



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01126/2017

THE IMMIGRATION ACTS

Heard at Bradford
On 19 September 2018

Decision & Reasons Promulgated
On 25 September 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIGISTI [Z]
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Diwnycz Senior Home Office Presenting Officer.

For the Respondent: Mr Barry, Solicitor, of Chapeltown CAB.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge Head-Rapson in which the Judge allowed the appellant's appeal against the refusal of an Entry Clearance Officer to permit the appellant to join her sponsor, her father, in the United Kingdom for settlement and family reunion pursuant to paragraph 352D of the Immigration Rules.

Background

2. The appellant is a citizen of Eritrea born on 8 November 1992. The appellant's sponsor, her father, left Eritrea in August 2012 and obtained limited leave to remain as a refugee. On 12 March 2013 he was granted asylum.
3. The Judge notes the family history between [6 – 17] of the decision under challenge.
4. In a determination of some 30 paragraphs the Judge takes between [18 – 25] to set out the text of article 8 ECHR and related case law and at [26 – 27] the law relating to section 117 B of the Nationality Immigration and Asylum Act 2002. Judges of the First-tier Tribunal are assumed to know the law and it is arguably unnecessary to set out swathes of references and quotes unless they are of specific relevance to the issues in the appeal. In this case all the Judge needed to do was make reference to article 8 and Razgar; and thereafter set out the findings in relation to the five stages of the Razgar test.
5. The Judge states at [25] that those five questions have been considered and that the decision rests upon the proportionality test under Razgar. While that is confirmation of an understanding of the correct approach, the question that arises is what findings the Judge made in relation to those particular questions.
6. The answer is found at [28 – 30] in which the Judge writes:
 28. I found that the sponsor to be an honest and credible witness, who is keen to enjoy family life with his children in the UK. I consider that the appellant has shown exceptional circumstances which, consistent with the right to respect for family life contained in article 8 of the European Convention on Human Rights, warrant a grant of entry clearance outside the Immigration Rules.
 29. The appellant wishes to join her father and three younger brothers in the United Kingdom. Their family life has been on hold due to immigration control. I consider that the appellant has a right to live with her father and younger brothers.
 30. I therefore find that such interference by the respondent is disproportionate to the legitimate public end sought to be achieved.
7. The Secretary of State sought permission to appeal on the following grounds:
 1. The appeal against refusal of entry clearance was allowed solely on the ground of Article 8 family life.
 2. The Judge notes [6] that the appellant was over the age of 18 when she made the application. Nowhere in the determination does the Judge make a reasoned finding that family life existed between the appellant and the sponsor, an issue the Judge should have resolved before moving on to a proportionality analysis.
 3. The Judge purports to make a decision on proportionality, but there is no meaningful balancing exercise wherein account is taken of the public interest in maintaining an effective immigration control per section 117B(1).
 4. For the reasons identified above the Judge has materially erred in law.

8. Permission to appeal was granted by another judge of the First-Tier Tribunal, the operative part of the grant being in the following terms:

3. In view of the Judge's acceptance of the sponsor's account, contained at paragraphs 6 to 17 and not challenged in the grounds pleaded, it was open to the Judge to find that exceptional circumstances existed. Nonetheless, it is arguable that the Judge made no clear findings with regard to the existence of family life between the sponsor and the appellant. It is also arguable that the Judge did not move on from his unchallenged findings of fact to perform the balancing exercise required in considering article 8 of the ECHR. In view of the favourable findings of fact, it may well be that the outcome of this appeal was inevitable. However, in the absence of a reasoned balancing exercise, the grounds of appeal are arguable and I grant permission on all grounds pleaded.

Error of law

9. Paragraph 352D sets out the requirements for leave to enter or remain as the child of a refugee. They are:

352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

- (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
- (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
- (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

10. The application for leave under the Immigration Rules was refused pursuant to paragraph 352 D (i), (ii) and (iv) of 353D. It was not submitted before the Judge the appellant was able to succeed under the Rules and the Judge notes at [7] that it was conceded that the requirements of the Rules could not be met. The Judge therefore assessed the merits of the appeal by reference to article 8 ECHR only.
11. Whilst it is accepted that the sponsor would like to enjoy family life with his children and the appellant to live with her father and other siblings that was, arguably, only evidence of de facto family life. There is a difference between such and family life recognised by article 8 ECHR.
12. The need to identify the nature of the protected right being relied upon is clearly set out in Razgar question one which requires a decision maker to consider whether the decision will be an interference with the exercise of a right to respect for private or family life. The Judge makes no finding on whether family life recognised by article 8 exists on the facts between the appellant and the sponsor

and, if the same is found, to provide adequate reasoning in support of such a finding.

13. In relation to the proportionality aspect; the grounds of challenge are right to refer to the fact that it was necessary for the Judge to make clear findings on the nature of the protected right first as that is material to the proportionality of the decision. The Judge finds exceptional circumstances exist which is a reflection of the Judge's views of the situation in which the appellant finds herself; but the finding that such are "inconsistent with the right to respect for family life" is not a sustainable finding in light of the failure of the Judge to find that such family life does exist as noted above. The other concern, as noted, is that whilst the Judge sets out a reference to the public interest and to section 117B at [26 – 27] there is no analysis of how the same is factored into the balancing exercise, supported by adequate reasoning, and how each of the competing factors are to be assessed. The Judge notes at [29] that family life has been on hold due to immigration control with no identification of what controls the Judge is referring to and whether those controls are lawful. A Contracting State has a margin of appreciation in relation to article 8 and if such controls are compliant with article 8 it is not clear how they should be held against the respondent. The Judge also finds in this paragraph the applicant has a right to life with the father and younger brothers but there is no absolute right to pursuant to article 8 ECHR. Even if a right exists, which is not conceded, article 8(2) establishes that such is not necessarily determinative in light of the requirement to assess the proportionality of a decision.
14. A reader having no detailed knowledge of the case is given the impression that the Judge concluded that this family were going to be allowed to live together and allowed the appeal on that basis, rather than conducting a properly reasoned assessment as outlined in the respondent's challenge. If such assessment leads to the same conclusion, so be it, but at least there will be a sustainable decision. If such assessment leads to the appeal being dismissed that will, again, at least be a sustainable decision.
15. In light of the failure of the Judge to undertake the proper assessment I set aside the determination of the First-Tier Tribunal. Substantial findings of fact are required in relation to article 8 ECHR following proper consideration of the Razgar questions which has not yet been undertaken. Having considered the Practice Direction in relation to the remitting of appeals to the First-Tier Tribunal, I consider it to be in accordance with such guidance and in the interests of justice that this appeal is remitted to the First-tier Tribunal sitting at North Shields or Bradford to be heard afresh by a judge other than Judge Head-Rapson.

Decision

16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-Tier Tribunal sitting at North Shields or Bradford to be heard afresh by another judge of that Tribunal other than Judge Head-Rapson.**

Anonymity.

17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 20 September 2018