



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001920
First-tier Tribunal No: HU/50668/2021
IA/02686/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 March 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

GRACE EYITO SALAMI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Matthew Sowerby, instructed by Quintessence Solicitors
For the Respondent: David Clarke, Senior Presenting Officer

Heard at Field House on 16 January 2023

DECISION AND REASONS

1. The appellant is a Nigerian national who was born on 23 March 1954. She appeals, with permission granted by First-tier Tribunal Judge O'Brien, against the decision of First-tier Tribunal Judge Sweet, who dismissed her appeal against the respondent's refusal of her human rights claims.

Background

2. The appellant entered the United Kingdom on 10 July 2016, holding entry clearance as a visitor. Upon the expiry of her leave to enter, she overstayed. On 6 August 2020, she made an application for leave to remain on human rights grounds. She maintained that she had a family life with her British daughter and

her daughter's British son, who was born on 1 November 2011. Evidence was provided to show that the appellant's grandson had Autistic Spectrum Disorder ("ASD") and that the appellant had been trained to assist with the management of his condition.

3. The Secretary of State refused the application on 7 January 2021. Having addressed the Immigration Rules briefly, she turned to Article 8 ECHR. She did not accept that the appellant's return to Nigeria would be a disproportionate interference with her private life. She did not accept that the appellant had a good claim under the Carers Concession because her grandson could receive care from his parents and/or the NHS. She did not consider there to be any exceptional circumstances which otherwise rendered the appellant's removal in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

4. The appellant appealed to the FtT and her appeal came before the judge, sitting at Hatton Cross, on 4 August 2021. The appellant was represented by counsel, the respondent by a Presenting Officer. The appellant and her daughter gave evidence. The judge then heard submissions from the advocates before reserving his decision.
5. In his reserved decision, the judge noted that the appellant relied on her relationship with her grandson but that the care she was said to provide for him did not feature in the SEND report which had been provided to the respondent. The judge was not persuaded that the relationship was 'anything other than a normal close relationship between a grandparent and a grandchild': [7].
6. The judge did not accept that the appellant would be bereft on return to Nigeria, as had been claimed: [7]. The judge noted that the appellant's daughter's outgoings exceeded her income and that she was 'utilising the services of her mother effectively as a child-minder'. He was not persuaded, therefore, that the appellant's return to Nigeria would be in breach of Article 8 ECHR. Then, at [10], which is the final substantive paragraph of the decision, the judge added this:

I was not persuaded that there was any breach of the Secretary of State's obligations under section 55 of the BCIA 2009 in respect of [the appellant's grandson's] welfare, because he is in the care of his lone mother parent and under the supervision of the educational and social services of the UK.

The Appeal to the Upper Tribunal

7. The appellant sought and was granted permission to appeal on four grounds, which may be summarised as follows. Firstly, that the judge's finding that the appellant was merely a childminder who did not enjoy a protected family life with her grandson was irrational. Secondly, that the judge erred in relying on the SEND report to undermine the asserted relationship because to do so was to overlook other evidence. Thirdly, that the judge had failed to undertake any or any lawful assessment of proportionality under Article 8(2) ECHR. Fourthly, that the judge failed to give any reasoned consideration to section 55 of the Borders, Citizenship and Immigration Act 2009.
8. Judge O'Brien gave permission on all of the grounds, although he singled out the third and fourth for particular comment.

9. The Secretary of State did not provide a response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Shortly before the hearing, however, Mr Clarke provided three authorities, to which I shall refer in due course.

Submissions

10. For the appellant, Mr Sowerby submitted that there was no proper finding on the part of the FtT as to the engagement of Article 8 ECHR in its family life aspect. He submitted that the judge had marginalised an important piece of evidence (the letter from Positive Changes) in favour of the SEND report. The judge had taken a point about the appellant's late husband but it had not been raised at the hearing. The judge had failed to undertake any sort of assessment which followed the stages set out in Razgar v SSHD [2004] 2 AC 368 and had failed to undertake any real assessment of section 55 BCIA 2009 on the facts of this case.
11. For the respondent, Mr Clarke submitted that the judge's decision was sustainable. The finding he had made at [7] - regarding the engagement of Article 8 in its family life aspect - was entirely in line with Das Gupta v SSHD [2016] UKUT 28 (IAC). The complaint was a perversity challenge to the findings of fact, in which respect he relied on Volpi & Delta Ltd v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48. The judge had had due regard to the evidence, including the Positive Changes letter. The judge was aware of the fact that the sponsor's husband had only left her shortly before the hearing and that the circumstances which obtained in August 2021 had only been in existence for around a month. The Positive Changes report was not an expert report in any event and there was not 'great evidence' to show that the appellant has a family life with her grandson or even that she played a significant role. That evidence should have been provided and the absence of it entitled the judge to draw an inference: TK (Burundi) v SSHD [2009] EWCA Civ 40. It was significant that the appellant had tried to present a *fait accompli* to the authorities of the UK: Jeunesse v Netherlands (2015) 60 EHRR 17. When it was recalled that the judge had assessed proportionality and section 55 BCIA 2009 in the alternative, the decision was an adequate and sustainable one.
12. I announced without needing to hear from Mr Sowerby in reply that I was satisfied that the judge in the FtT had erred in law. I stated that I would give my reasons in writing. Having considered the question of relief with the advocates, I stated that the appeal would be remitted to the FtT to be heard afresh by a different judge. My reasons for reaching those conclusions are as follows.

Analysis

13. I am satisfied that the judge erred in law in considering whether or not the appellant's relationships in the United Kingdom engaged Article 8 ECHR in its family life aspect. There were two relationships. The first was with her daughter, an adult and (by the date of the hearing before the FtT) a lone parent. The second was with her grandson, a boy who was nearing the age of ten at the date of the hearing and who has ASD. The appellant lived with them both and was said to undertake important childcare functions in relation to her grandson.
14. The judge's conclusion, having reviewed the evidence including the letter from Positive Changes and the report from SEND was that the appellant's relationship with her grandson was nothing 'other than a normal close relationship between a grandparent and a grandchild'. I cannot understand how that conclusion was

reached on the evidence before the judge. He recorded that the appellant had undergone specialist training in order to assist with her grandson but he appeared to attach significance to the fact that the appellant's role was not reported in the SEND report. In doing so, the judge failed to consider the circumstances as they obtained at the date of the hearing. By that date, as was seemingly accepted on all sides, the sponsor's relationship with her husband had come to an end and the childcare routine had changed markedly. The arrangements which were considered in the SEND report (which was dated 17 January 2020) were no longer those which were in place, and the absence of the appellant from that report was not a matter which bore rationally on the role she occupied in relation to her grandson in August 2021. The absence of reference to the appellant in the report was certainly not a pivot by which the judge was entitled to reject what was said to be a family life.

15. I derive little or no assistance from Mr Clarke's citation of Das Gupta [2016] UKUT 28 (IAC). He relied on the second paragraph in the headnote, by which the Upper Tribunal (McCloskey P and UTJ Blum) applied the Kugathas v SSHD [2003] INLR 170 approach (viz a requirement of more than normal emotional ties) to relationships between grandparents and grandchildren. Assuming, as I do, that this part of the decision represents the law, it is no answer to the complaint articulated by Mr Sowerby. The challenge is not whether the judge appreciated the law correctly; it is, instead, whether he reached a rational conclusion which took into account the relevant evidence. For the reasons I have given, I do not consider the judge to have done so; in considering the relationship between the appellant and her grandson he failed to consider the up-to-date circumstances and focused, erroneously, on the SEND report from the year before.
16. There is a further error in the judge's assessment of family life. It was clearly asserted by the appellant that she enjoyed a protected family life with her daughter *and* her grandson but there is no finding about the engagement of Article 8 ECHR in the former respect. Where it was asserted that the appellant had taken on the mantle of caring for the child to enable the sponsor to go to work, it was at least arguable that the cohabiting relationship between the adults in the family unit was one which was characterised by real or effective or committed support. The judge failed to consider that question at all.
17. I am conscious of the fact that the FtT(IAC) is a specialist jurisdiction and that its decisions should be respected unless they are clearly wrong. I have reminded myself of what was said by Lewison LJ about appeals on fact in Volpi v Volpi but I am quite satisfied in this instance that the judge in the FtT fell into error in his assessment of the relationship between the appellant and her family members in the UK.
18. Mr Clarke nevertheless submitted that any error in relation to Article 8(1) was rendered immaterial by the judge's subsequent consideration of Article 8(2) in the alternative. It is by no means clear to me that this part of the judge's analysis was in the alternative. He certainly did not say so in terms. For the purposes of this decision, however, I shall assume that the judge's findings at [8]-[10] were articulated in the alternative to the apparent finding that Article 8 was not engaged in its family life aspect.
19. Proceeding on that basis, it is abundantly clear that the judge erred in law in his consideration of Article 8 ECHR and s55 BCIA 2009. The judge seems to have decided that the appellant's removal is not disproportionate because her daughter is using her 'effectively as a child-minder'. I cannot understand why

that was thought to be a matter which militated against the appellant, however, and it was certainly not dispositive of the appeal. The relationship – which the judge appears to have accepted – is characterised by the sponsor’s restricted income and her dependency upon the appellant to provide childcare for her autistic child whilst she goes to work. What the judge was required to do – in order to reach a properly reasoned conclusion on the best interests of the grandson – was to consider the extent to which his best interests militated in favour of the status quo being maintained: EV (Philippines) v SSHD [2014] EWCA Civ 874, at [36]. That required a reasoned assessment of what was likely to happen to the appellant’s grandson in the event of her departure. Merely referring to the grandson being in the ‘care of his lone mother parent’ and the supervision of the UK authorities did not, in my judgment, suffice. It is well known that children with ASD often react adversely to change and the judge was required to consider the extent to which the disruption in his care would affect his best interests.

20. I take Mr Clarke’s point that there might have been little evidence on which to base the necessary assessment but the comment at [10] of the judge’s decision was nevertheless inadequate when set against the obligation explained at [10] of Zoumbas v SSHD [2013] UKSC 74; [2013] 1 WLR 3690. What was said in Jeunesse v Netherlands about aliens who present the host state with a family life *fait accompli* is obviously important but it is not a panacea which renders any interference with such a family life proportionate; it is clear that those principles are to be considered as part of a proportionality assessment and that another part of that assessment is a lawful consideration of the best interests of the child. That lawful consideration is absent from the decision of the FtT in this case.
21. I am entirely satisfied for these reasons that the decision of the FtT is erroneous in law and cannot stand. Having reached that conclusion, I was invited by Mr Sowerby to remit the appeal to the FtT so that it could be considered afresh. Given the need for updated evidence about the relationships in questions and the likelihood that the appeal can be considered more quickly in the FtT, I accede to that request.

Notice of Decision

The decision of the FtT involved the making of errors on points of law. The decision of the FtT is set aside in full and the appeal is remitted to be heard afresh by a judge other than Judge Sweet.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 January 2023