



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/41326/2014**

Appeal Numbers:

THE IMMIGRATION ACTS

**Heard at Glasgow
On 20th August 2015**

**Decision & Reasons
Promulgated
On 28th September 2015**

Before

**UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

Between

Mrs Yohana Yuniarti Bitu McCaffery

Appellant

And

Secretary of State

Respondent

Representation:

For the Appellant: Mr A Devlin, instructed by McGlashan MacKay
For the Respondent: Ms M O'Brien, Senior Presenting Officer

DECISION AND REASONS

1. The background to this case is the death in Scotland in January 2014 of the appellant's British Citizen husband. She is a national of Indonesia. They married in Aberdeen on 18 March 2005. The couple had met in September 2000 in Jakarta where Mr McCaffery worked as an engineer in the oil and gas industry. Thereafter the appellant met members of her husband's family when they visited Indonesia. Her first trip to Scotland was in April 2002.
2. The Indonesian assignment finished in April 2003, after which the couple lived together for periods of time in Scotland. According to the Respondent's summary (and details from a copy of the passport) the

appellant had been granted multiple entry visit visas by the British Embassy in Jakarta in 2003 and on a further occasion in 2004. She was granted entry clearance based on her marriage and then entered the United Kingdom on 14 January 2005 with leave until 10 July that year. In April 2005 her leave as a spouse was granted until April 2007.

3. In 2006 the appellant left the United Kingdom with her husband for Russia, where he worked in Siberia for two years. The appellant returned to the United Kingdom as a visitor in November 2007 and in September 2008, she was given entry clearance as a spouse valid until 1 December 2010. However the couple left the United Kingdom for Angola in December 2008 and lived there in connexion with Mr McCaffery's employment. Mr Devlin explained that the couple had regularly visited the United Kingdom during that time but he accepted that the appellant had not spent an extended period in the United Kingdom since 2008. The copy passport which was valid until 31 December 2012 shows entry to the United Kingdom in August 2010.
4. According to the appellant's application leading to the decision under appeal, she returned to the United Kingdom on 20 December 2013. As revealed in her statement it was then that her husband's cancer was diagnosed. After his death in early 2014, the appellant returned to Angola to sort matters out and thereafter returned as a visitor to the United Kingdom on 16 February 2014 with 6 months leave. She applied on 24 July 2014 before expiry of that leave for leave to remain on the basis of private and family life. This was refused by the Secretary of State who decided on 30 September 2014 to refuse to vary the appellant's leave to enter or remain and she made a further decision for her removal. The appeal before the First-tier Tribunal was against those decisions.
5. First-tier Tribunal Judge Clapham heard evidence from the appellant in the course of which she explained her intention had been to live in the United Kingdom permanently with her husband from February 2014. The judge also heard evidence from the appellant's husband's son, his wife, and his brother. She also had before her statements by other family members.
6. It was conceded before the First-Tier Tribunal by Mr McGlashan (who represented the appellant on that occasion) that the appellant was unable to meet the requirements of the Immigration Rules. Mr Devlin indicated to us that the applicable rule would have been paragraph 276ADE. It is not surprising that a concession was made in the light of the limited time the appellant had spent in the United Kingdom and in the light of the evidence of her connections and ties to Indonesia which would result in no real obstacle to integration.
7. The judge addressed Article 8 in her findings and reasons. This was on the basis of submissions from Mr McGlashan that the decision of the Respondent had not given proper consideration to family life. He argued that no weight had been given to the importance of the wider family here, with whom the appellant had been associated since 2000 and that she had formed a particularly close bond with her late husband's grandson Reece aged three. He relied on the intentions of the parties to settle in the

United Kingdom once the postings abroad had finished. The claim related not simply to private but family life which existed in tandem. It was argued that the bond forged between Reece and the appellant was stronger than between the child and his natural grandparents, thus crossing the threshold of family life.

8. The judge made these findings:

- (i) There is no doubt that the appellant had “normal familial ties” with individual members of the McCaffery family.
- (ii) It may well be that the relationship between the appellant and her “adopted grandchild” is sufficient to constitute family life.
- (iii) The interference with that life is proportionate on the basis that the bonds were formed at a time when the appellant’s immigration status was precarious, not having indefinite leave to remain.
- (iv) The fact that the appellant and her late husband intended to live in the United Kingdom was not relevant to the balancing exercise, since whether or not to do so would depend upon the particular rules at any given time.
- (v) The appellant and her late husband continued to maintain links not only to his family but also to her family in Indonesia. There was nothing to prevent such visits continuing.
- (vi) The fact that the appellant had substantial assets in the UK did not lend weight to the argument one way or the other.
- (vii) The appellant has substantial family connections in Indonesia.
- (viii) Accordingly, removal was proportionate.

9. The grounds of challenge and our analysis are as follows:

Ground 1

10. It is argued that it was unclear whether the judge accepted that family life existed. Having regard to all the evidence of the strength of ties that bound the appellant to her step family was deficient and if the conclusion was that family life did not exist was perverse.
11. In the course of argument Mr Devlin developed this ground on the basis that there was family life between the appellant and other members of the McCaffery family.

12. It is correct that the judge made no finding on whether there was family life between the appellant and her late husband's family members, but it is clear that she had the relationships in her mind having regard to the detail with which she set out the evidence before reaching her conclusions.
13. We are not persuaded that the evidence could have rationally supported a finding of family life within the meaning of article 8. Mr Devlin relied on the decisions in *Ghising (family life-adults-Gurkha policy)* [2012] UKUT 00160 (IAC) as approved by the Court of Appeal (as to its analysis of family life) by the Court of Appeal in *R(Gurung) v SSHD* [2013] 1 WLR 2456.
14. Application of these authorities to the evidence does not in our view indicate error by the judge in her analysis. The appellant spent the majority of her time with her late husband outside the United Kingdom and away from his family. The judge was entitled to draw the distinction between family life and family ties. The shared grief the parties have, although compelling, does not result in family life having been established in the short time that the appellant has been here taking account of where the appellant has for the large part been living. This ground is disagreement and not one that identifies error by the judge.
15. We reminded the parties of the decision of the Court of Appeal in England and Wales, in *Singh and Anor v SSHD* [2015] EWCA Civ. That authority was not amongst those produced by Mr Devlin, although we consider it to the point. We quote in particular the observations of Sir Stanley Burnton at [25]:

“However, the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in *AA*, in a judgment which I have found most helpful, the facts to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. “
16. It is clear that the judge took into account all the facts. The remaining challenges relate the judge's assessment of the proportionality of interference.

Ground 2

17. We regard this aspect as a separate ground which we take to be that in respect of the appellant's private life, the judge had failed to consider this aspect and, if she had, she had not done so in a structured *Razgar* way with reference to the proportionality of interference. Mr Devlin argued in addition that the judge had confined her consideration to the grandchild and had failed to take account the impact of removal of the appellant on the lives of the other family members with reference to *Beoku-Betts v SSHD* [2008] UKHL 39. Mr Devlin also argued that there was no consideration of the practical and compassionate issues underlying this case.

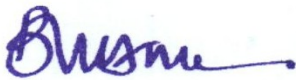
18. It is correct that the judge did not set out the formal steps in *Razgar*, although we are satisfied that in substance she did and indeed referred to the test laid down in *Razgar*. The judge identified the connexions the appellant had with the United Kingdom, the circumstances in which they had arisen and the impact on those connections of removal of the appellant. Whilst a more structured approach might have been adopted, we find no material error in the judge's analysis. In substance she did what was required. She took all relevant evidence into account and her conclusion that visits between the family members could continue was rationally open to her.

Ground 3

19. This appears to be a challenge to proportionality analysis of the interference in the family life between the appellant and her late husband's grandchild and also the private life the appellant relies on. Objection is taken to the judge's observation that this had been formed when the appellant's immigration status was precarious. It is argued this finding is irrational, in the light of the appellant having had a clear and settled intention to live permanently in the United Kingdom.
20. We begin with the relationship between the appellant and the grandchild. The judge considered the case on the basis that it might "well be" that the relationship with the grandchild was sufficient to constitute family life. She nevertheless found the bonds were formed when her immigration status was precarious. Although statutory consideration of precariousness is confined in section 117B to private life, the judge was rationally entitled to take the appellant's immigration status into account when assessing the proportionality of interference with the speculative family life with the grandchild. This is particularly so in the light of Mr Devlin's concession that he could not go so far as to say that the appellant had a parental relationship with the grandchild. It follows by virtue of this understandable concession that the appellant is unable to benefit from section 117B (6). We conclude that the extent to which the judge found family life existed, she was entitled to take the appellant's immigration status during the formation of that family in assessing the proportionality of interference. It needs to be remembered that the appellant was here as a visitor and the basis on which a party is in the country during which the family life developed is a legitimate aspect to be considered in the proportionality exercise.
21. We turn now to the proportionality analysis of the private life factors in the case. The Tribunal made clear in *AM (S 117B) Malawi [2015] UKUT 0260 (IAC)* that a person's immigration status is precarious if their continued presence in the United Kingdom will be dependant on obtaining a further grant of leave. The appellant has only been here as a visitor since coming here with her late husband in December 2013. Her continued presence has been dependent on obtaining further leave on which she was unsuccessful. There is no doubt that the appellant developed the relationships that feature in her private life when she was here lawfully but statute requires little weight to be given in the circumstances.

22. Although the appellant had in the past the prospect of permanent leave on two occasions that possibility was lost as a result of the couple choosing to live elsewhere. Thus the connexions that were established during “precarious” leave and the possibility that ultimately the couple intended to live here permanently are not sufficient to displace the force of primary legislation.
23. The judge was sympathetic and naturally so in the sad circumstances of this case. She was correct however to observe that that this could not form part of the balancing exercise. She took into account all the relevant evidence and reached a rational conclusion within the range of permissible responses under Article 8 without material error. The task before us is to decide whether the judge erred in law. The possibility that another tribunal might have reached a different conclusion on the facts does not of itself indicate error. The grounds of challenge are a disagreement with the judge’s conclusions and they do not identify error. Nevertheless it always remains open to the Secretary of State to exercise her discretion on a compassionate basis and we hope that she turns her mind to this possibility.
24. This appeal is dismissed.

Signed



Date: 3 September 2015

Upper Tribunal Judge Dawson