



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25096/2014

THE IMMIGRATION ACTS

Heard at Newport
On 24 July 2015

Decision & Reasons Promulgated
On 4 September 2015

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

KIMBERLY VANDIE BRACKIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L C Mbaeyi of Victory@Law Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. We were not invited to continue the anonymity direction made by the First-tier Tribunal. Given that the appellant is now an adult and no longer a child, we see no basis to justify continuing or making such an order in this appeal.

2. The appellant is a citizen of St Vincent & the Grenadines who was born on 18 February 1996. On 5 August 2013 the appellant arrived in the UK and was granted a six month visit visa expiring on 5 February 2014. On 17 February 2014, she applied for indefinite leave to remain as the child of a person, namely her father (the sponsor) Mr Gerald Horne who has indefinite leave to remain in the UK.
3. On 13 May 2014, the Secretary of State refused the appellant's application under para 298 and Appendix FM of the Immigration Rules (HC 395 as amended) and Art 8 of the ECHR. On 15 May 2014, the Secretary of State made a decision to remove the appellant as an overstayer to St Vincent & the Grenadines by way of directions under s.10 of the Immigration and Asylum Act 1999.

The Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Y J Jones and, in a determination promulgated on 20 October 2014, Judge Jones dismissed the appellant's appeal. Before Judge Jones, the appellant's representative accepted that the appellant could not meet the requirements of the Rules including para 276ADE. He relied exclusively upon Art 8 of the ECHR. Judge Jones did not accept that the appellant and sponsor were related as claimed and consequently dismissed the appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal principally on the basis that the judge had been wrong to conclude that the appellant had not established that the sponsor was her father and that, therefore, "family life" did not exist between them for the purposes of Art 8.
6. Permission was initially refused by the First-tier Tribunal but on 23 March 2015 the Upper Tribunal (DUTJ McWilliam) granted permission on that ground.
7. Thus, the appeal came before us.

Discussion

8. Mr Mbaeyi, who represented the appellant, relied on the appellant's grounds. In addition, he sought to argue that the appellant could, in fact, rely upon the Immigration Rules, in particular para 298 dealing with an application for indefinite leave to remain by a child of a parent settled in the UK. He submitted that it was not crucial that the appellant had reached the age of 18, after her application was made, by the time of the respondent's decision.
9. That argument is, in our judgment, hopeless. Para 298(ii) sets out as follows one of the requirements which the appellant must satisfy in order to succeed in an application for settlement, namely that the person:

“(ii) has or has had limited leave to enter or remain in the United Kingdom, and

(a) is under the age of 18; or

- (b) was given leave to enter or remain with a view to settlement under paragraph 302 or Appendix FM; or
- (c) was admitted into the UK in accordance with paragraph 319R and has completed a period of two years limited leave as a child of a refugee or beneficiary of humanitarian protection who is now present and settled in the UK or as the child of a former refugee or beneficiary of humanitarian protection who is now a British Citizen, or
- (d) the applicant has limited leave to enter or remain in the United Kingdom in accordance with paragraph 319X, as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom and who is now present and settled here; or
- (e) was last given limited leave to remain under paragraph 298A; ...”

10. The relevant date to determine whether the appellant met the requirements of para 298 is the date of the respondent’s decision. That is clear from the decision of the House of Lords in Odelola v SSHD [2009] UKHL 25; [2010] Imm AR 59 despite Mr Mbaeyi’s confessed ignorance of that decision. The requirements in (a) to (e) are alternatives. At the date of the respondent’s decision, namely 15 May 2014, the appellant had reached her eighteenth birthday. She could, therefore, not meet the requirement in para 298(ii)(a) as being “under the age of 18”. Likewise, and it was not suggested to the contrary by Mr Mbaeyi, the appellant had not been granted leave to enter or remain under any of the provisions set out in para 298(ii)(b)–(e). Her leave was as a visitor under para 41 of the Rule and that leave does not fall within any of sub-paragraphs (b) to (e). There is no doubt, therefore, that the appellant could not succeed under para 298.
11. Mr Mbaeyi did not seek to press before us the appellant’s claim under para 276ADE. That, no doubt, underlay his acceptance before Judge Jones that the appellant could not succeed under the Rules including para 276ADE. Taking, as para 276ADE(1) requires, the appellant’s age “at the date of application”, as she was at that time “under the age of 18 years” she would have to show that under para 276ADE(1)(iv) that she had “lived continuously in the UK for at least seven years”, and patently could not do so. She had been in the UK for only just over six months. Further, if her age was taken to be between 18 years and 25 years, then she would have to establish under para 276ADE(1)(v) that she had “spent at least half of her life living continuously in the UK”, and again patently could not do so. Judge Jones was, therefore, in our view, entirely correct to consider the appellant’s claim under Art 8 on the basis that she could not satisfy any of the Immigration Rules.
12. Turning now to Judge Jones’s decision to dismiss the appeal under Art 8, her decision rests principally upon her finding that the appellant had not established that the sponsor was her father. As a consequence, it was not established that there was “family life” between them. The judge’s reasoning is at paras 23–28 as follows:
- “23. The first matter to consider is whether the appellant has established a private and/or family life in the UK with the sponsor. The appellant’s application was submitted and received on 17 February 2014, one day before her 18th birthday. At the date of the application therefore the appellant was a minor and had been in the UK for a period of just over six months. The evidence of both the appellant and

the sponsor is that the appellant has never lived with the sponsor until she came to the UK. She last remembers seeing him when she was about 5 when she was living with her mother in St Vincent and the sponsor confirmed that he last saw her eleven or twelve years ago. It appears that over that period of time the appellant and the sponsor were in sporadic contact and more recently in contact via Skype. There is no evidence before me of any consistent contact between the appellant and sponsor until she came to the UK.

24. I am concerned by the paucity of evidence to support the claimed relationship between the sponsor and the appellant. The birth certificate produced does not name the sponsor as her father and there is no independent evidence produced to confirm the relationship. Although there are medical letters sent from the British Virgin Islands in respect of the appellant's mother there is no confirmation from her that the sponsor is the father of the appellant. At the very end of the hearing letters from Cellmark were produced by Mr Mbaeyi and they showed that an appointment had been made for a DNA test to take place, however the sponsor has confirmed that the test has been cancelled and no payment made because the appointment date was after the date of the hearing. As has been said the appellant was 17½ when she came to the UK and is now 18½.
 25. It was put to the appellant during the hearing that she had contacted the Home Office twice since the refusal of her application to remain in the UK for help to return to St Vincent and the Grenadines. She confirmed that she had made such contact as she could not endure "the stress" and was suffering from migraines. She also confirmed that she cancelled the proposed arrangement with the Home Office to leave. However the fact that she contacted the Home Office twice to return to St Vincent and the Grenadines I find undermines her claim now to wish to remain in the UK with the sponsor. I therefore find that on the basis of the evidence before me she has not established a family life with the sponsor. It has been emphasised by her representative that her application was as a minor and as such I find that she has not established an independent private life in the UK in the short time that she has been here. The appellant was a minor when her application was made and her welfare is my primary consideration.
 26. I have considered Section 117B inserted into the Nationality, Immigration and Asylum Act 2002 in July this year and I note that the appellant's claimed family and private life were established in part when the appellant was in the United Kingdom unlawfully and when her immigration status was precarious. I find that the appellant is not a qualifying child for the purposes of Section 117 as she is not a British citizen and has not lived in the United Kingdom for a continuous period of seven years or more.
 27. I do find the appellant to be a credible witness and I find that she has given her evidence honestly. However there is no independent evidence that she is related to the sponsor. Her mother has not confirmed that the sponsor is her father. She still has relatives in St Vincent and the Grenadines, namely her sister who is aged 22 and her great-grandmother who lives with relatives. I am not satisfied on the balance of probabilities that on the evidence before me the sponsor is the appellant's biological father.
 28. Taking all these circumstances into account I find that the appellant has not established a family life in the UK and therefore cannot succeed under Article 8 of the 1950 Convention. There is no need to consider proportionality Article 8 is not engaged by this appellant's claim."
13. As we expressed at the hearing, we have some concerns about the judge's adverse finding that the appellant and sponsor were not related as they claimed.

14. First, it does not seem to have formed any part of the Secretary of State's case before the judge that the appellant was not the daughter of the sponsor. That point was not raised in the refusal letter of 13 May 2014 and is not recorded as an issue raised by the Presenting Officer in the summary of his submissions at paras 18–19 of the judge's determination. The thrust of those latter submissions would appear to be that the appellant could not meet the requirements of the Rules and it was not disproportionate for her to return to St Vincent and the Grenadines.
15. That said, we can see from the determination that Mr Mbaeyi on behalf of the appellant was at least alive to the possibility that the appellant's relationship with the sponsor might be an issue. Thus, DNA testing had been arranged with Cellmark but, at the hearing, the sponsor indicated that that was not going ahead as the appointment was not until after the appeal hearing and, in effect, there was no point in incurring the cost of over £388 in the light of that.
16. Nevertheless, we are left uneasy that the matter was not fully explored at the hearing in order that the appellant could seek to substantiate her claim to be the daughter of the sponsor. It would have been open to the appellant to seek an adjournment of the proceedings in order that a DNA test could be undertaken with Cellmark.
17. Secondly, we were told that the sponsor had some considerable time ago when making his own application for leave included the appellant as his daughter within the particulars of that application. This would have been at a time when there was no obvious advantage to do so and so the relationship between the appellant and sponsor had long been asserted to be that of daughter and father. That is a matter which Judge Jones does not appear to have taken into account.
18. At the hearing, the sponsor produced an amended birth certificate for the appellant including his name as a result of a statutory declaration made on 13 May 2015. We do not place weight upon this for two reasons. First, it was not before Judge Jones in order for her to have taken it into account. Secondly, in any event, the amendment to the birth certificate is simply on the declaration of the sponsor asserting his parenthood. It provides no independent evidence of their relationship.
19. Nevertheless, Mr Richards, who represented the Secretary of State, indicated that he was content that the paternity finding should not stand given the long-time assertion by the sponsor that the appellant is his daughter.
20. For those reasons, Judge Jones erred in law in finding that the appellant had not established she is the daughter of the sponsor. We set aside that finding. In our judgment, the relationship is established by the evidence on a balance of probabilities.
21. Consequently, we must determine the appellant's Art 8 claim in the light of that finding.
22. No additional evidence was submitted by the appellant. The oral evidence of the appellant and sponsor is set out in the determination of Judge Jones. We also have a bundle of documents including a witness statement by the appellant dated 7 October

2014 and by the appellant's father dated 8 October 2014 together with a short medical report relating to the appellant's mother.

23. We apply the five-stage approach set out in Razgar [2004] UKHL 27.
24. First, as we have already indicated, we accept that the appellant and sponsor are daughter and father respectively. The appellant came to the United Kingdom when she was 17½ years old. She came to visit the sponsor who lives with his wife and the appellant's step-siblings in the UK. The evidence before the judge, which she accepted, was that the appellant had last seen her father when she was 5 years old and living with her mother in St Vincent. That was some eleven or twelve years ago. Since then, contact between them was sporadic and more recently they had been in contact via Skype. As the judge noted, there was no evidence of "any consistent contact" between the appellant and sponsor until she came to the UK.
25. The appellant's evidence before the judge was (somewhat inconsistently) that prior to coming to the UK she had never lived with a parent but had always lived with her maternal grandmother in St Vincent.
26. There was no solid evidence of any private life developed by the appellant in the UK since her arrival in August 2013.
27. Even though the appellant is now 18 years of age, we accept that the relationship between her and her father amounts to family life for the purposes of Art 8. We also accept that there will be interference with that family life, at least to the extent of daily contact, if the appellant returns to St Vincent.
28. We are prepared to accept that Art 8 is engaged to that extent.
29. In relation to Art 8.2, any interference will be in accordance with the law and for a legitimate aim namely the economic wellbeing of the country. The crucial issue is whether any interference is proportionate. That issue involves balancing the public interest against the rights and interests of the appellant and others affected by the decision.
30. As we have already noted, the appellant cannot succeed under the Immigration Rules. In those circumstances, the public interest will only be outweighed if there are compelling circumstances such that the consequences of her removal would be unjustifiably harsh (see, e.g. R (Nagre) v SSHD [2013] EWHC 720 (Admin); Singh and Singh v SSHD [2015] EWCA Civ 74 and SSHD v SS(Congo) and Others [2015] EWCA Civ 387). In reaching that assessment, we are required to "have regard" to the factors set out in s.117B of the NIA Act 2002.
31. The position is that the appellant lived with her maternal grandmother until she came to the UK in August 2013. When she came to the UK that was in order to visit the sponsor and not because of any difficulty or problem that existed with her continued residence with her grandmother. Her mother had, at that time, already moved to the British Virgin Islands where she was receiving medical treatment. The sponsor's evidence before the judge was that the appellant's grandmother was now

too old to look after the appellant. The sponsor said that he sent money for the appellant's upkeep to her grandmother through a friend. It is said that the appellant's grandmother has now moved in to live with relatives. The evidence is that she feels safe and emotionally connected to her father and his family.

32. The appellant is now an adult and she only left St Vincent in order to make a temporary visit to the UK. It must have been her intention, in order to qualify for entry, that she intended to return at the end of her visit. At that time, her circumstances in St Vincent, in other words, did not encourage her to do otherwise. She had lived with her grandmother and financial support was provided by her father. Their contact was, as the judge noted, sporadic. There is no supporting evidence that, if the appellant returned to St Vincent, her grandmother would no longer be able to provide accommodation and a home for the appellant as she has previously done. Nothing in the evidence leads us to conclude that the appellant, as an adult, could not reasonably be expected to return to St Vincent. There was some suggestion before us that the appellant was, in effect, a minor in St Vincent but Mr Mbaeyi was unable to support that assertion by any evidence. In English law, and for the purposes of this appeal, the appellant is to be treated as an adult.
33. Applying s.117B(1) the maintenance of effective immigration controls is in the public interest. As regards s.117B(2), we accept that the appellant speaks English and therefore is less likely to be a burden on taxpayers and is better able to integrate in society. As regards s.117B(3), Mr Mbaeyi did not address us on whether the appellant would be financially independent in the UK. There was no evidence that the appellant intended or had any immediate prospect of employment although she would, no doubt, continue to receive financial support from her father. In any event, those factors provide the appellant with no positive assistance in her claim (see, AM (S 117B) Malawi [2015] UKUT 260 (IAC)). Further, the appellant's private life in the UK has been established whilst her immigration status was initially "precarious" and latterly "unlawful" and so is entitled to "little weight" (see s.117B(5) and (4) respectively).
34. The appellant has no right under the Immigration Rules to remain in the UK and, as we have already found, we do not consider it unreasonable to expect her to return to St Vincent as a young adult and continue the life that she relinquished (intending to do so only temporarily) when coming to the UK as a visitor in August 2013. Nothing in the evidence persuades us that there are "compelling" circumstances such that the consequences to the appellant of returning to St Vincent would be unjustifiably harsh.
35. For these reasons, we are not satisfied that the appellant has established a breach of Art 8 of the ECHR.

Decision

36. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision is set aside.
37. We remake the decision dismissing the appeal under Art 8.

38. For the avoidance of doubt, the appellant's appeal is also dismissed under the Immigration Rules.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

Having dismissed the appeal there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal