



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/50490/2013

**THE IMMIGRATION ACTS**

**Heard at Columbus House,  
Newport  
On 28<sup>th</sup> January 2015**

**Determination Promulgated  
On 18<sup>th</sup> February 2015**

**Before**

**UPPER TRIBUNAL JUDGE POOLE**

**Between**

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

Appellant

**and**

**MISS PRISCILLA NOLUTHANDO LUBELWANA**

Respondent

**Representation:**

For the Appellant: Mr Irwin Richards, Home Office Presenting Officer

For the Respondent: In person

**DETERMINATION AND REASONS**

1. In this appeal I will refer to the parties in the style in which they appeared before the First-Tier Tribunal.
2. The appellant is a female citizen of South Africa, born 3 September 1956. She applied for indefinite leave to remain in the United Kingdom as Tier 2 (General) Migrant. Her application was refused by the respondent on 18 November 2013. The appellant appealed that decision and the matter came before Judge of the First-Tier Tribunal Powell sitting at Newport on

18 August 2014. In summary Judge Powell found that the appellant could not succeed in her appeal under the rules, but he allowed her appeal by reference to Article 8 ECHR. In dismissing the appeal under the rules the judge found that the appellant's salary was not sufficient to meet the annual income required as set out in the Immigration Rules.

3. The appellant did not seek to challenge the judge's decision in respect of her appeal under the rules, but the respondent did seek leave to appeal in respect of the decision made by Judge Powell in allowing the appeal under Article 8.
4. The grounds seeking leave allege that the judge made a material error of law in respect of his assessment of the family life and private life of the appellant. It is also suggested that the judge had erred by applying a "near miss" view in respect of the appellant's salary. The grounds refer to the reported case of **Nasim & Others (Article 8) [2014] UKUT 0025 (IAC)**.
5. In granting leave to appeal another judge of the First-Tier Tribunal found an arguable error of law in the way the judge dealt with both family life and private life, again by reference to the case of **Nasim**.
6. Hence the matter came before me in the Upper Tribunal.
7. The appellant had been legally represented before Judge Powell, but has decided to represent herself before the Upper Tribunal. Her previous advisors had produced a bundle of documentation.
8. At the start of the hearing I explained the procedure in detail to the appellant. She clearly understood the proceedings.
9. Mr Richards then drew my attention to the application for leave. That application had clearly been lodged out of time, the judge granting leave had not dealt with that issue. Mr Richards invited me to consider sitting as a First-Tier Tribunal judge to consider that aspect of the application and to deal with it before moving onto the substance of the application. I expressed my gratitude to Mr Richards for very fairly raising this point. I endeavoured to explain this to the appellant. Miss Lubelwana raised no objection.
10. In sitting in the First-Tier I noted that the application for leave contained an explanation of illness preventing the Secretary of State's representative returning the application in time. I consider that it would be appropriate to accept that explanation and that it would be unjust not to extend time, and that time would therefore be extended.
11. In his submission regarding an error of law Mr Richards relied upon the grounds seeking leave. With regard to family life the judge was wrong to

find that the appellant had a family life with her daughter. There was no emotional ties beyond the norm.

12. As to the issue of private life, Mr Richards submitted that the judge had contradicted himself at paragraph 45 of the determination and viewed with his findings at paragraphs 55 to 57. The judge had failed to properly consider **Nasim**. That case had found that the use of Article 8 had very limited use for private life cases which did not interfere with a person's moral and physical integrity. The judge had been over influenced by the appellant's employment and had adopted a "near miss" consideration.
13. In her response the appellant referred in detail to a relationship with her grandson and her daughter. The daughter was dependent upon her for reason of her mental illness.
14. At the end of the hearing I announced that I found no material error of law and that the appeal of the respondent was accordingly dismissed.
15. It is necessary for me to explain my reasoning.
16. The decision of Judge Powell in respect of the appellant's substantive appeal under the rules is not challenged by the appellant. He found at paragraph 32 that the appeal was bound to fail.
17. Dealing with the challenges made by the respondent as advanced by Mr Richards. I do not consider that the judge contradicted himself. Paragraph 45 is merely a statement of fact. One that was not in issue. This does not conflict with paragraph 55, as in this paragraph the judge was merely dealing with an argument advanced by the Presenting Officer who appeared before him. Clearly the respondent's initial decision refusing the application was a legitimate decision. Had it not been so the matter would have ended there.
18. I do not consider that the judge came to an eventual decision on the "near miss" principle. When read as a whole, the decision was clearly not taken as a consolation prize. In weighing up the evidence the judge clearly considered that the appellant had sufficient financial means so as not to be a burden on the state whether by reason of income or accommodation.
19. It is not the respondent's case that Judge Powell should not have considered a stand alone Article 8 appeal. The argument is how he dealt with that aspect and it is alleged that he erred both with regard to his assessment of family life and private life.
20. Had Judge Powell based his decision entirely on private life, it may well be that he ran foul of the views expressed in **Nasim**. However, the judge clearly based his decision with regard to the appellant's family life.

21. The evidence accepted by the judge related to the appellants relationship, both with her adult daughter and with her adult daughters son. The judge did not specifically consider **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**. However, that decision was clearly in his mind because he has detailed the daughter's mental condition and clearly has found that something more exists than normal emotional ties. The appellant's evidence was that in times of crisis the daughter turned to her. Judge Powell clearly took the view that this relationship went beyond normal emotional ties. He was entitled to reach that conclusion.
22. As to the grandchild, Judge Powell quite properly explained the effect of the adoption order, but did note that the adoption was by a family member and for all practical purposes the relationship between the appellant and the child remained the same.
23. Judge Powell, at paragraphs 37 onward, sets out the evidence and he had made clear findings from that evidence based on the appellant's family life. I note that at paragraph 40 he expresses the view that the relationship with the grandson could not be classed as family life because of the adoption, but he seeks at paragraph 41 to argue that this amounts to private life. I am not sure the judge is correct, however he has come to clear views with regard to the relationship between the appellant and the child, and I consider that to be the important aspect rather than entering into a artificial argument between what amounts to private life and what amounts to family life. However that does not alter the overall outcome of the appeal.
24. The judge has undertaken a balancing exercise and in doing so noted the income of the appellant following his review of the effect of the Immigration Act 2014, as set out in paragraph 47 of the determination.
25. For these reasons, I consider that Judge Powell was entitled to reach the conclusions that he did. The grounds advanced by the respondent amount to nothing more than disagreement with the judges findings. There is no material error of law contained within the determination.

### **Decision**

26. The Secretary of State's appeal is dismissed and the decision of Judge Powell must stand.

Signed

Date **18<sup>th</sup> February 2015**

Upper Tribunal Judge Poole