Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17989/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th July 2015	**On 2nd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANGELA LILIANA GOMEZ PULIDO

Claimant

Representation:
For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Claimant: Ms E Harris, Counsel instructed by Kilic & Kilic Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Chowdhury allowing the Claimant's appeal on human rights grounds with reference Article 8 ECHR, against the Secretary of State's decision to refuse her human rights application in relation to her right to private and family life and against removal directions set for the claimant's country of origin, Colombia.

2. The refusal letter failed to engage with Article 8 ECHR and the Claimant appealed outwith the rules on the basis of *Nagre* exceptionality.

3. First-tier Tribunal Judge Chowdhury allowed the Claimant's appeal on human rights grounds with reference Article 8 ECHR on the basis that the decision was a disproportionate interference with her family and private life.

4. The Appellant appealed against that decision. The grounds may be summarised as follows:

   (i) The judge erred in failing to consider the decision of *Kugathas v SSHD* [2003] EWCA Civ 31 which confirmed that there is no presumption of family life and family life is not established between an adult child and their parent or sibling unless something more exists than normal emotional ties. The judge failed to identify any circumstances above and beyond normal family ties other than a "shared experience of trauma in Colombia" at paragraph 48, which falls short of identifying issues of dependency;

   (ii) The judge has erred in allowing the appeal under Article 8 private life but has failed to give reasons for doing so at paragraph 52.

5. The Appellant was granted permission to appeal by First-tier Tribunal Judge Simpson by way of a decision which stated inter alia as follows:

> "Although the judge found that the appellant cannot meet the requirements of Appendix FM or Paragraph 276ADE and went on to consider *MM (Lebanon)* [2014] EWCA Civ 985 and *MT (Zimbabwe)* [2007] he did not give adequate weight to the respondent's concerns and, in particular, did not give adequate consideration to paragraph 117B. The reasoning was terse and lacked clarity, particularly the finding that the appellants' removal would be disproportionate".

6. I should observe that the section 117B (not paragraph 117B) point was not taken by the Appellant in her grounds seeking permission and were not said to be *Robinson* obvious either. It is unclear to me how the original grounds correlate to that new point at all; however as permission was granted on that basis, I entertained submissions on the grounds as well as Judge Simpson's grant.

7. I was provided with a Rule 24 response from Ms Harris who represented the Claimant at the First-tier also.

Submissions

8. In advancing the Secretary of State's grounds of appeal, Ms Isherwood submitted *inter alia* that the Claimant has joined her aunts, uncles and cousins in the UK via a student application and only after numerous other forms of leave did she make a family and private life application and raise that she has been adopted by her family in the UK when she was 3 months old (see Annex E of the Secretary of State's Bundle before the First-tier which rehearsed the lawful immigration history). She highlighted that the Claimant was in her home country without her immediate family and the family in the UK remain in contact with other family in Colombia. She

submitted that if approaching the matter through *Kugathas*, this Claimant does not live with parents but with cousins. In short, Ms Isherwood stated that a shared experience is not enough to engage family life. She highlighted that the judge did not explicitly state he was approaching family life with the knowledge that the Claimant was an adult. The Claimant had not shown *Kugathas* dependency and she sees her family only once or twice a week. Ms Isherwood criticised the Article 8 assessment and submitted that the weight of not meeting the immigration rules gives weight to the Secretary of State's position (pursuant to [48] of *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387). In short, the evidence presented does not show that this appeal, which does not meet the Rules, should be allowed on Article 8. Ms Isherwood accepted that the judge did consider section 117B of the Nationality, Immigration and Asylum Act 2002 Act at paragraph 50 of the decision but reiterated that *AM (s.117B) Malawi* [2015] UKUT 260 (IAC) confirmed that the Claimant cannot retain the right to remain due to her financial independence. She finally criticised the judge for looking at the facts that prevailed in the past.

9. I then heard submissions from Ms Harris who relied on her Rule 24 Reply. Ms Harris submitted in reply that the test cited in the grounds of appeal originated from *Kugathas* at [25] and such ties might exist due to dependency, meaning that this was not the only manner in which family life could be engaged. This was confirmed in *MT (Zimbabwe) v Secretary of State for the Home Department [2007] EWCA Civ 455* at [8] wherein the applicant had to show "her relationship with her cousin and his family is "Beyond what would normally be accepted between adult family members in an adult child and parent"".

10. Ms Harris submitted that as the judge had applied the test, the judge implicitly assessed the Claimant as an adult, otherwise the test would not have been applicable. The judge's findings particularly at paragraph 48 demonstrated the strength of family life being engaged. Ms Harris highlighted that these findings were made after the judge heard evidence from several members of the family and after a full day of oral testimony. It was submitted that on the basis of the evidence of a shared history, a legitimate reason was given to find that a closer bonding process existed.

11. Furthermore, Ms Harris submitted that the Secretary of State's submissions were a mere disagreement rather than highlighting an approach outside the remit of what the judge was entitled to do or find. All of the information given in the witness statements before the judge was accepted and the Presenting Officer had accepted that the question of adoption was not in issue and it seemed to be accepted that the Claimant's parents and siblings were who they claimed to be. Regardless of financial dependency, there is emotional dependency anyhow which remains ongoing. Concerning section 117B, Ms Harris contended that paragraph 50 demonstrates that the judge has regard to the considerations she is required to and nothing therein shows the judge is deriving a right for the Claimant to remain solely on the basis of section

117B considerations. Finally, concerning private life, the judge found arguably good grounds for granting outside the Rules and the fact of little consideration of private life does not undermine the position concerning family life which still resulted in success. In short, Ms Harris submitted that the appeal amounted to a disagreement with the factual analysis falling well below the standard set at [90(2)] in the judgment of Lord Justice Brooke in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982 and did not amount to an error of law. In response to my query concerning the living arrangements, Ms Harris confirmed that the Claimant was living with her family as confirmed in oral evidence before the First-tier Tribunal.

12. I enquired of both parties whether they wished to address me on the relevance if any of the most recent reported decision of the Upper Tribunal concerning family life, namely that of *Ghising (family life - adults - Gurkha policy) Nepal* [2012] UKUT 160 (IAC), wherein the Upper Tribunal discussed the leading authorities on family life at [48-62], including the judgment of the Court of Appeal in *Kugathas*.

13. In relation to that authority, Ms Harris asked me to note [48] onwards and [54] in particular, regarding *Kugathas* at [17] where Lord Justice Sedley confirmed that dependency is not limited to 'economic' dependency. She also asked me to note [56] concerning the weight to be given to *Kugathas* but submitted that in any event the Claimant met *Kugathas* according to the judge's decision. Finally, she asked me to note that [62] of *Ghising* confirms that the family life assessment is fact-sensitive and that there are exceptional facts here.

14. Ms Isherwood submitted that the Rule 24 reply does not address the grounds and *Kugathas* requires a case by case assessment, and there are a number of authorities addressing Article 8 where the immigration rules are not met and as stated in *SS (Congo)* at [33 and 55] there have to be compelling reasons why a person should be granted leave outside the rules, which the decision does not take into account. Finally, Ms Isherwood submitted that emotional ties could be defeated in a proportionality assessment when looking at the Appellant's position against that of the Claimant.

15. I asked both parties at the close of submissions whether they had anything further to add and both confirmed that they did not.

No Error of Law

16. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

17. In relation to the first ground (repeated at paragraph 4(i) above), family life does not surreptitiously or suddenly expire when a child turns 18 years

of age, as noted by Sir Stanley Burnton in the recent decision of *Singh & Anor v The Secretary of State for the Home Department* [2015] EWCA Civ 630 at [24]. Here, at paragraphs 45-48, the judge made findings in light of well-trod authority and concluded that the Appellant has "much more than the normal, emotional ties". I find that the judge approached the fact-sensitive question of family life in an entirely appropriate and lawful manner, giving due consideration to all the relevant facts and in particular giving consideration to those facts stated to be more important than others by higher court authority before finding, with evidenced reasons, that family life was engaged. The assessment of the facts engaging family life are a matter for the fact-finding Tribunal having heard the evidence and considered all of the documentation before it on that issue.

18. In relation to the submission that the weight of not meeting the Immigration Rules gives weight to the Secretary of State's position (pursuant to [48] of *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387), this skews the interpretation of this passage in *SS (Congo)* somewhat. In the instant appeal, the Rules were not live in the appeal (as the Rules do not cater for family life save as set out in paragraphs 276ADE and Appendix FM). Therefore, the reliance upon *SS (Congo)* is misplaced in the present context. Notwithstanding that, the weight to be given to the public interest is given statutory voice in the form of section 117B(1) for all Article 8 matters arising before the Tribunals. The judge rightly assessed the relevant factors before her and her decision is compliant with the observation in *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC) that not every subsection of section 117B need be examined explicitly in turn as what matters is substance not form. The judge independently assessed the evidence of family ties and all relevant factors going for and against the refusal decision but ultimately decided the issue in the Appellant's favour as she was unarguably entitled to do.

19. Finally, in relation to the private life issue, whilst the decision in this regard is robust, I find that the judge gave consideration to that life in the context of family life findings already made as to the quality of her private life overall, and the statutory presumptions at Part 5A of the 2002 Act. Having considered the nature and quality of the Appellant's life in the UK, nothing more was required of the judge. The decision is not devoid of reasoning. The reasons are proper, intelligible and adequate to sustain the conclusions drawn.

20. The grounds do not reveal an error of law such that the decision should be set aside.

21. The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.

Decisions

22. The appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Saini