



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21012/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 July 2017

Decision & Reasons Promulgated
On 14 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

NANCY [C]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Appellant: Miss M Malhotra, Counsel instructed by West Brook Laws
For the Respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Sri Lanka, date of birth 11 October 1986, appealed against the Respondent's decision of 20 May 2015 to refuse an application for leave to remain by reference to the Immigration Rules. The Appellant appealed by reference to Article 8 ECHR and, at a hearing before First-tier Tribunal Judge A Kelly (the

judge), evidence was adduced concerning the role that the Appellant played in the care of her sister and brother-in-law and the subsequent part she had played in the upbringing of their children. Her appeal was dismissed. Permission to appeal was given and on 25 May 2017 I decided that the original Tribunal had failed to properly address Section 55 BCIA 2009 and give reasons why the claim did not succeed under Article 8 ECHR in terms of the proportionality of the Original Tribunal's decision.

2. I gave directions for a resumed hearing which took place on 18 July 2017. At the hearing evidence was called from the Appellant and her sister, [NJ].
3. The evidence was tested in cross-examination by Mr Bramble. In a nutshell the Appellant's case is that she came to the United Kingdom as a student and, in circumstances that are fully particularised, she stayed to look after NJ, with whom she is very close in any event, during her sister's pregnancy with her first child. Also at the time, having married in June 2009, NJ learned in 2010 that her husband was terminally ill with cancer. In the circumstances NJ had become very weak and needed moral and physical support during the end of the pregnancy and with the new-born child. The Appellant describes the relationship she developed with the child while NJ had concentrated on the care of her husband (KJ).
4. The position was that KJ was bedridden and the sister was unable to take care of herself, the baby's needs and him. The situation significantly deteriorated after the child was born. The Appellant therefore was looking after the children, [JJ] (date of birth [] 2010) and [EJ] (date of birth [] 2014)
5. The Appellant's bundle contains copious evidence of the ailments of (KJ) and the problems that he faced together with his death certificate in the name of [KJ] (date of death [] 2016).
6. It is clear also that the NJ not only had a relevant medical condition, being a blood clot on the lungs, but she also during her pregnancy with the second child started to undergo tonic-clonic seizures and manifesting signs of epilepsy. The contemporary

evidence showed of the Appellant caring for NJ, KJ while he was bedridden and taking nearly complete care of the children.

7. After the death of KJ the Appellant, whilst NJ was undergoing medical treatment, was essentially the primary carer of the two children.
8. The evidence from St. Bartholomew's Hospital confirms the illness of KJ and other medical evidence confirms the ill-health of the NJ and the need she had for care as well as the Appellant looking after the two children and providing a stable home for them. It is to a degree unsurprising that at least the eldest child and probably the younger were aware of the death of their father with the disturbance and disruption it caused, not least in terms of its effect upon NJ. The evidence is therefore that the seizures which NJ had began in 2013 and progressed into 2014.
9. Whilst the NJ eventually received medication to try to limit the number of epileptic attacks, the position was that they continued in 2015 and 2016. It appears that there were certainly three and possibly four such attacks relating to the period before the death of KJ and thereafter. It also is again recorded that in March 2017 NJ had a further epileptic attack in church. The experience of the seizure leaves her at risk of hurting herself when she falls and blacks out. She really has no idea what is going on around her. Given the young age of the children, the significance of these attacks is not only concerning to any adult but particularly concerning to the Appellant who has such a close relationship with both the children and her sister. It is said that generalised tonic-clonic seizures carry a risk of serious injury, mortality and morbidity and SUDEP (Sudden Unexpected Death in Epilepsy).
10. The epilepsy clinic, as well as the GP, confirms NJ's problems and there is no prognosis to suggest that there is any likelihood of the problem going away. The attack in March 2017 may have occurred because the NJ forgot to take her medication, but that is by no means certain, might be the cause of the most recent attack. The evidence from the eldest child, [S], that the Appellant is playing an active part in her going to school, managing the processed case. It is also clear that the Appellant will play a similar part when the second child, [EJ], is attending school.

There was no challenge to the claimed deep relationship between the Appellant and the two children nor of the relationship the Appellant has with her sister.

11. The Appellant and NJ have no other family in the United Kingdom. The Appellant's parents have rights to remain in Italy but are not Italian nationals. They have no rights to enter the United Kingdom to play a part in the care of the children.
12. One of the features of the problems the NJ faces is that the seizures can be precipitated by lifestyle, stress and anxiety raising the threshold. It is clear that there is, as it is put, some level of supervision of NJ by the Appellant particularly when the former is cooking and bathing to ensure her safety if she did have a seizure at that time. The medical evidence, particularly from the 'epilepsy nurse specialist', is that it is important for the stability of the children and her sister and NJ's safety that the Appellant remains with her. This correspondence has been disclosed to the Respondent and there has been no substantive response to that analysis.
13. In addition Pastor Kamalendran from the Newbury Park Tamil Church, part of the Emmanuel Christian Fellowship, confirmed the role the Appellant plays in the church together with her involvement in church activities and assisting NJ. There was confirmation of the epileptic fit on 12 March 2017 at the church at which the Appellant was "... the only person who was able to attend to her sister, which would be the case in domestic environment." St Bede's Catholic Primary School and Nursery wrote concerning the Appellant

"The above-named person is reported by school staff to be heavily involved in [J]'s life ([JJ]) currently a pupil at St Bede's ... She picks the child up from school and supports mum heavily during the passing of Jane's father. Mum presents a strong case to school that Miss [C]'s continued involvement with the family is of a pivotal nature."

14. The letter dated 31 March 2017 is from the headteacher Mr Nott. NJ made a statutory declaration, sworn before a solicitor on 21 July 2016, making the Appellant the legal guardian of both children with the necessary powers to act in caring for the children.

That document does not determine the role played by the Appellant but it is certainly consistent with the evidence of the role and responsibility engaged in by the Appellant.

15. The Appellant's immigration history is set out in her statement. In particular it is clear that the Appellant had been in the United Kingdom for a number of years before returning to Italy in or about 2003. The Appellant came to the UK as a student and was given leave to remain which expired in October 2008. An application was made for further leave to remain as a Tier 4 (General) Student but the application was refused because the intended course to be followed was at the Cambridge College, a college subsequently brought into disrepute for other reasons. The decision was sent to her on that application on 26 January 2009 and the Appellant took advice from an approved immigration adviser who made an application to vary leave to remain as a student. The Appellant thought an application was made, the fees were paid, and the Appellant was informed by the adviser that the application had been lodged. Whilst waiting for the Respondent's decision, the Appellant was unable to renew her leave to remain in Italy as her solicitors informed her that her passport was with the Home Office in relation to the Tier 4 application.
16. At the same time her mother, brother and father obtained permanent residence in Italy. The Appellant chased the application that had been made, contact was made with the Home Office and it was learned that no application had actually been made despite the fee having been taken. The position therefore was that by 2009 the Appellant had no basis to remain. The Appellant through other representatives made an application for further leave to remain outside of the Rules on compassionate and discretionary grounds on 1 March 2010. The application was rejected on 10 March 2010. The Appellant says that with that rejection she decided to leave the UK but could not relocate to Italy and had difficulties in going back to Sri Lanka on her own when her parents and entire family were in Italy. During this period the Appellant became aware of KJ's illness and diagnosis and so she stayed on, as recited above, to assist her sister who had the general care along with the young child and the fact she was pregnant. In the circumstances it is said that the

Appellant was not playing or abusing the immigration system but that events ultimately intervened.

17. Further representations were made and those were refused and the position was that the Appellant was requested by KJ to care for NJ and their child. With the death of KJ, NJ went into deep depression, was unable to deal with their children, fell ill and her epilepsy became more difficult to manage.
18. NJ's evidence essentially recites the same description of events, along with far more detailed material concerning her health and personal problems in dealing with the death of KJ and the delivery of the second child together with the onset of pulmonary problems and the epilepsy.
19. There was no substantive challenge to the medical history or the role that the Appellant has played in the personal care of NJ and the two children. The position therefore is that the Appellant has developed a very close relationship much as if she was the mother of the children and continues to play such a role. NJ says that she has a continuing need for her sister to be present in the UK, as do her children with whom she has such a close relationship. It appears that the household sleeping arrangements, care arrangements including bathing, dressing, preparing meals, dropping the children off for school or nursery, collecting them and managing their daily lives falls almost entirely on the Appellant.
20. I formed the view that these personal circumstances and best interests of the children, who are British nationals and cannot be required to leave the United Kingdom, fall to be considered as exceptional under Article 8 outside of the Immigration Rules.
21. The onset of illnesses of NJ, together with the requirements of the children and the role the Appellant plays are important factors in assessing the children's best interests. It is quite apparent that simply being able to obtain social care from Social Services is not akin to what the children have become, through events, used to.

22. There is no suggestion that the Appellant has been financially dependent on the state. Indeed I was told on instructions that she receives some £300-£400 a month by way of maintenance from her parents in Italy.
23. It is clear the Appellant speaks reasonable English and that chimes in with the involvement she plays in the upbringing of the children.
24. It is true to say that her immigration history is poor but I take into account the efforts that she did make, confirmed by NJ as a fact, of the role she played in seeking to regularise her situation and the circumstances in which it came to pass that she simply stayed on. This is not a case simply of the cost and practical implications of social care. This is the involvement the Appellant has, in effect as a mother of the children, and the active role she has played now for several years.
25. I consider these circumstances are exceptional and compelling and there was no argument that essentially, if this matter is to be looked at outside of the Rules as it seems the judge did, although his reasoning is less than a model of clarity, that the evidence shows assessing all the evidence in the round that the first four questions posed by the decision in Razgar [2004] UKHL 27 are answered in the affirmative. In considering this matter I have fully taken into account Sections 117A and 117B of the NIAA 2002 particularly the public interest.
26. I reach the conclusion that, even though NJ's leave to remain is due to expire in November 2017, the position is that with British national children the near certainty is that she will apply for a further period of leave and, there being no contrary arguments by the parties, she is likely to obtain a renewal and to continue within the United Kingdom.
27. I therefore find, having regard to the considerations of the public interest, to which I attach great weight, this is a case where the interests of the British national children clearly outweigh the public interest. There is nothing to gainsay their best interests lie in the Appellant's daily presence in their life for some years to come. I do not agree with the Rule 24 response of the Secretary of State to the effect that it was in the

children's best interests to learn to adapt to life without her. It does not seem to me that that is a proper consideration of their best interests. I find the Respondent's decision is disproportionate and outwith the interests of British nationals and the public interest.

DECISION

The appeal should be allowed under Article 8 ECHR.

ANONYMITY ORDER

In view of the age of the children I have considered whether an anonymity order was necessary. None was sought and I do not find one is required in the circumstances of the case.

FEE AWARD

This appeal has succeeded on the weight of evidence in far greater detail than was before the Secretary of State and in the circumstances I do not find a fee award is appropriate.

Signed

Date 8 August 2017

Deputy Upper Tribunal Judge Davey