
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/36116/2014

**THE IMMIGRATION ACTS**

**Heard at: Columbus House, Newport**
**On: 4 November 2015**

**Decision & Reasons Promulgated**
**On: 4 December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ALTHEA GRACE ANGUS**
(Anonymity direction not made)

Respondent

**Representation**
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms R Moffat, Counsel instructed by Hoole & Co

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Coaster in which the Judge allowed on Article 8 grounds the appeal of Ms Angus, a citizen of Jamaica, against the Secretary of State's decision to refuse leave to remain. I shall refer to Ms Angus as the Applicant although she was the Appellant in the proceedings below. This appeal is not subject to an anonymity order by the First-tier Tribunal and neither party invited me to make such an order.

2. The Applicant arrived in the United Kingdom on 18 August 2000 and was granted leave to enter as a visitor for six months. Subsequent periods of leave to remain as a student were granted the last expiring on 30 April 2005. The Appellant's application for further leave to remain as a student made on 21 April 2005 was refused on 2 June 2005 and no appeal was lodged. The Applicant remained in the United Kingdom without leave and on 26 October 2010 applied for leave to remain outside the terms of the Immigration Rules. This application was refused with no right of appeal on 10 January 2011 and a request for reconsideration was refused on 18 November 2011 and thereafter further representations were made. On 28 August 2014 a detailed decision was made refusing the Applicant's application for leave to remain in the United Kingdom on the basis of representations made between October 2010 and August 2014. The Applicant exercised her right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Coaster on 12 February 2015 and was allowed on Article 8 ECHR grounds. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Parkes on 14 May 2015 in the following terms

> "The grounds argue that the judge erred as it was not found that there were compelling circumstances to justify considering the Appellant's case outside the Immigration Rules. The grounds rely on Gulshan and Nagre and there were no significant obstacles to the Appellant returning to Jamaica.
>
> To find that the Appellant has a family life with her daughter the Appellant would have to show that there were more than the usual ties between adults, paragraphs 46 does not show that. The Appellant's private life was considered. The judge wrongly considered that the Home Office had done nothing since 2005, there was no evidence that an application had been made and the response delayed, the Appellant overstayed and did not bring herself to the attention of the Home Office until 2010. The delays were those of the Appellant not the Home Office.
>
> The grounds, that the judge failed to identify the circumstances adequately, are arguable, it is arguable that insufficient weight was given to the factors set out in section 117B and the failure of the Appellant to meet the Immigration Rules."

## Background

3. The history of this appeal is detailed above. The facts, not challenged, are that the Applicant came to the United Kingdom lawfully and having remained lawfully for a period of about 5 years overstayed. The Applicant was 39 years old on arrival in the United Kingdom and she is now 54. The Applicant's daughter, Stacey-Ann Hutchinson came to the United Kingdom shortly after the Applicant and lives close to the Applicant with her child, the Applicant's grandchild. The Secretary of State refused the application for leave to remain because the Applicant did not meet the requirements of the Immigration Rules and it was considered that there were no exceptional circumstances to warrant a grant of leave to remain outside the terms of the Immigration Rules.

4. There was no suggestion before the First-tier Tribunal that the Applicant met the requirement of the Immigration Rules, the appeal was put forward to the First-tier Tribunal and allowed by reference to Article 8 ECHR. In doing so the First-tier Tribunal found that the public interest did not require the removal of the Applicant being outweighed by her protected Article 8 rights.

**Submissions**

5. Mr Richards appeared on behalf of the Secretary of State and Ms Moffat represented the Applicant and submitted a written skeleton argument along with copies of the authorities of SS (Congo) [2015] EWCA Civ 387, Agyarko and others v SSHD [2015] EWCA Civ 440 and Jeunesse v Netherlands [2015] 60 EHRR 17.

6. On behalf of the Secretary of State Mr Richards noted that the grounds upon which permission was granted do not reflect the grounds upon which the appeal was lodged. This appeal was allowed by virtue of Article 8 ECHR and the Judge found that Article 8 was engaged in respect of the Applicant's daughter and grandson and also that she had a protected private life in the United Kingdom. The Judge goes through the Razgar criteria but when she comes to the final proportionality stage the Judge focuses on one issue alone being the supposed inactivity of the Home Office. This was wrong. Any delay by the Home Office was confined to the period 2010 to 2014, between 2005 and 2010 the Applicant was an overstayer with no applications or representations outstanding. Otherwise Mr Richards relied on the grounds as set out. The Judge failed to have appropriate regard to section 117 and used the Applicant's illegal overstaying as a factor in her favour rather than against. Little weight should have been given to her private life.

7. For the Applicant Ms Moffat referred to her skeleton argument. There is no reference to primary legislation in the grounds of appeal. The grounds say that there is no identification of compelling circumstances. There is no error of law in this respect and indeed compelling circumstances are specifically mentioned at paragraph 57. The correct test was applied. It was open to the Judge to take account of the delay between 2010 and 2014. The Judge makes the correct finding that the reasons for the Applicant overstaying do not exonerate her breach of immigration control (at paragraph 53). The Judge found that the family life developed with her daughter and grandson engaged Article 8 and gives cogent reasons for doing so. The Judge makes a finding as to compelling circumstances and the Judge correctly noted that the Appellant's daughter suffers from depression following a hysterectomy. The Judge took other factors into account as well as the delay.

8. In response Mr Richards said that in terms of proportionality and compelling circumstances the Judge's reasoning is exclusively devoted to delay. This was an error of fact amounting to an error of law.

9. I reserved my decision and both representatives agreed that in the event of an error of law being found there would be no additional facts to consider and that I should proceed to remake the decision based upon the evidence that was before the First-tier Tribunal.

## Error of law

10. The grounds of appeal to the Upper Tribunal assert a single error being that the Judge made a material misdirection in law. The misdirection alleged is a failure to identify compelling circumstances in accordance with Gulshan [2013] UKUT 00640 and Nagre [2013] EWHC 720 Admin. The Secretary of State adds in the grounds that there are no significant obstacles or insurmountable difficulties to prevent the Applicant from returning to Jamaica.

11. As Mr Richards rightly pointed out permission to appeal was granted for reasons that do not reflect the grounds of appeal. Permission was granted not on the basis of material misdirection of law but on the basis of inadequate reasoning. Indeed the detail of the error of law is equally unrelated to the grounds being in respect of the relationship between the Applicant and her daughter and the length of the delay by the Home Office. Grants of permission to appeal should not be made for reasons that are not asserted in the grounds of appeal, except in respect of Robinson obvious matters, and in an exceptional case where such disconnect has nevertheless occurred should, where appropriate, be rectified by an application to amend the grounds. There was no such application made before me.

12. Dealing first with the grounds of appeal the First-tier Tribunal found (at paragraphs 42 and 43) that the obstacles in the way of the Applicant returning to Jamaica are not insurmountable and that it cannot be said that she does not retain cultural or emotional ties there. It was not argued before me that there was any fault in these findings and this was not the basis upon which the appeal was allowed. It was a finding made by the Judge which was part of the matrix in which the proportionality assessment was conducted. There is no error of law in this respect.

13. Equally there can be no error of law in the alleged failure to identify compelling circumstances in accordance with Gulshan and Nagre. This is firstly because the jurisprudence in this regard has developed and is probably best now summarised in SS (Congo) and Others [2015] EWCA Civ 387 and Sunassee [2015] EWHC 1604. If the requirements of the rules cannot be met, and a judge finds that an Article 8 assessment outside them is required there does not need to be exceptional reasons or very compelling circumstances to justify carrying out the Article 8 exercise and it will usually be necessary to go through the Article 8 assessment to identify whether compelling circumstances exist. Paragraph 33 of the judgment in **SS (Congo)** provides guidance.

> "In our judgement, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM."

14. Secondly and in any event the Judge makes a specific finding, at paragraph 57, that there are compelling circumstances. The Judge having found that such circumstances exist it is not the remit of the Upper Tribunal to go behind such an assessment unless there is some perversity or irrationality or unless the finding was based upon a mistake as to a material fact (see R (Iran) [2005] EWCA Civ 982 para 9). There is no allegation of perversity or irrationality either in the grounds, the grant of permission or Mr Richards' submissions.

15. The grant of permission suggests that the First-tier Tribunal may have erred in finding that the family life enjoyed by the appellant, her daughter and her grandson did not engage Article 8. Mr Richards did not pursue this point in submissions. In my judgement the Judge correctly self directed at paragraph 44 referring to appropriate authorities including Kugathas v SSHD [2003] EWCA Civ 31 and reached a conclusion at paragraph 47 that was open to her. There is no misdirection in law and there is no inadequacy of reasoning.

16. So far as mistake of fact is concerned and whereas it is not raised in the grounds Mr Richards submitted on behalf of the Sectary of State that the Judge erred in focusing on the one issue of delay on behalf of the Home Office. The Judge's reasoning he said is exclusively devoted to delay and, bringing into the argument the terms of the grant of permission to appeal, any delay by the Home Office concerned the years 2010 to 2014 and not the 9 year period referred to by the Judge. Ms Moffat said that other matters had been taken into account and pointed out the Judge's attention to the other elements of the Applicant's claim.

17. To the extent that this can be considered to be a valid ground of appeal it is in my judgement misfounded. A careful reading of the decision and reasons shows that the Judge was under no illusion about the length of the delay or the responsibility for the delay. Paragraph 53 is illuminating in this regard

> "The appellant has been in the United Kingdom for 14 years. She came here legally in 2001 and remained her legally until June 2005 when her application for leave to remain was refused for breach of the conditions of her student visa. The reason for committing the breach, although laudable, does not exonerate and expunge the breach."

Paragraph 54 is equally helpful.

> "… The appellant stayed here for five years without leave, overstaying illegally. Whilst this is a serious matter which should not be overlooked, the remarkable failure of the respondent to deal with her request for reconsideration in 2010 cannot be ignored on the question of proportionality."

Further at paragraph 55

> "The Home Office should have been aware that the appellant was present in the UK between 200 and 2010. He file was 'live'. It was certainly aware between 2010 and 2014 when it finally dealt with her reconsideration request."

18. The First-tier Tribunal Judge found the Appellant's circumstances compelling and in doing so took account of the facts that were in existence and allowed the appeal by virtue of Article 8 ECHR. The challenge to the Judge's decision in the grounds of appeal is, for the reasons given above, not made out. Permission to appeal was granted for reasons not contained in the grounds. There was no application to amend those grounds. It was asserted in submissions, in the light of the grant, that the First-tier Tribunal based its proportionality assessment solely upon delay in doing so upon a mistake of fact. Neither assertion is correct. Whereas the finding of compelling reasons may have been predicated on delay the proportionality assessment as a whole was based upon the plethora of circumstances put forward on the Applicant's behalf. In dealing with delay there was no mistake of fact, the Judge demonstrated that she was fully aware of the factual matrix. There was in my judgment on error of law.

19. My conclusion from all of the above is that the Judge did not fall into error of law either as asserted in the grounds of appeal or oral submissions or as identified in the grant of permission to appeal.

**Summary**

20. The decision of the First-tier Tribunal did not involve the making of a material error of law. I dismiss the Secretary of State's appeal.

**Signed:** **Date:**

**J F W Phillips**
**Deputy Judge of the Upper Tribunal**