Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43380/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 September 2014	**On 5 February 2015**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ROCIO GONZALEZ LOPEZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Thoree of Thoree & Co Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Columbia. She appealed to a First-tier Judge against the respondent's decision of 5 October 2013 to remove her as an illegal entrant under section l0 of the Immigration and Asylum Act 1999.

2. The appellant came to the United Kingdom in 2001, overland from Spain in a lorry. Her entry to the United Kingdom was illegal and she has remained in the United Kingdom ever since. She came to join her daughter, also a Colombian national, who had arrived some months previously. Her daughter is now naturalised as a British national as is her husband and they have two children aged respectively 12 and 8.

3. In the decision letter it was said that the case was not considered under paragraph 317 of HC 395 as had been requested because the wrong kind of application and fee had been provided. The matter was therefore considered under the relevant provisions of the Immigration Rules which came into force on 9 July 2012.

4. The judge considered the decision in Edgehill [2014] EWCA Civ 402 and decided that paragraph 317 was applicable. The judge also considered the matter in respect of Appendix FM and in relation to the Razgar guidance as well as in respect of Article 8 outside the Immigration Rules.

5. The judge noted the appellant's evidence that she has suffered from epilepsy since she was around 25 years old (she was born on 4 September 1960) and was a single mother and had the one child, her daughter in the United Kingdom. She had lived with her daughter in Colombia until her daughter left in 2000 and she had followed her to the United Kingdom a year later because she missed her. She said that she entered the United Kingdom illegally on the back of a lorry and that as far as she understood it this was how her daughter had entered the United Kingdom in 2000 also.

6. She had lived with her daughter and grandchildren throughout her stay in the United Kingdom. She produced evidence in respect of the epilepsy from which she suffers and the treatment she has received while in the United Kingdom. She had never worked while in the United Kingdom and had been entirely supported by her daughter and son-in-law and had always been part of her daughter and grandchildren's lives and they had a special bond with one another. She took the children to school and collected them every day and helped them regularly with their homework.

7. In 2007 her granddaughter Nicolle was diagnosed with a kidney tumour and the appellant was there to support her and the child's mother emotionally. She said that she did not have a home to return to in Colombia as the house she lived in prior to coming to the United Kingdom was rented. She had no family in Colombia and in cross-examination she said she had no brothers or sisters and her parents and aunts and uncles were all dead. There would be death certificates available but she had not obtained them. It would not be practical for her to return to Colombia and for her daughter to send remittances to her and visit her from time to time because she had no home to go to in Colombia. She had never been hospitalised on account of her epilepsy and the last time she was taken to hospital following a seizure was quite some time ago. She had

experienced her last convulsion at home as recently as the week before the hearing.

8. The appellant's daughter said that she had always lived with her mother apart from the few months when she came to the United Kingdom ahead of her mother. She and her mother were heavily emotionally dependent upon one another. She was very worried about the prospects of her mother returning to Colombia. In cross-examination she said that she had come to the United Kingdom on a tourist visa and not as in her mother's evidence, illegally in a lorry. When asked about this she said her mother did not know and that her mother would just have assumed that was the way she came in and she was forgetful.

9. The judge considered that there was a glaring inconsistency between the evidence of the sponsor and the appellant as to the manner and purpose of the sponsor's original entry into the United Kingdom in 2000. She said that the appellant was quite clear that her daughter had entered illegally overland via a lorry and that was entirely at odds with her daughter's claim that she had come to the United Kingdom on a tourist visa. The judge considered that it was the inconsistency between the two accounts which undermined both versions of events. She considered that the Presenting Officer's questioning was to the effect that it was not at all likely that a tourist visa would be given to somebody to visit the United Kingdom for a period of a year and that that further undermined the sponsor's claim to have come to the United Kingdom lawfully. She accepted the evidence that the mother and daughter were undoubtedly very close, and the idea that the appellant would not have known the journey that her daughter was about to undertake to the United Kingdom or had undertaken to the United Kingdom was regarded as nonsensical. The judge therefore concluded that in a very significant manner both appellant and witness had sought to conceal the purpose and method of what she concluded was a pattern of unlawful migration to the UK for economic betterment and in those circumstances regretted that she must give little weight to the other features of the account such as the claim that there were no relatives in Colombia which was a claimed fact which underpinned the entire basis of the appeal.

10. The judge went on to say that the appellant could properly advised have obtained from Colombia copies of the death certificates of the only relatives she claimed to have in Colombia and any evidence from other relatives living abroad in Spain and the US and had not done so. There was, the judge commented, an entire lack of documentary evidence to show that the appellant would be without family members on return to Colombia, in circumstances where she would have expected at least some efforts to have been made to demonstrate the truth of this. She had concluded that her account in at least one important point was unreliable and that it was highly unlikely that such evidence that she had suffered such an unfortunate series of bereavements did not exist and therefore the claim that she had no one at all in Colombia to turn to was at best an

assertion and certainly was not shown to the required standard of proof. The judge considered that she had been told little of the appellant's life in the UK. There were letters of reference but the people who wrote them did not explain how they knew her and were usually short and simply reiterated her good qualities and her devotion to her grandchildren.

11. The most recent substantive evidence from University College Hospital in March 2005 was to the effect that her epilepsy was being managed without seizures successfully with drugs. There was no up-to-date medical evidence and the most recent report of May 2014 recorded a stable medical condition with routine drugs taken daily.

12. Thankfully there was no evidence of any recurrence of Nicolle's cancer and it was more likely than not that she had been given the all clear.

13. The judge went on to say at paragraph 81 that in the circumstances in which this family had chosen to live in exile from their home country and with the appellant financially dependent on the family they would have developed a closeness beyond that which perhaps occurred where adult relatives lived separately and without daily engagement in each other's lives. She said that she also bore in mind that the appellant's evidence was less than reliable on certain aspects and it would undoubtedly have been in the witnesses' interests to have emphasised the mutual dependence of the adult family members.

14. A matter on which the judge had no doubt at all was the undoubted affection which the appellant's grandson has for her which, as the judge said was made plain by his courageous and emotional plea to the judge at the hearing. He said that he believed that her presence in his life was essential for his future wellbeing but the judge felt able to say that he was without doubt an able young man who would succeed in the future.

15. With regard to the paragraph 317 issue, the judge noted that the appellant's son-in-law had said that at his current level of income he would be able to send remittances to his mother-in-law for her to live in Colombia. The judge considered that her health was managed well as an outpatient and that the necessary drugs were available in Colombia. She had not shown to a required standard of proof that she had no close relatives in her own country to whom she could turn. The claim could not succeed under paragraph 317.

16. As regards Appendix FM, the appellant could not succeed bearing in mind the provision that an applicant had to be in the United Kingdom with a valid entry clearance as an adult dependent relative. Paragraph EX.1 was freestanding as had been held by the Upper Tribunal in Sabir. She could not meet the requirements of paragraph 276ADE, and had not shown that she had no ties with the country to which she would have to go. Consideration was given to the best interests of the children under section 55, and the judge concluded that the best interests of the children were to

remain living as British citizens with their British citizen parents and there was no suggestion they would have to follow their grandmother to Colombia. They would continue to have a full family life with their parents and would remain in contact with their grandmother and when finances permitted would no doubt visit her as well.

17. Finally the judge went on to consider proportionality in respect of the Razgar guidelines, and concluded that the proposed interference with the established family or private life would be proportionate. On the one hand there was the strong relationship with the grandchildren. On the other side there was the considerable pubic interest in the maintenance of effective immigration control. The appeal was dismissed.

18. The appellant sought and was granted permission to appeal on the basis that arguably the judge had provided inadequate reasons for not accepting that the appellant's claim to have no relatives in Colombia because she found that she and her sponsor had sought to conceal the purpose and method of what the judge concluded was a pattern of unlawful migration to the United Kingdom. It was noted by the judge who granted permission that the determination recorded the appellant had given evidence that she had entered the country unlawfully and that she thought her daughter had done the same and that it was not clear upon what basis the judge had found that the appellant had sought to conceal a pattern of unlawful migration.

19. In his submissions Mr Thoree argued that the adverse finding did not go to the heart of the claim and the issue in question would not have affected the appellant's credibility. There had been no misrepresentation to the judge. The finding had distorted the judge's decision and hence there was an error of law. The evidence was that she had no family in Columbia and there was no one there to send death certificates to her and her son-in-law and daughter's evidence corroborated what she said. Again this had distorted the judge's findings. She would be returned in the most exceptional compassionate circumstances bearing in mind that she would be alone and with her illness and would have no one to look after her and this would amount to the most exceptional compassionate circumstances.

20. There was no requirement under the old Rules that she should have entry clearance. The judge had made findings, with regard to Article 8, concerning the degree of closeness of the family. There was a Kugathas situation where relationships went beyond the normal family ties. If there were such a relationship then in the balancing act that would tip the balance in her favour. There were also the findings in respect of the children. There required to be a balance under Appendix FM between the legislative aim of economic wellbeing etc. and the individual circumstances. She was not a criminal but had just remained in the United Kingdom unlawfully and had sought to regularise the situation. There was a need to safeguard the welfare of the children. Properly done the consideration of the best interests of children would have found that the

impact on their best interests was such that the appeal should have succeeded. If a person did not meet the Rules, as held in Gulshan, it was necessary to decide whether there were exceptional circumstances and it would be unjustifiably harsh for individuals or their family. She should have been found to be credible. The decision should be re-made and allowed.

21. In his submissions Mr Nath referred to the references in the determination concerning the issue about entry and there had clearly been detailed reference to the evidence given by the witnesses. Those were the facts of the case and the judge had made a finding which was open to her. The judge had noted the financial dependency. If there were no relatives in Colombia then that should be shown. The judge had considered the medical evidence. The appellant's condition was stable. Exceptional circumstances had been considered. The judge had considered matters under Appendix FM of the new Rules in the alternative and also Article 8 outside the Rules. The decision was sound.

22. By way of reply Mr Thoree argued that there had been no concealment. They had said how they came so it was wrong to make an adverse credibility finding on that. The application had been made in August 2009 and refused in 2010 and there had been significant delay due to judicial review in the Home Office and that had cost the appellant and she could have been dealt with under the older more generous Article 8 provisions. The decision in Shala was relied on in respect of delay.

23. I reserved my determination.

24. I consider first the credibility issue. The judge at paragraph 27 of her determination noted the appellant's evidence that she had entered the United Kingdom illegally in the back of a lorry and that as far as she understood it this was the manner in which her daughter had entered the United Kingdom in 2000. In cross-examination the appellant's daughter said that she had come to the United Kingdom on a tourist visa and not illegally in a lorry and when she was asked about this she said her mother did not know and that her mother would just have assumed that this was the way she came in and was forgetful.

25. In relation to this the judge commented that this was the most glaring inconsistency in the evidence, and noted this in the context of her acceptance that the mother and daughter were undoubtedly very close. She did not accept that the appellant would not have known the journey that her daughter was about to undertake to the United Kingdom or had undertaken, considering that that was nonsensical. She also noted that it was unlikely that a tourist visa would be given to someone to visit the United Kingdom for a period of a year.

26. It may have been going a little far to suggest as she did in paragraph 72 that it was in a very significant manner that both witnesses sought to

conceal the purpose and method of what she concluded was a pattern of unlawful migration to the United Kingdom for economic betterment, but I consider that it was clearly open to her to find that there was a lack of credibility in their evidence in account of the discrepancy between the two accounts and to bear that in mind when assessing the rest of the evidence, as she did.

27. With regard to the issue of whether or not there were relatives in the United Kingdom, the judge noted that it would have been open to the appellant to have obtained copies of the death certificates of the only relatives she claimed to have had there and evidence from other relatives living abroad in Spain and the United States of America, and she had not done so. Mr Thoree made the point that she had no one left in Colombia and that there was evidence given by her daughter and son-in-law to support what she said, but again I consider the judge was entitled to attach weight to the absence of evidence of a documentary nature to prove the appellant's contention. She was entitled to take into account in this regard the discrepancy noted above in assessing the credibility of the appellant's claim.

28. In light of this I consider it was clearly open to the judge to find that the appellant could not succeed in meeting the requirements of paragraph 317 of HC 395 since she had not shown that she would be living alone in the most exceptional compassionate circumstances and had no other close relatives in Columbia. She had not discharged the burden of proof in that regard, as it was properly open to the judge to find.

29. The judge went on to consider the position in respect of Appendix FM and as she noted at paragraph 83(c), the appellant could not succeed given that she was in the United Kingdom otherwise than with a valid entry clearance as an adult dependant relative. She rightly noted that in accordance with the decision in Sabir, the provisions of EX.1 do not operate as a freestanding provision but are parasitic upon the main Rule. The judge properly concluded that the requirements of the Rules could not be met in this case. She went on also to consider Article 8 outside the Rules and gave this issue proper consideration in paragraphs 85 and 86 of the determination. She took account of both sides of the balance and concluded that the balance fell on the side of proportionality of the proposed interference with the established family or private life. Again that was a conclusion that was open to her. I do not think there is anything in the point Mr Thoree raised late in the day about delay. It is true that there was a gap of several years between the application for leave to remain and the decision of 5 October 2013, that there was a judicial review of an earlier decision and clearly that had some effect on the passage of time. I do not consider delay to be a material point in this case. Accordingly, for the reasons above, I consider that the judge has not been shown to have erred in law and her decision dismissing this appeal is upheld.

Signed Date

Upper Tribunal Judge Allen