



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

Appeal Number: IA/46203/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18 December 2015

**Decision & Reasons Promulgated
On 6 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WINIFRED BETSY FREEMAN

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Ms K McCarthy (counsel) instructed by Visa Legal

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Metzger, promulgated on 16 June 2015 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was **born** on 6 December 1955 and is a national of Sierra Leone. The appellant was granted entry clearance as a visitor 10 February 2013 until 21 December 2017. That visa allows the appellant to enter the UK as many times as she wants to throughout its validity, but prohibits the appellant from remaining in the UK for more than 180 days in any one visit.

4. The appellant last entered the UK on 12 April 2014. She has remained in the UK since then. On 7 October 2014 the appellant submitted an application for leave to remain in the UK as a visitor. The respondent refused that application on 18 November 2014. The respondent correctly calculated that by that time the appellant had been in the UK for more than 180 days, so that the appellant could not meet the requirements of paragraph 44 (ii) of the immigration rules.

5. The respondent considered whether or not the appellant had created article 8 ECHR private life by considering paragraph 276 ADE of the rules. The respondent found that, because of the appellant's age and the length of time she had been in the UK, the appellant could not fulfil the requirements of paragraph 276 ADE of the rules.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Metzger ("the Judge") allowed the appeal against the Respondent's decision finding that the appellant had established Family life within the meaning of article 8 ECHR in the UK.

7. Grounds of appeal were lodged and on 23 September 2015 Judge Parkes gave permission to appeal stating *inter alia*

"3. The grounds argue that the Judge had omitted the appellant's immigration history from the decision which would have been relevant. The appeal was put on a different basis from her application, the Judge failed to have regard to the public interest and the appellant did not have regard to the first three questions in Razgar [2004] UKHL 27, or to section 117 the 2002 Act.

4. The grounds are self-explanatory and correctly identify issues within the decision where the judge appears to have overlooked the matters that had to be addressed."

The Hearing

8. Ms Fijiwala, for the respondent moved the grounds of appeal. She took me to the appellant's immigration history and emphasised the fact that the appellant's application proceeded on an entirely different basis to that argued before the Judge. She argued that there was inadequate reliable evidence before the Judge to enable him to make a finding that family life within the

meaning of article 8 ECHR existed for the appellant in the UK. She reminded me that the appellant's argument is that family life exists with her adult children, and between the appellant and her grandchildren.

(b) Ms Fijiwala argued that the Judge had paid no regard to the provisions of section 117 of the Nationality Immigration and Asylum Act 2002, and argued that the appellant's immigration status is precarious. She urged me to find that the decision is tainted by material errors of law, and to set the decision aside.

9. (a) Ms McCarthy, for the appellant, took me through the detailed rule 24 response. She told me that the decision does not contain any material errors of law, but that the decision is a carefully worded, well-reasoned, decision containing adequate findings of fact & correct directions in law leading the judge to unassailable conclusions. She argued that at [18] the Judge clearly takes account of the appellant's good immigration history, and told me that it is clear from the decision that the appellant's circumstances changed because of a combination of the Ebola outbreak in Sierra Leone, and the loss of her business there.

(b) Ms McCarthy told me that whilst the appellant has been prevented from returning to Sierra Leone the intensity of her relationships with her daughters and her grandchildren increased so that family life within the meaning of article 8 ECHR was created. In addition the appellant's elderly father is in the UK. He suffers from cancer; the appellant visits him every day and is fearful that he may not have long to live.

(c) She argued that the Judge carried out a full & flawless proportionality assessment, taking account of the five stage test set out in Razgar. Ms McCarthy told me that although the Judge does not specifically referred to section 117 of the 2002 Act, an holistic reading of the decision makes it abundantly clear that the judge's proportionality assessment is beyond criticism.

Analysis

10. The respondent's first criticism is that the Judge does not take account of the appellant's immigration history. There is no merit in that criticism. Between [2] and [9] of the decision the Judge sets out the appellant's immigration history as part of a summary of the appellant's evidence. It is true that details of the appellant's immigration history and not set out in the Judge's findings of fact, but in reality the appellant's immigration history has not been ignored and is narrated in the decision.

11. The thrust of the respondent's challenge is that the Judge should not have found that family life exists on the evidence placed before him; and even if he could find that family life exists (the respondent argues) the proportionality balancing exercise is defective.

12. Between [2] & [15] the Judge summarises the evidence. His findings of fact are restricted to paragraphs, [17] and [18]. Those two paragraphs do not contain adequate findings in fact. [17] starts with the bald statement

“I had no difficulty in finding that the appellant had established that she had a right to family life under article 8(1) of the ECHR”

The problem is that (in a case which involves family life between adult children and the appellant, then the appellant and her grandchildren) inadequate reasoning is given to explain why the Judge reaches the conclusion that article 8 is engaged.

13. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

14. At [18] the Judge appears to embark on a proportionality exercise. Whilst the Judge lists the factors which he finds weigh in the appellant's favour he does not take adequate account of section 117 of the 2002 Act. Nowhere in the decision does the Judge acknowledge that effective immigration control is in the public interest.

15. Put simply, the decision contains conclusions but does not contain an analysis of the evidence nor does it contain adequate findings of fact. The result is that when the respondent reads the decision she knows that she has lost, but she does not know why. I therefore have to find that the decision is tainted by material errors of law because it races to a conclusion without sufficient explanation. As the decision contains material errors of law, I set it aside. There is sufficient evidence before me to enable me to remake the decision.

Findings of Fact

16. The appellant is a national of Sierra Leone, born on 6 December 1955. The appellant is divorced. Her daughters and her father live in the UK. The appellant is a business woman who has run a bar in Sierra Leone for many years. She still owns heritable property in Sierra Leone.

17. The appellant has visited the UK on a number of occasions over the last 20 years. The respondent granted the appellant a multi-entry visit visa valid from 10 February 2013 until 21 December 2017. That visa allows the appellant to enter the UK as many times as she wants to throughout its validity, but prohibits the appellant from remaining in the UK for more than 180 days in any one visit. The appellant last entered the UK on 12 April 2014. She has remained in the UK since then.

18. In Spring 2014 Sierra Leone was afflicted by an Ebola epidemic. On 7 November 2015, the World Health Organization declared Sierra Leone Ebola-free. The appellant had been due to fly back to Sierra Leone in June 2014, but postponed her return because of the Ebola epidemic. Her flight was re-scheduled for August 2014, but that flight was cancelled because of the Ebola outbreak. Her flight was again re-scheduled for October 2014.

19. The appellant's father is 89 years old. He suffers from metastatic prostate cancer. The appellant now visits her father each day and brings African food (which she has prepared) to him.

20. The appellant's two daughters and four granddaughters all live in the UK. The appellant's daughters and granddaughters are all British citizens. The appellant lives with her daughter Dolly. Dolly has two children, one of them has special needs. The appellant shares a bedroom with her granddaughter with special needs. There is a bond of affection and understanding between the appellant and her grandchildren.

21. The appellant's daughter, Dolly, works part-time. She suffers from anaemia and an under active thyroid. Her husband works 35 hours per week. The appellant helps her daughter with child care.

The Immigration Rules

22. The appellant's application was for leave to remain as a visitor. It is beyond dispute that between 12 April 2014 and 18 November 2014 (when the respondent's decision was made) more than 180 days passed. The appellant cannot fulfil the requirements of paragraph 44(ii) of the immigration rules. The real focus in this case is on article 8 ECHR.

23. The respondent considered the appellant's case against paragraph 276 ADE of the rules. The respondent correctly found that because of the combination of the appellant's age and the length of time she has been UK the appellant cannot fulfil the requirements of paragraph 276 ADE. Even though the appellant appealed against the respondent's decision dated November 5 the appellant has never challenged the respondent's decision in relation to the immigration rules.

24. No consideration has been given to appendix FM by either the respondent or the Judge at first instance. The appellant cannot fulfil the requirements for the leave to remain as an adult dependent relative, and this case has not been plead on that basis. The appellant has not applied for indefinite leave to remain as an adult dependent relative. Even if the appellant had made such an application there is a dearth of evidence to indicate that the financial requirements are met.

25. The appellant cannot meet the relationship requirements for an application as the parent of a child in the UK (E-ECPT.2.2). The appellant does not fall within any of the six categories of persons to whom appendix FM

applies. The appellant's claim cannot succeed under appendix FM of the immigration rules nor under any other part of the immigration rules.

Article 8 out-with the Immigration Rules.

26. In SS(Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 *"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ"*.

27. In Kugathas v SSHD (2003) INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD (2009) EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was *"no way exceptional or beyond the norm"*. In JB(India) and Others v ECO, Bombay (2009) EWCA Civ 234 the Court of Appeal reiterated that the approach in Kugathas must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children.

28. The appellant's daughters are independent adults. Much is made of the relationship between the appellant and her 14-year-old granddaughter with special needs, but the harsh truth is that the appellant is not the primary carer of any of her grandchildren. The appellant's 14-year-old grand-daughter lives with both of her parents and her younger sister. The arrangements for the appellant's 14-year-old granddaughter's special needs were established long before the appellant entered their household.

29. The appellant's father may be approaching the end of his life. The appellant visits him daily. No reliable evidence of dependency was before the first-tier nor is it before me. There is no reliable evidence of any form of dependence in any of the appellant's family relationships in the UK. The appellant has the normal emotional ties to her relatives in the UK. Family life within the meaning of article 8 ECHR does not exist for this appellant in the UK.

30. No reliable evidence of the component parts of private life are placed before me. The undisputed facts are that the appellant lived 59 years of her life in Sierra Leone, and has only been in the UK for 20 months. For many of those

months it was the appellant's intention to return to Sierra Leone. The appellant still owns her own business premises and her own home in Sierra Leone. Private life within the meaning of article 8 ECHR does not exist for this appellant in the UK.

31. Against those findings I balance the respondent's interest in preserving fair and effective immigration control to protect this country's fragile economy. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was held that the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

Conclusion

32. I set aside the decision of the First-tier Tribunal because it contains a material error of law. I substitute the following decision.

Decision

I dismiss the appeal under the Immigration Rules.

I dismiss the Appeal on Articles 8 ECHR grounds.

Signed
Deputy Upper Tribunal Judge Doyle

Date 23 December 2015