



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

Appeal Number: IA/39681/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19th June 2015**

**Decision & Reasons Promulgated
On 6th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ELISA MABBORANG SIBAL
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms F Beach of Counsel instructed by Selvarajah & Co
Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Designated Judge of the First-tier Tribunal Manuell promulgated on 2nd February 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female citizen of the Philippines who arrived in the United Kingdom on 10th October 2013 with leave as an overseas domestic worker. The visa was valid between 4th September 2013 and 4th March 2014.
4. The Claimant was subsequently granted further leave to remain outside the Immigration Rules, based on the Secretary of State's carer's concession, which leave was valid from 14th May 2014 until 14th August 2014.
5. Prior to the expiry of that leave the Claimant applied for further leave to remain in the United Kingdom to enable her to care for a British citizen Mrs Marian Gold born 20th June 1926.
6. The Claimant's application was refused on 22nd September 2014, and the Secretary of State issued a Notice of Immigration Decision refusing to vary leave to remain, and deciding to remove the Claimant from the United Kingdom.
7. The Secretary of State's reasons for refusal are set out in a letter dated 22nd September 2014 and may be summarised as follows. It was noted that the Claimant had previously been granted three months' leave outside the Immigration Rules so that alternative care for Mrs Gold could be organised. It was noted that Mrs Gold's children had interviewed some applicants but they were deemed unsuitable, and no evidence had been submitted to confirm that any other type of care had been sought, such as social services care.
8. The Secretary of State's view was that the local authority and social services are under a duty to provide suitable care, and it was not accepted that Mrs Gold's family had explored and exhausted all alternative arrangements for care. It was noted that Mrs Gold had family members in the United Kingdom who were not subject to immigration control, and the Secretary of State was not satisfied that the Claimant was required to remain in the United Kingdom in order to arrange alternative care. The Secretary of State believed that there would be other people available in the United Kingdom who could be employed as a carer and did not find that the Claimant's circumstances were such that warranted discretion to be exercised outside the Immigration Rules, and the application was therefore refused pursuant to paragraph 322(1) of the Immigration Rules.
9. The Claimant's appeal was heard by Judge Manuell (the judge) on 20th January 2015. The judge heard evidence from the Claimant and Mrs Gold's daughter, describing both witnesses as frank and reliable. The judge found that removal of the Claimant would interfere with her private life rights under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention), and also the private life rights of Mrs Gold. The judge allowed the appeal under Article 8, making a recommendation that the Secretary of State should grant discretionary leave to remain for a period of six months initially.

10. The Secretary of State was granted permission to appeal to the Upper Tribunal and the appeal came before me on 22nd May 2015.
11. In brief summary while I found that the decision of the First-tier Tribunal was compassionate and had been prepared with care, I found that the judge had failed to demonstrate that he had had regard to the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), and in particular section 117B(5). Because of this I set aside the decision of the First-tier Tribunal, as the proportionality assessment had been carried out without having regard to the section 117B considerations.
12. On a separate point, my view was that the judge had misdirected himself in law by extending the principles in Beoku-Betts [2008] UKHL 39 to include the private life of Mrs Gold, the Claimant's employer, as Mrs Gold was not a member of the Claimant's family.
13. The hearing was adjourned at the request of Ms Beach to enable her to prepare submissions on the principles in Beoku-Betts.
14. Full details of the application for permission to appeal, and the grant of permission by Judge Hollingworth, and my reasons for finding an error of law are contained in my decision dated 26th May 2015.

Re-making the Decision

Preliminary Issues

15. I ascertained I had received all documentation upon which the parties intended to rely. I had received the Claimant's bundle comprising 47 pages, with a further witness statement made by the Claimant dated 13th May 2015, and a skeleton argument prepared by Ms Beach.
16. Ms Beach confirmed that no further oral evidence was to be given by or on behalf of the Claimant, and reliance was placed upon the evidence given to the First-tier Tribunal.

The Claimant's Submissions

17. Ms Beach relied upon her skeleton argument dated 15th June 2015. It was submitted that the key issue was whether the Secretary of State's decision to refuse leave to remain was proportionate. It was acknowledged that the Claimant had not formed a family life with Mrs Gold in the sense of blood relations but it was submitted that Mrs Gold's Article 8 rights should still be considered as part of the proportionality assessment.
18. Reliance was placed upon Beoku-Betts [2008] UKHL 39 and it was submitted that the Claimant and Mrs Gold had a quasi-family relationship in that there was a particular bond between the Claimant and Mrs Gold which went beyond a normal employer/employee relationship.

19. It was accepted that the Claimant could not satisfy any of the Immigration Rules in relation to Article 8, but I was asked to allow the appeal in relation to Article 8 outside the rules. I was referred to UE (Nigeria) [2010] EWCA Civ 975, in support of the contention that the wider interests of the community should be taken into account when assessing proportionality. I was asked to take into account the Article 8 rights of the Claimant, Mrs Gold, and Mrs Gold's adult children.
20. In relation to section 117B of the 2002 Act, I was asked to note that the Claimant speaks English and is financially independent. I was asked to note the report of Dr Kanakaratham which confirmed that Mrs Gold is particularly dependent on the Claimant. It was submitted that considerable weight should be placed upon this. I was also asked to take into account that if the Claimant had to leave the United Kingdom, then some of the care provided for Mrs Gold would necessarily be provided by the state thus incurring further costs.

The Secretary of State's Submissions

21. Ms Everett submitted that the appeal should be dismissed. I was asked to find that it was not realistic to suggest that care could not be provided to Mrs Gold if the Claimant had to leave the United Kingdom. Ms Everett submitted that the focus should be on the Claimant's private life rather than on the private life rights of Mrs Gold and her family.
22. I was asked to note that the Claimant had always had a precarious immigration status since arriving in the United Kingdom in October 2013 and therefore little weight should be given to her private life, in accordance with section 117B(5).
23. Ms Everett accepted that there may be difficulties in arranging suitable care for Mrs Gold, as is the case with many elderly people, but she contended that Article 8 should not be used in a case like this, to allow the Claimant leave to remain, even though she could not satisfy the Immigration Rules. I was asked to find that there were no exceptional circumstances in this appeal which should therefore be dismissed.

The Claimant's Response

24. Ms Beach pointed out that the Claimant's private life involves Mrs Gold, and it was found by the First-tier Tribunal (paragraph 22) that the Claimant derives personal fulfilment from caring for others, and therefore her removal would have an adverse effect upon her as well as Mrs Gold. Ms Beach submitted that Mrs Gold's private life rights were engaged, and they should not be marginalised.
25. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

26. I have taken into account all the evidence placed before me, together with the submissions made by both representatives. I have considered the circumstances as at the date of hearing.
27. In considering an Article 8 claim the starting point must be the Immigration Rules, and Appendix FM which deals with family life, and paragraph 276ADE which deals with private life.
28. It has been conceded by the Claimant that she cannot satisfy the Immigration Rules in relation to Article 8 and I so find.
29. The Secretary of State did not argue that Article 8 should not be considered outside the Immigration Rules. It is appropriate to consider Article 8 if the Immigration Rules are not a complete code. In my view it is in this case appropriate to consider Article 8 outside the rules.
30. I have followed the principles set out in Razgar [2004] UKHL 27 which involves answering the following questions;
 - (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
 - (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (3) If so, is such interference in accordance with the law?
 - (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
 - (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?
31. I do not find that the Claimant has established a family life in the United Kingdom. Her family members, including her children, remain in the Philippines. I do not accept that the Claimant has established a "quasi-family life" with Mrs Gold. The Claimant is paid to care for Mrs Gold, and the evidence indicates that she does so very well. I accept that Mrs Gold is dependent upon her, and it is absolutely clear from the evidence that Mrs Gold needs a high level of care. However the relationship between the Claimant and Mrs Gold is that of employer-employee and does not amount to family, or quasi-family life.
32. I do not find the principles in Beoku-Betts assist the Claimant in this case, as the decision in that case related to family members.
33. Dealing with the Razgar questions, I accept that the Claimant has established a private life in the United Kingdom, and that her removal will be an interference with that private life, which would engage Article 8.

34. I find that the proposed interference with the Claimant's private life is in accordance with the law because she cannot satisfy any of the Immigration Rules in order to be granted leave to remain. The proposed interference is necessary in the interests of maintaining effective immigration control which is necessary to maintain the economic well-being of the country.
35. The key issue in this appeal relates to proportionality which involves a balancing exercise.
36. In considering proportionality I take into account the Claimant wishes to remain in the United Kingdom, and Mrs Gold and her family also wish her to remain. I accept that the Claimant is Mrs Gold's full-time carer, and that Mrs Gold depends upon her. I place weight upon the medical evidence which confirms that Mrs Gold requires a high level of care, and that this care is being provided by the Claimant.
37. In relation to the reliance placed upon EU (Nigeria), I note that this decision was made prior to the introduction into the Nationality, Immigration and Asylum Act 2002 of section 117B.
38. I take into account that the Claimant has only lived in the United Kingdom since 10th October 2013 and has only ever had limited leave to remain. I also take into account that Mrs Gold's family have made some efforts to find an alternative carer but have not yet been successful.
39. The Upper Tribunal in Dube [2015] UKUT 00090 (IAC) confirmed that judges are duty bound to "have regard" to the specified considerations in sections 117A-117D of the 2002 Act. These sections are essentially a further elaboration of Razgar's question 5 which is essentially about proportionality and justifiability.
40. Section 117B(1) confirms that the maintenance of effective immigration controls is in the public interest. Sub-sections (2) and (3) confirm that it is in the public interest that a person seeking to remain in the United Kingdom can speak English and is financially independent. The level of the Claimant's English has not been proved, but I accept that she is able to communicate in English and that by virtue of her employment is financially independent. However the Upper Tribunal in AM Malawi [2015] UKUT 0260 (IAC) confirmed that a Claimant can obtain no positive right to a grant of leave to remain from either section 117B(2) or (3) whatever the degree of fluency in English or the strength of financial resources.
41. I set out below section 117B(5);

'Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.'
42. It was confirmed in AM Malawi that a person's immigration status is precarious if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. The Claimant has therefore always

had a precarious immigration status since her arrival in October 2013. I am constrained by statute therefore, to attach little weight to the private life that she has established in this country.

43. That is important, when conducting the balancing exercise which is necessary to ascertain whether the Secretary of State's decision is proportionate.
44. I have to attach weight to the fact that the Claimant cannot satisfy any of the Immigration Rules, that the maintenance of effective immigration controls is in the public interest, and that little weight can be given to her private life. I do take into account the effect that the Claimant's removal would have upon Mrs Gold, in that it is clear that arrangements will have to be made to provide alternative care for her. I do not accept that it would be impossible to provide the high level of care that is currently provided. I accept that the Claimant and Mrs Gold and her family wish the current arrangement to continue, but in my view the weight that must be attached to the need to maintain effective control and the fact that little weight should be given to the Claimant's private life, means that the Secretary of State's decision to refuse to vary leave to remain, and to remove the Claimant from the United Kingdom is proportionate and does not breach Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The Claimant's appeal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction. There has been no request to the Upper Tribunal for anonymity, and no anonymity order is made.

Signed

Date 22nd June 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date 22nd June 2015

Deputy Upper Tribunal Judge M A Hall