Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47702/2013

THE IMMIGRATION ACTS

Heard at Field House

On 6 June 2014

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MRS UWANDU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adeolu, instructed by Moorehouse Solicitors
For the Respondent: Mr G Saunders, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria born on 20 February 1946. She entered the United Kingdom on 13th March 2013 with a six month multivisit visa, that visa running between 14 June 2012 and 14 June 2014.

2. On 22 August 2013 the appellant made an application for leave to remain. The basis of her application was that her daughter, whom she had been visiting in the United Kingdom and whom is also a student of an MSc at the London Metropolitan University, has final stages of renal failure which had been diagnosed in July 2012. The appellant's daughter has two children aged 6 and 4. The appellant's daughter is on daily dialysis as a consequence of her condition.

3. The Secretary of State refused to vary the appellant's leave to enter in a decision of 29 October 2013. On the same date the Secretary of State made a decision that the appellant should be removed from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The appellant appealed these decisions to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Eldridge on 6 March 2014 and dismissed on all grounds in a determination promulgated on 20 March 2014.

5. During the course of his determination the First-tier Tribunal Judge made the following findings of fact [12-15]:

> "12. Having heard from the appellant and her daughter and having regard to the medical evidence provided in the appellant's bundle, I have no doubt that the daughter is in the last stages of chronic renal failure and has been since summer of 2012, when her condition was diagnosed, I find as a fact additionally that she has required to undertake dialysis at home every night for eight hours and that this is an automated process that should not be disturbed.
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> 13. I also find that the appellant has two young grandchildren and that she has been assisting with their childcare. I also accept that the father of the children left the family home in October 2013 and has not returned to live with them. I see no reason to doubt the evidence that he does have contact with the children but it is limited and he does not play an active part in their care.
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> 14. I also find as a fact, because it is not in dispute, that the daughter has the assistance of a neighbour who acts as a carer but the amount of care that she can expect from that lady is limited. It is not in dispute that the daughter works for about 24 hours per week in three shifts from 2 p.m. until 10 p.m. on each of three days as a support worker in a residential home. The purpose of the study she continues to undertake is to enable her to achieve less physically demanding work by moving into administration and management. She told me that her course had been due to complete in September 2014 and because of her health problem the university have now agreed to her completing by about June 2015. I accept this.

15. Finally, I accept the evidence given by the appellant's daughter that the transplant she needs might occur any time but the typical expectation is about five years, although it could be tomorrow or in ten years' time. This does mean that situation probably will not ameliorate for some time."

6. I shall consider the conclusions of the judge further when considering whether the First-tier Tribunal erred on a matter of law such that its determination requires setting aside.

7. The appellant sought and obtained permission to appeal to the Upper Tribunal. Such permission was granted by Designated First-tier Tribunal Judge French in a decision of 2 May 2014 in the following terms:

> "2. Much of the grounds consists of disagreement with the judge's finding that the decisions under appeal were not disproportionate. These arguments would not necessarily involve potential errors on points of law. One element the judge did not expressly deal with was the argument that to remove the appellant would be in breach of Zambrano (and thus of EEA Regulations relating to derivative rights) as the children are British whilst their mother and the appellant are Nigerian and it is said that if the appellant had to leave the children would not be able to remain. Whether there is any substance in this contention is difficult to say on the documents before me but the point is arguable and was not addressed by the judge, the issue having been raised in the appellant's skeleton argument.
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> 3. In accordance with *Ferrer* permission is granted on all grounds."

8. Moving onto the hearing before me, Mr Adeolu's submissions lacked any real structure and for the most part related to grounds which had not been pleaded in the notice of application for permission to appeal. After having been prompted by the Tribunal in this respect Mr Adeolu made a formal application to amend the grounds that he sought to rely upon and this application was not opposed by Mr Saunders. Consequently I allowed amendments to the grounds in the form which I will identify below.

9. I will first however deal with the grounds which were pleaded in the notice of application.

10. Paragraph 1 of the grounds asserts that the judge erred in dismissing the appeal on human rights grounds because the appellant and her family members' circumstances are compelling and compassionate so as to warrant departure from the Immigration Rules "as prescribed in the recent cases of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 and R (Nagre) [2013] EWHC 720 (Admin)".

11. This in reality is just a disagreement with the conclusions of the First-tier Tribunal as to whether the appeal should be allowed on Article 8 grounds.

At its highest it is an assertion that the First-tier Tribunal's conclusion on such ground is perverse. At the hearing Mr Adeolu sought to submit that encompassed within the terms of this ground was an assertion that the judge failed to give consideration to the factual circumstances and compassionate circumstances of the appellant's case. I do not read the ground in that way but in any event neither the ground that is originally pleaded nor in its stretched form lead me to conclude that the First-tier Tribunal's determination contains an error on a point of law requiring it to be set aside.

12. As identified above the judge made careful factual findings in paragraphs 12 to 15 of his determination. He concludes that the appellant does not meet the requirements of the Immigration Rules, a matter I shall return to shortly, and thereafter properly directs himself in accordance with the decision of Mr Justice Sales in Nagre [18]. Having identified a number of features of the case which point in the appellant's favour the judge concludes in paragraph 21 of the determination that if the appellant were to be removed that would cause an interference with the family life she has with her UK-based family members of sufficient severity so as to engage Article 8. At paragraph 22 the judge once again reminds himself that the appellant cannot bring herself within the Immigration Rules. The core of the First-tier Tribunal's reasoning on the issue of proportionality begins midway through paragraph 24, and given the nature of the challenge brought against the Tribunal it is prudent for me to set out the reasons identified by the judge thereafter:

> "24. … the appellant argues that the service she is providing to her daughter and grandchildren is not only part of her family responsibility and to the benefit of the family but that it is also justified economically.
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> 25. That reason would suggest, however, that in any circumstances someone with health issues in this country is entitled, unless there are strong reasons for exclusion, to invite a relative from abroad to come and live in this country and care for them and any children on an indefinite basis until their health has improved if it can be done in a manner that alleviates the public purse. Similarly, the argument would run that any relative from abroad who happens to be in this country has a right to remain on a similar basis.
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> 26. There are alternatives open to the family in this appeal. The appellant's daughter could cease her study or work or both and undergo her dialysis during the hours her children are normally at school nursery. A relatively small amount of childcare would then be needed at one or other end of the school day. She would then of course be further dependent on the state. If she has not done so, she could do something active to compel her partner, who she told me was always working, to make a sensible

financial provision for his children. These are choices for the family in this country.

27. In my judgment, although there are superficial economic arguments for this appellant being allowed to remain, it was a proportionate decision to refuse her that leave to remain. The person with leave to remain is not going to be without cost to the state if she is not working. She will enjoy many of the public benefits in the wider sense that those living here are entitled to. They come at a cost, too. It remains proportionate today notwithstanding the absence of the partner. It is a matter for the state to regulate immigration. The health difficulties of the appellant's daughter demand compassion but they were always going to place her in a position of taking difficult decisions until she is restored to good health.

28. I have considered carefully the best interests of these two young children. Whilst I am sure it would be beneficial to them to continue to enjoy the care and company of their grandmother, I do not find there are sufficiently compelling reasons to conclude that their interests and those of their grandmother outweigh the interests of the state in the maintenance of an effective and consistent system of immigration control."

13. Looking at the decision of the First-tier Tribunal as a whole, as I must, I do not accept the submission that it has failed to take into account relevant facts when coming to its conclusion on the issue of proportionality. The Tribunal were at pains to consider the position and interests of the UK-based family members, including the appellant's daughter and grandchildren, and it had well in mind the best interests of the children, which I have no doubt are that the children remain in the United Kingdom. In my conclusion the First-tier Tribunal were fully entitled to come to the conclusion, on the facts of this case as they found them to be, that having regard to the fact that the appellant does not meet the requirements of the Immigration Rules that her removal in any event would be proportionate.

14. Moving on, paragraph 2 of the grounds simply asserts that the appellant has a genuine and subsisting parental relationship with her daughter and grandchildren and that Article 8 is engaged. That paragraph does not identify or particularise any error in the First-tier Tribunal's determination and indeed appears to just recite findings which were made by the Tribunal. Paragraph 3 submits that the First-tier Tribunal were wrong to find that the decision was in accordance with the law but as Judge Eldridge observes in paragraph 16 of his determination that he was never addressed on the basis upon which decisions taken by the respondent were said not to be in accordance with the law other than on human rights grounds and neither does paragraph 3 of the grounds of application make any attempt to identify the manner in which it is said the Secretary of

State's decision was not in accordance with the law other than asserting that the adverse decision would breach her human rights. In other words this ground takes the appellant no further.

15. I shall deal with paragraph 4 of the grounds later in the determination, this being the ground that relates to the EU treaty rights said to be derived by the appellant from her grandchildren.

16. Paragraph 5 of the grounds is merely a disagreement with the First-tier Tribunal's conclusion that the appellant's removal would be proportionate. That paragraph appears to suggest that the author of the ground is under the misapprehension that if Article 8 is engaged and that individual's removal would interfere with their family life in the United Kingdom, then that must lead to the decision to remove being disproportionate. I need say no more than that the submission is wholly misconceived.

17. Paragraph 6 of the grounds asserts that the First-tier Tribunal took into account the appellant's daughter's health difficulties and the fact that they demand compassion but failed to see that this would cause disproportionate interference with the appellant's and her daughter's and granddaughters' rights. Again this is simply another attempt to reargue the point put in paragraph 1 of the grounds that the First-tier Tribunal's conclusion was not a rational one. Paragraph 7 of the notice of application carries on in much the same vein, asserting at its highest that the First-tier Tribunal failed to identify the very compelling reasons for family life outweighing the public interest "even when he identified unjustifiably harsh consequences upon the appellant's daughter and grandchildren if the appellant was not permitted to stay in the United Kingdom". The First-tier Tribunal did not identify compelling reasons for family life outweighing the public interest because it found that there were no such compelling family reasons which outweigh the public interest, that is why it dismissed the appeal. As I indicated earlier the Tribunal properly directed itself to the relevant considerations it ought to have in paragraph 18 of its determination, and in my conclusion properly applied that approach in paragraphs 19 and onwards. I therefore find no merit in paragraph 7 of the pleaded grounds.

18. Paragraph 8 of the pleaded grounds submits that the appellant's removal would be in breach of the Community law principle of proportionality. It does not identify however on what basis it is said the Community law principle of proportionality is applicable in the circumstances of this case, and it seems to me that if anything is to be made of this ground it must bear some link, although it is not quite sure what link, to paragraph 4 of the grounds which relate to the decision of the CJEU in Zambrano.

19. Turning then to the additional grounds which Mr Adeolu sought, and obtained, permission to rely upon at the hearing. These were as follows:

(i) the Tribunal's findings in paragraph 26 of its determination are inconsistent with its findings in paragraph 12 therein;

(ii) the Tribunal failed to give a detailed evaluation of the best interests of the children;

(iii) the Tribunal failed to give consideration to the Article 8 rights of the appellant's daughter and grandchildren as required by Beoku-Betts.

20. Dealing with these in turn I find nothing in the submission that the conclusions in paragraph 26 of the determination are inconsistent with the factual findings in paragraphs 12 to 15. Mr Adeolu sought to persuade me that if the appellant's grandmother were to be required to leave the United Kingdom then the appellant's children would necessarily be left alone in the United Kingdom at the times their mother was either working, studying or in dialysis. He says that the inference to be drawn from paragraphs 12 to 13 of the determination is that this factual scenario would arise and that in paragraph 26 of the determination the judge went behind that finding. In my conclusion there is nothing in paragraphs 12 to 15 of the determination identifying that the judge found therein that the children would be left alone in the United Kingdom if their grandmother were to be removed. Moreover I asked Mr Adeolu to draw my attention to any evidence to support this contention and in doing so he pointed to a letter from a former childminder of the children indicating inter alia that she would have difficulty in undertaking the children's care if the grandchildren were to leave and he also drew my attention to a letter from the Oxford Kidney Unit of the Oxford University Hospital indicating that the appellant's daughter needs someone around all of the time to be with her and her children, given her medical difficulties and that she wishes this to be her mother.

21. This evidence does not however identify that if the appellant is removed from the jurisdiction her grandchildren will be left without care. At paragraph 26 of the determination the First-tier Tribunal came to conclusions as to how that care could be arranged, and in my conclusion these findings were open to the First-tier Tribunal and are not inconsistent with its earlier findings of fact.

22. As to the second and third of the amended grounds, I reject both of these. The Tribunal identified at paragraph 19 of its determination that the interests of the grandchildren had to be taken into account. It directed itself to Section 55 of the Borders, Citizenship and Immigration Act 2009 and then thereafter gave careful consideration to both the circumstances and interests of the appellant's grandchildren as well as the appellant's daughter. In addition in particular at paragraph 28 of the determination the judge identifies that he had considered carefully the best interests of the two young children. Looking at the determination as a whole in my conclusion the judge gave adequate reasons for dismissing the appeal on Article 8 grounds, took into account all matters which were relevant but

did not take into account any relevancies and came to conclusions that were open to him on the available evidence.

23. I finally turn to the "Zambrano ground" pleaded in paragraph 4 of the notice of application.

24. This was not a ground pursued by the appellant in his grounds of appeal to the First-tier Tribunal (IAFT-1), but it is a matter which is to be found in the skeleton argument relied upon by the appellant before the First-tier Tribunal, which is undated but which formed part of the bundle received by the First-tier Tribunal three days prior to the hearing. In paragraph 9 of the skeleton the following is submitted:

> "We refer to the human rights case where the Court of Justice of the European Union (ECJ) recently handed down judgment in the case of Ruiz Zambrano (C-34/09). This judgment creates a right to reside and work for the carer of a dependent British citizen when that carer has no other right of residence in the UK and removing the carer from the UK would mean the British citizen would have to leave the European Union."

25. A further reference is made to the underlying Article of the European treaties in paragraph 24 of the skeleton argument which states:

> "The decision further conflicts with Article 20 TFEU, to which the UK is whereby (sic) the treaty precludes national measures that have the effect of depriving Union citizens and their family members of the enjoyment of the substance of their rights."

26. The First-tier Tribunal made no reference to the decision in Zambrano or a potential conflict between removing the appellant and the appellant's British citizen relative's rights under Article 20 TFEU. This is plainly an error of law given that it was pleaded in the skeleton argument before the Tribunal. The question I must now ask myself however is whether the failure of the First-tier Tribunal to consider this issue is such that I should set aside its determination. I conclude that it is not.

27. At the hearing Mr Adeolu sought, with some degree of force, to resile from the statements of law which were identified in the skeleton argument before the First-tier Tribunal and submitted in its place that the decision in Zambrano protects the care providers of British citizen children and that if a non-British citizen national is providing care for British citizen children in the United Kingdom then they are entitled to reside here, irrespective of whether their removal would lead to those British citizen children being required to leave the territory of the European Union. This submission quite clearly in my conclusion misunderstands the decision in Zambrano.

28. [When this returns from typist cite from paragraphs 107 to 211 of my decision in Mehmood Ahmed]. In the instant case there is no prospect of

the appellant's grandchildren being required to leave the territory of the European Union if their grandmother is removed. The appellant's daughter, i.e. the grandchildren's mother, makes no assertion to this effect in her witness statement and in any event the Tribunal came to conclusions in this regard in paragraph 26 of its determination, which I have already considered above to be conclusions that were open to it.

29. Consequently there is no prospect that this appeal could succeed on the "Zambrano ground" and so the failure of the First-tier Tribunal to consider this ground is not a matter which requires its determination to be set aside because it is not a matter which is capable of affecting the outcome of the appeal.

30. I finally turn my attention to a ground which was raised for the first time by Mr Adeolu at the end of his submissions and after he had already applied for and been given permission to amend his ground in other respects; that being the assertion that the First-tier Tribunal erred in failing to allow the appeal under the Immigration Rules and in particular in failing to conclude that the requirements of paragraph EX.1 to those Rules had not been met.

31. In his decision Judge Eldridge said as follows at paragraph 17:

> "The appellant does not suggest she can bring herself within them [Immigration Rules]. There is nothing in Appendix FM that would enable her successfully to plead that she was entitled to remain under the Rules on the basis of her family life. She has no private life that would meet the requirements of paragraph 276ADE."

32. This is palpably correct. Even if, which he is not, Mr Adeolu is right in saying that the applicant meets the requirements of paragraph EX.1 this does not lead to the appellant meeting the requirements of the Immigration Rules. As the Tribunal indicated in the reported case of Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 00063;

> "it is plain from the architecture of the Rules … that EX.1 is parasitic on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a freestanding element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now plain by the respondent's guidance dated October 2013."

33. It is not suggested, or at least if it is and it has not been particularised, that the applicant meets the other requirements of Appendix FM to the Immigration Rules, she plainly does not. In any event, as identified above, the appellant did not assert to the First-Tier Tribunal that she did meet the requirements of the Rules as this can be seen from both paragraph 17 of

the First-tier Tribunal's determination and a consideration of the skeleton argument that was placed before the First-tier Tribunal.

34. For all these reasons in my conclusion the appellant has not demonstrated that the First-tier Tribunal's determination contains an error of law capable of affecting the outcome of the appeal and consequently I find that its determination does not require setting aside.

35. The determination of the First-tier Tribunal shall remain standing.

Signed Date

Upper Tribunal Judge O'Connor