



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

Appeal Number: IA/08685/2015

THE IMMIGRATION ACTS

Heard at Field House

On 8 December 2017

**Decision & Reasons
Promulgated
On 16 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

**MRS YGK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ilahi, of Counsel instructed by Moorehouse Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Ivory Coast, born on [] 1943, appeals against a decision of Judge of the First-tier Tribunal Davey who, in a determination promulgated on 4 January 2017, dismissed her appeal against a decision of the Secretary of State made on 3 March 2015 for leave to remain under Article 8 of the ECHR.
2. Judge Davey, in his determination set out the reasons for the refusal of the decision and in paragraph 13 of the determination stated:-

“13. Having considered the matter and the evidence of the Appellant, I do not find that the issues of her health, put broadly, militate in favour of her remaining in the United Kingdom. Similarly, the active role she is able still to play in the life of others is, as a fact significant, but the interference in it is not so significant as to amount to a breach of Article 8(1) ECHR”.

3. In paragraph 15 he wrote:-

“15. The Appellant’s circumstances are not of the kind that could be called exceptional or beyond those which would fall to be considered so as to militate in favour of her remaining in the United Kingdom. The healthcare system in Ivory Coast may not be equivalent to that in the United Kingdom but I do not find that Article 8 ECHR is engaged outside the Rules”.

4. Although he expressed sympathy for the appellant and indeed referred to her role in looking after her grandchildren, the judge went on to say that there were no exceptional circumstances nor that there was evidence which would have any impact on her grandchildren if she departed. He ended the determination by stating in paragraph 18 “Accordingly, I do not find that Article 8 ECHR is engaged”.

5. The grounds of appeal submitted that the judge had erred in failing to accept that the appellant had a family life in Britain which engaged Article 8(1) of the ECHR. They referred to the comments of the judge in paragraphs 13 and 15 which I have quoted above and to the judgment in **AG (Eritrea) [2007] EWCA Civ 801** which stated that:-

“It follows, in our judgment, that while an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement (the ‘minimum level’) is not a specially high one. Once the Article is engaged, the focus moves, as Lord Bingham’s remaining questions indicate, to the process of justification under Article 8(2). It is this which, in all cases which engage Article 8(1), will determine whether there has been a breach of the Article”.

6. The grounds then referred to various definitions of family life in case law before asserting that the judge had failed to carry out a proper balancing exercise as required by Article 8(2).

7. The grounds of appeal were considered by Upper Tribunal Judge Smith who granted permission on 27 October 2017. She wrote:-

“1. The Appellant appeals against the decision of the Respondent dated 14 February 2015 refusing her leave to remain applying Article 8 ECHR and directing her removal to the Ivory Coast. The Appellant’s appeal was dismissed by First-tier Tribunal Judge Davey sitting at Taylor House in a decision promulgated on 4 January 2017 (‘the Decision’). Permission to appeal was refused by First-tier Tribunal Judge Ford in a decision sent on 4 October 2007.

2. The Appellant's Article 8 claim depends on her relationship with her daughter and grandchildren, her age and medical conditions.
 3. It is arguable that the Judge's reasoning fails clearly to identify why Article 8 is not even engaged in the circumstances of this case. There is arguably some confusion about the various concepts under the Rules as between 'insurmountable obstacles' (which applies in the case of a relationship where the consideration is whether family life may be continued abroad) and 'very significant obstacles' which applies in a private life context (and raises the question whether a person would be able to integrate in their home country). The latter was arguably the more relevant on the facts of this particular case but arguably was not considered (or not sufficiently so).
 4. Even if the Judge may arguably have been entitled to conclude that Article 8 was not engaged in the sense of the formation of and interference with family life between mother and daughter/grandchildren, he arguably fails to explain why the Appellant's private life does not engage Article 8 ECHR, whether her case meets the test in paragraph 276ADE(1)(vi) of the Rules and, even if it does not, whether the consequences of removal would be 'unjustifiably harsh' outside the Rules when balancing the interference against the public interest".
8. At the hearing of the appeal I first asked Mr Avery to comment on the grounds of appeal. He argued that the judge had not said that Article 8 was not engaged - what he had said was that there had not been a breach. It was clear, he argued, that the judge had taken into account all relevant factors in the balancing exercise and he argued in fact that the grounds in the application to the Upper Tribunal were disingenuous and that there was no error of law in the decision.
 9. In reply Mr Ilahi emphasised that there had been a two-part test which had not been considered by the judge.
 10. For the reasons given by Judge Smith in granting appeal I consider that it is clear that the judge did make errors of law. It is not at all clear that he did not find that Article 8 was not engaged: indeed I consider that that is the tenor of what he wrote in paragraphs 13 and 15 of the determination. Moreover, the reality is that Article 8 encompasses both family and private life grounds. It is difficult to consider that the appellant, over the last twelve years, has not built up a private life here, let alone family life with her daughter and her family here.
 11. I consider that there is an error of law in this determination because the judge has not carried out the appropriate structured approach when considering the Article 8 rights of this appellant. It is difficult to see how a conclusion could be reached that there was not an interference with the appellant's rights under that Article and having so found the judge would then surely have considered a proportionality, weighing up all relevant factors. It may be well be, when taking into account the family

circumstances here and indeed the costs, if any, in the use of public services here, let alone the fact that the appellant's private life has been built at a time when she did not have leave to remain here and when her situation was clearly precarious, that the appellant's removal would not be found to be disproportionate, but that does not mean that such an assessment should not have been undertaken.

12. For these reasons, having found there is an error of law in the determination, I set aside the decision of the First-tier Tribunal and I direct that this appeal be remitted for a hearing afresh in the First-tier Tribunal.

Signed 

Date: 13 January 2018

Deputy Upper Tribunal Judge McGeachy