Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03172/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 21 January 2015	**On 3 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAPPY THOBEKILE NGULUBE

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms M Hannan of Corban Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge R L Walker) allowing the appellant's appeal against a refusal to grant her further leave to remain under the Immigration Rules and Art 8 of the ECHR. The judge found that the decision breached Art 8 of the ECHR.

2. For convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Zimbabwe who was born on 14 May 1977. She first entered the United Kingdom on 17 September 2006 with leave as a student valid until 31 October 2009. She was subsequently granted extensions of leave until 10 November 2013.

4. On 9 November 2013 the appellant applied for further leave to remain. The basis of that application was, in essence, her claimed close relationship with her sister and her three nephews and nieces with whom she lived in the UK.

5. On 20 December 2013, the Secretary of State refused the appellant further leave to remain under the Immigration Rules (in particular para 276ADE) and under Art 8 of the ECHR. In addition, the Secretary of State made directions for the appellant's removal to Zimbabwe under s.47 of the Immigration, Asylum and Nationality Act 2006.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 20 August 2014, Judge Walker allowed the appellant's appeal under Art 8 of the ECHR. He accepted that the appellant had established "family life" for the purposes of Art 8 with her adult sister and her nieces and nephew. Further, he accepted the evidence of an Independent Social Worker (Mr Robert Simpson) that the appellant's removal would not be in the best interests of her nephew and two nieces and the interests of the children outweighed the public interest such that the appellant's removal was not proportionate.

The Appeal to the Upper Tribunal

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the following grounds:

> "Making a material misdirection in law
>
> 3. Having found that the Appellant could not qualify for leave to remain under the Immigration Rules, it is submitted that only if there may be arguably good grounds for granting leave to remain outside of the Immigration Rules, would it be necessary for the Judge to proceed to consider whether there are compelling circumstances not sufficiently recognised under the, as per ***R (on the application of) Nagre v Secretary of State for the Home Department*** **[2013] EWHC 720 (Admin)**.
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> 4. The Judge has directed himself to the above test, at paragraph 31, however he has failed to give adequate reasons for why there are arguably good grounds for granting leave to remain, and why the circumstances are compelling and not sufficiently recognised under the Immigration Rules.
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> 5. It is submitted that the relationship between the Appellant and her sister does not go beyond normal emotional ties as required to qualify as "family

life" in light of Article 8. The Appellant has helped her sister, as many siblings would, but this does not go beyond normal emotional ties.

6. Even if there is family life between the Appellant and her sister and her nephews and nieces, the refusal is not a disproportionate interference.

7. Grants of leave outside of the Immigration Rules are reserved for the most exceptional cases and should not be used as a means to circumvent the requirements of the Rules, which are in themselves a complete code.

8. It is submitted that the Judge has erred in law in allowing the appeal under Article 8 and the decision is not in accordance with the law.

9. Permission to appeal is respectfully sought."

8. On 8 October 2014, the First-tier Tribunal (Judge Foudy) granted the Secretary of State permission to appeal on the basis that it was arguable that: "the judge failed to give adequate reasons for allowing the appeal outside the Rules."

9. Thus, the appeal came before me.

The Submissions

10. In his submissions, Mr Richards did not pursue the point made in paras 3 and 4 of the grounds that the judge had erred in law by failing to consider whether there were "arguably good grounds" for granting leave outside the Rules before going on to consider whether there were any "compelling circumstances" which justified a grant of leave outside the Rules. Mr Richards took that position, no doubt, in the light of the Court of Appeal's decision in MM (Lebanon) v SSHD [2014] EWCA Civ 985. There, at [128] Aikens LJ (with whom Maurice Kay LJ and Treacy LJ agreed) concluded that there was no "threshold" criterion of "arguability" before a decision maker was required to consider whether leave was justified outside the Rules under Art 8 (see also R (Aliyu and Aliyu) v SSHD [2014] EWHC 3919 (Admin) at [59]).

11. Instead, Mr Richards centred his submissions on the judge's reasoning.

12. First, Mr Richards submitted that the judge had failed to give adequate reasons for his finding that the appellant had established "family life" with her adult sister. He submitted that the only reason that appeared to be given for finding that there were "more than normal emotional ties" between them was that the appellant looked after her sister's children when her sister went to work. Secondly, Mr Richards submitted that the judge had failed to carry out the balancing exercise inherent in proportionality and give adequate and proper reasons for his finding that the appellant's removal would not be proportionate. In particular, he criticised the judge at para 35 of his determination for stating that the public interest was not a strong argument based upon the appellant's good immigration record and that she was capable of working and earning money. Mr Richards submitted that, although the judge had referred to part 5A of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002") at para 10 of his determination, thereafter he had failed to take it

into account, in particular s.117B(1) which stated that the maintenance of immigration control was "in the public interest". Mr Richards submitted that the appellant was a student who no longer qualified for leave on that basis and it was in the public interest that she should return to her own country or be removed.

13. Mr Richards submitted that the judge had materially erred in law and he invited me to set aside the decision and order a rehearing of the appeal.

14. On behalf of the appellant, Ms Hannan submitted that the judge had not materially erred in law.

15. First, she submitted that he had asked himself the correct question whether there were "compelling circumstances" and secondly, he had taken into account all the evidence. She pointed out that at paras 23 and 26 of the determination he had expressly stated that he had done so and had found the evidence before him, namely that of the appellant, her sister and Mr Simpson, the Independent Social Worker credible and truthful. Thirdly, she submitted that the judge had fully considered the circumstances at paras 27-35 of his determination including at para 29 setting out and, at para 30 accepting, the expert opinion of Mr Simpson that it was not in the interests of the appellant's nephew and nieces that she should be removed, the impact of which would be "very damaging". Fourthly, Ms Hannan submitted that the judge had been entitled to conclude that the nature of the relationship between the appellant and her sister and her sister's children was such that "family life" existed. Ms Hannan submitted that it was not irrational for the judge to conclude that, in all the circumstances, the impact on the appellant's family and the appellant (including the best interests of her nephew and nieces) outweigh the public interest.

Discussion

16. It was accepted before the judge that the appellant could not meet the requirements of the Immigration Rules, in particular para 276ADE and that her appeal rested exclusively upon her Art 8 claim.

17. First, I deal with the issue of the judge's finding that family life existed between the appellant and her sister and her sister's nephew and nieces. At para 32 the judge said this:

> "I accept that there is an established family life between the Appellant her sister and her nieces and nephews. Their relationship does go beyond the normal emotional ties between such relatives."

18. Mr Richards did not suggest that the judge had misdirected himself in looking for more than "normal emotional ties". That is consistent with authority, for example, Kugathas [2003] EWCA Civ 31 and Ghising (Family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC) at [50]-[62].

19. The judge summarised the evidence concerning the appellant's relationship with her sister and her nieces and nephew at paras 14-20 as follows:

"14. The Appellant resides in the same household with her sister Florence and her three children, two girls aged 12 and 8 and a boy aged 10. They live together at 10 Rifles Lane, The Maltings, Shaftsbury, North Dorset. The Appellant has lived with her sister, nieces and nephew for most of the time she has been in the UK and since 2006. She plays a major role in the upbringing and development of her nieces and nephew and also has a very strong and supportive relationship with her sister. Her role with the children and the time she has spent with them has resulted in them looking upon her as a second mother. She has helped raise them since her arrival in 2006.

15. When the Appellant arrived in 2006 she soon became aware that her sister's husband was being abusive to her sister as well as causing difficulties and upset for the children. This abuse sometimes manifested itself as domestic violence against the sister. It also involved rape and sexual assault.

16. The level of domestic violence was such that the police were called on several occasions. Ultimately in 2011 the sister's husband was arrested and removed from the then matrimonial home. The sister, fearing for her safety went to a women's refuge with the children and where she stayed for 6 months. The Appellant did not accompany her at this time but went to visit regularly as well as seeing the children. After the 6 months the sister has found the current accommodation at 10 Rifles Lane and the Appellant resumed living with her sister, her nieces and nephew.

17. The sister's husband has failed to provide financially or in anyway for his family. He is no longer in contact with any of them and has not been since the last domestic violence incident in 2011.

18. The Appellant has provided the much-needed support for her sister and the children. This has been not only practical support with looking after the children, taking them to school and out socially but emotional support. This has been provided when the sister and her children have been vulnerable and traumatised and when such support was needed by them.

19. Both the Appellant and her sister work as carers. Their work schedules are arranged so that somebody is always at home with the children. The Appellant contributes towards the finances of the household.

20. If the Appellant had to leave her sister's home then this would be a very serious situation for her sister and the children. They would lose the support she provides. The sister would not be able to work and it would clearly not be in the best interests of the children. Their relationship does amount to a family life and taking the Appellant away from this would result in a breach of Article 8 and would be a disproportionate decision."

At para 27 the judge made the following finding:

"27. I accept that the Appellant has been providing very valuable support, in all respects, to her sister and her children especially after the end of the abusive relationship with her sister's husband. I accept the evidence that

> the children have now for some considerable time been treating the Appellant as a second mother. She carries out the same roles with them as their own mother."

20. At para 28, based upon Mr Simpson's report and the oral evidence, the judge stated that:

> "the Appellant was the stronger character of herself and her sister. This has enabled her to give the guidance and support to her sister and the children."

21. That evidence, in my judgment, strongly underpins the judge's finding that the relationship between the appellant on the one hand and the appellant's sister and the children of the appellant's sister on the other was one of more than "normal emotional ties". At para 35, the judge referred to the circumstance as a "unique family situation". Whether or not the situation was "unique", it was unusual and, bearing in mind the history of domestic violence directed against the appellant's sister, was one which the judge was entitled to find that amounted to "family life" between the appellant and the other members of her family.

22. In addition, in reaching his finding, the judge set out in detail paras 8.2-8.15 of Mr Simpson's report at para 29 of his determination as follows:

> "29. I accept the conclusions in the report that if the Appellant is removed from the UK then her sister and the children will suffer trauma and loss. The report goes on to say:
>
> '8.2 I am of the view that the fracturing impact would vary between the children, their mother and the Appellant and based upon my knowledge and understanding of the history of the family, I do not believe this family is likely to recover in any meaningful sense, from such an event.
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> 8.3 I would expect that the eventual fragmentation will follow a period of deterioration, possibly exacerbated by a recurrence of the mother's poor mental health, logistical issues of managing three children alone, the global impact of her past abusive experience, and in all probability the necessity for the local authority to begin to intervene.
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> 8.4 It may be further argued that the absent father to the children is likely to see the removal of the Appellant as the removal of a protective barrier, and the author is unable to state with any certainty that his would be something that the Appellant's sister would find easy to resist, if she were to feel that the only credible protector to the family was no longer present as a guardian.
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> 8.5 I base these observations upon the reaction and behaviour of both of the adults when recounting the events of the past abuse, and the determination of the children's father even when the Appellant was present in the home. It would appear that if the Appellant is not in the country, were the Appellant's father attempt to return there would be little to prevent him from doing so.

> 8.6 I would be very concerned about the long-term affect the separation from the Appellant would have on the children.
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> 8.7 I believe that the removal of the Appellant from the children's' lives is not in the children's best interest. I believe that the two adults in what appear parental roles, the Appellant is probably the parent with the greatest earning potential if she is allowed to remain in the UK. The income required for a family with two adults and three children, even at a basic and good enough level, is likely to be substantial.
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> …..
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> 8.14 In the author's opinion, if the Appellant is permanently removed from the UK, and therefore the family is conversely permanently broken, this will be an end to their family life. The children have accepted, and internalised their family as it now is. It is not appropriate mindful of the experiences of the children, to speculate with them about how their might look if their family if one of them were not present; given that it has taken some time to achieve their current level of security and stability, speculation of the removal of their credible protector might also be described as emotionally abusive.
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> 8.15 In summary, if the Appellant were to be removed from the UK, the impact upon the children would be very damaging and no in the children's' best interests.'"

23. At para 30, Judge Walker stated:

> "I accept Mr Simpson's opinions and conclusion as being credible."

24. The interdependency between the appellant and the other members of the family is highlighted by Mr Simpson. That interdependency is such that he considers that the appellant's removal would be "very damaging" to the children and not in their best interests. Equally, he also identified the importance that the appellant plays in her sister's wellbeing given the history of domestic violence.

25. There is no doubt that that history has created significant ties (and indeed dependency) between the family members. The judge clearly had this evidence in mind when he made the positive finding in respect of "family life" in para 32. He applied the correct approach in recognising that more than "normal emotional ties" had to exist and, on the evidence, which he expressly accepted I see no basis for concluding that he was not entitled to reach that finding given the weight of evidence before him.

26. Secondly, Mr Richards submitted that the judge had failed to give adequate reason for his conclusion that the appellant's removal would not be proportionate. That conclusion is expressed at paragraph 35 of the judge's determination as follows:

> 35. The need to maintain effective immigration control in these particular circumstances is not a strong argument the Appellant has a good immigration record, she has obtained her qualifications and appears to be a person who is capable of working and earning. Set against this is the unique family situation and the disruption that would be caused to this by the Appellant's removal and which would be serious and substantial especially for the children. The needs of this family group particularly the children far outweigh any public interest considerations."

27. That finding has, of course, to be seen in the light of the whole of the judge's determination including his positive credibility finding and his acceptance of Mr Simpson's view that the impact of the appellant's removal on the children would be "very damaging" and not in their best interests. There was also the potential impact on the appellant's sister if the "protective barrier" of the appellant was removed (see para 8.4 of Mr Simpson's report).

28. Mr Richards placed some reliance upon s.117B(1) of the NIA Act 2002 which states that:

> "maintenance of effective immigration controls is in the public interest."

29. This point was not raised in the grounds where no reliance was placed specifically on Part 5A of the NIA Act 2002. Nevertheless, Mr Richards developed the submission that in para 35 the judge had been wrong to state that "immigration control" is "not a strong argument".

30. In my judgment, para 35 should not be read as the judge stating that "effective immigration control is [not] in the public interest". What the judge is saying in para 35 is that there are good countervailing factors that go to outweigh the "public interest" in "maintaining effective immigration control". He identifies those factors as the appellant's good immigration record, and that she is capable of working and earning. As s.117B(2) states, it is in the public interest that an individual is "financially independent" which is, without reference to s.117B(3), the point to which Judge Walker is, in part, alluding.

31. In my judgment, this was not a straightforward case of an individual who was a student and who no longer qualified to stay under the Rules. The "unique family situation" of the appellant was significant in assessing proportionality. Indeed, the evidence of Mr Simpson, accepted by the judge, was powerful in reflecting the damaging effect upon the children of the appellant's removal. The judge made express reference to this in para 35 of his determination. It is not suggested, in the grounds or by Mr Richards in his submissions, that the judge was not entitled to find that the appellant's removal was not in the best interests of the children and would be damaging to them. Neither is it suggested that the judge gave excessive (irrational) weight to their interests rather than taking them into account as a "primary consideration". Indeed, as I pointed out to Mr Richards during the hearing, the grounds do not raise an irrationality challenge at all. They only raise a reasons challenge.

32. In my judgment, the judge correctly approached the issue of whether the appellant should be granted leave outside the Rules under Art 8. He clearly directed himself that there must be "compelling circumstances". He made a number of positive findings in the appellant's favour both in relation to her family life and the impact upon the children of her removal. At paragraph 35, he noted a number of positive aspects of the appellant's circumstances including her good immigration record and her, in effect, self-sufficiency. He then concluded that on the basis of the evidence the disruption to the "unique family situation" would be "serious and substantial especially for the children". I do not accept Mr Richards' submission that the judge failed to carry out a balancing exercise when he concluded that:

> "the needs of this family group particularly the children far outweigh any public interest considerations."

33. Paragraph 35, when read - as it must - in the context of the whole of the determination and the judge's findings, adequately sets out the judge's reasons for finding that the appellant's removal would be disproportionate.

34. For these reasons, I do not accept Mr Richards' submission that the judge erred in law in allowing the appellant's appeal under Article 8.

Decision

35. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of an error of law. That decision stands.

36. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal, in allowing the appeal, made a fee award of £140 payable to the appellant which, as I have dismissed the Secretary of State's appeal, remains the appropriate fee award.

Signed

A Grubb
Judge of the Upper Tribunal