). She was also aware that there was a potential problem with being reunited with the sponsor if she returned to Uganda due to the fact that their combined resources may not be sufficient to meet the requirements of the Immigration Rules. However, she pointed to the fact that the sponsor’s future financial circumstances may change in the future and there was a degree of speculation in the submission that the appellant would not be able to return to join the sponsor in the UK. The Immigration Judge noted that the appellant had a family support network in Uganda to which she could turn (see paragraph 17).

21. The Immigration Judge had at the forefront of her mind the fact that there is potential at least for the child of this relationship to be separated from one or other of the parents for a period of time. She did not regard it as plausible that the father would return to Uganda but she did regard it as reasonable for mother and child to do so, particularly having regard to the fact that family support was available there.
22. It is only exceptionally that an application that fails under the Immigration Rules will succeed on a freestanding basis under Article 8. I find the matter to have been fully ventilated before the Immigration Judge and for her to have made full and appropriate findings on the evidence. I can find no proper basis for interfering with those findings or conclusions. Accordingly her decision ought to be allowed to stand.

Decision

23. The appellant has not established that there was a material error of law in the decision of the First-tier Tribunal. Accordingly, the appeal against that decision is dismissed.

There is no appeal against the decision to make no fee award and no anonymity direction and those decisions also stand therefore.

Signed

Date

Deputy Upper Tribunal Judge Hanbury