IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19226/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 December 2015	**On 27 January 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MRS SANDRA ELAINE BELL (MCLEANE)
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Querton instructed by Anthony Ogunfeibo & Co Solicitors
For the Respondent: Mrs N Willocks-Briscoe, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a Jamaican citizen, appeals with permission against the decision of the First-tier Tribunal, dismissing her appeal against the respondent's refusal of leave to remain in the United Kingdom on Article 8 ECHR private and family life grounds pursuant to paragraph 276ADE, alternatively outside the Rules on the basis of the line of decisions beginning with *Nagre*.

Background

2. The appellant, who is 53 years old, came to the United Kingdom as a visitor in 2001 and successfully applied for her visit visa to be extended to 21 March 2002, to enable her to care for her uncle here. When her extended visit visa expired, the appellant did not embark for Jamaica.

3. She next applied for indefinite leave to remain outside the Rules in June 2004, on the basis that her children were in the United Kingdom. That was refused with an in-country right of appeal, which the appellant exercised. Appeal rights were exhausted in January 2007, but again, the appellant did not embark for her country of origin.

4. Over 6 years passed. In November 2013, the appellant applied again for leave to remain on family and private life grounds. The appellant has two children, a son who has indefinite leave to remain, and a daughter. The appellant is not living with her son. She also has a step-daughter here. Both her children and her step-daughter were adults at the date of decision. The appellant asserted that she had a heart condition for which she was receiving medication, but no evidence of that accompanied her application. The respondent considered the application, within the Rules and on exceptionality grounds outside the Rules, but in December 2013, she refused leave to remain, with an in-country right of appeal, which the appellant exercised.

First-tier Tribunal decision

5. The First-tier Judge heard oral evidence from the appellant and her daughter (paragraphs 20 to 32 of the decision). Having considered the evidence, and the submissions made, the First-tier Tribunal Judge noted the appellant's immigration history. She had remained in the United Kingdom unlawfully for two years before making an application in 2004 for indefinite leave to remain which was refused and on which appeal rights were exhausted in 2007. The 2007 decision of the Asylum and Immigration Tribunal is not before me and was not before the First-tier Tribunal.

6. The judge found that the appellant had met the man who is now her husband in 2007, and that by 2010 or 2011, he was aware that that she was in the country without leave. They married in 2013, in the knowledge on his part that the appellant did not have leave to remain.

7. The First-tier Tribunal accepted that the relationship was genuine and subsisting but considered that no evidence had been presented to show why family life could not continue in Jamaica. The judge made an error of fact by directing himself that the appellant's husband had been born in Jamaica; he was born in the United Kingdom and is a British citizen, but has visited Jamaica twice, in the 1980s and 1990s. The appellant advanced no evidence to support the assertion that the family could not settle in Jamaica.

8. The Judge found that the appellant, and her husband, were living together with both her son and her daughter, as well as her step-daughter. All of

the children are adults. The appellant relied on the mental health and social difficulties experienced by her natural daughter, arguing that the dependency demonstrated was sufficient, on *Kugathas* principles, to amount to family life between mother and adult child.

9. The Judge then went on to deal with part 5A of the 2002 Act: at paragraph 117A the court is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 and would be unlawful under Section 6 of the Human Rights Act 1998. He applied section 117B (see paragraph 40) and directed himself that the family life between the appellant and her husband 'cannot be considered'. He noted that the appellant and her husband did not yet have sufficient earnings to meet the requirements of the Rules but that 'This is matter for the future application and cannot be relied upon as a factor warranting a decision in the appellant's favour'. He then directed himself at paragraphs [41]-[42] as to the test for the exercise of the respondent's discretion outside the Rules, but reached no clear decision thereon. His self-direction is not wrong but the decision is not complete: there seems to be a deciding paragraph missing.

Permission to appeal

10. Permission to appeal was given on the basis that the First-tier Tribunal Judge had arguably failed adequately to address Article 8 ECHR, alternatively applied too high a test when considering family and private life between the appellant and her adult children.

Rule 24 Reply

11. The respondent opposed the appeal and filed a rule 24 Reply, relying inter alia on the refusal of permission by First-tier Tribunal Judge Astle. The basis of the refusal of the first application is not a proper challenge to a grant of permission on the renewed application and I disregard that element of the Rule 24 Reply.

12. The core of the Reply is as follows:

> "2. … Judge Khan took into consideration all the relevant evidence and it was based on accepted legal principles and relevant case law that the Judge declined to go further and consider a free standing Article 8 claim. It was open to the Judge notwithstanding the medical issues surrounding the appellant's daughter to find that the support did not go beyond the normal emotional ties. *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 (21 January 2003).
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> 3. The grounds have no merit and merely disagree with the adverse outcome of the appeal. The Judge considered all the evidence that was available to him and came to a conclusion open to him based on that evidence and the Rules, based on the balance of probability and does not disclose any error. …"

13. That was the basis on which this appeal came before me. I note that pursuant to the directions to parties issued by the Upper Tribunal on 24 November 2015 no Rule 15(2A) application has been made to admit

further evidence, so I make this decision on the evidence which was before the First-tier Tribunal.

Submissions

14. For the appellant, Ms Querton relied on *Vikas Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630, *Singh v The Secretary of State for the Home Department* [2015] EWCA Civ 74, *MM & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2014] EWCA Civ 985, *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 and *Dube* (ss.117A-117D) [2015] UKUT 90 (IAC). She argued that the appellant's application should not be regarded as damaged by the requirements in paragraph 117B(2) and (3) since she was fluent in English and had never been a burden on the United Kingdom state. Her husband worked and the couple were financially independent. Her family life with her husband had not been taken into account: he was United Kingdom born and had lived here all his life, which was a strong and relevant consideration.

15. As regards her natural daughter, the appellant relied on the medical evidence overlooked by the First-tier Tribunal Judge, which showed that she had anxiety and panic attacks, and that the daughter depended on the appellant for moral support. The Judge had not taken those matters into account. Whether or not there was family life was not a simple question and must be weighed properly, which she submitted that the First-tier Tribunal Judge had failed to do. Nor was the relationship with other family members properly analysed and taken into account: they were still living in the family home and those relationships were material to the outcome of the appeal.

16. For the respondent, Mrs Willocks-Briscoe argued that the Judge had given adequate reasons and that there was no evidence in the appellant's bundle regarding circumstances in Jamaica. All that underpinned her argument was a bare assertion that the appellant could not receive adequate treatment there and it was not reasonable to expect her to leave her extended family in the United Kingdom to return to her country of origin.

17. Mrs Willocks-Briscoe accepted that the Judge had not gone on to decide on Article 8 outside the Rules and relied upon paragraph [27] of the decision of Mr Justice Edis in *Sunassee, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Ano*r [2015] EWHC 1604 (Admin), that 'a proper decision may seem mystifying if expressed in unsuitable language'. Reliance on paragraphs 117B(1) and (2) did not of itself dilute the public interest. The Tribunal was required to consider whether weighty factors outside the Rules had been shown.

18. In reply, Ms Querton repeated her assertion that it was an error of law for the Judge to have failed to make any finding on Article 8 outside the Rules, despite having made a proper self-direction.

Discussion

19. I accept that this decision is not well drafted: the Judge misdirected himself as to where the appellant's husband was born, omitted the medical evidence concerning the appellant's daughter, and failed to complete his Article 8 reasons outside the Rules.

20. The appellant's reliance on sub-paragraphs 117B(2) and (3) does not assist her case: compliance with those tests is not determinative of an application, as set out by the Upper Tribunal in *AM* (S.117B) [2015] UKUT 260 (IAC) at (2) in the judicial headnote:

> "(2) An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources."

21. Paragraph 117B(4) and 117B(5) deal with the weight to be given to certain relationships. The relevant sub-paragraph for this appeal is sub-paragraph 117B(iv):

> "117B(iv) Little weight should be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully".

22. The appellant's partner is British-born and a British citizen. As regards the birthplace of the appellant's husband, that is a finding of fact not a finding of law, and is relevant only if weight is capable of being attached to the relationship. At the time when the appellant formed her relationship with her husband, in 2007, she was in the United Kingdom unlawfully. Accordingly their family life can be given little weight, and the error regarding his place of birth falls away from consideration.

23. As regards private life, whether a person is in the United Kingdom unlawfully, paragraph 117B(4) or precariously, paragraph 117B(5) little weight can be given to such private life.

24. It is clear, therefore, that whether the claimed *Kugathas* dependency of the appellant's daughter is sufficient to amount to family life is crucial to the appellant's attempt to stay in the United Kingdom, because only if she has family life with her adult daughter, which would not be affected by the statutory presumptions in section 117B, can the claim succeed. The judge's reasons at paragraph 39 for finding that family life did not exist were based on the material before him and the oral evidence that he heard from the parties and were unarguably open to him on that evidence.

25. I have considered whether a review of the medical evidence, which the Judge did not consider, avails the appellant. The medical evidence from South West London and St. George's Mental Health NHS Trust Service shows that in March 2014 the appellant's daughter was unable to attend

her College or undertake her coursework because she had anxiety and panic attacks for a period of 3 weeks. She began taking antidepressants, which worked well, because in May 2014 she was discharged from the Trust's mental health service, with a recommendation to keep using the strategies and ideas she had learned: her scores on the PHQ-9 depression scale had reduced from 20 to 2 and on the GAD-7 anxiety scale from 17 to 2, now indicating sub-clinical levels of depression and anxiety. A report from her College stated that the appellant's daughter "engaged well with the course and regularly contributed to discussions". She had the option of a three months' booster session and self-referral in future if she considered it appropriate. The evidence is of a temporary problem, resolved by treatment and with future support available.

26. By 2015, the evidence was that the appellant's daughter was working part-time, studying psychology and receiving counselling and now had the support, not just of her father, brother, half sister and mother, but of her partner, with whom she planned to live in the near future, and with whose child she was pregnant. The omitted evidence does not undermine the First-tier Tribunal's finding that the support needed by the appellant's daughter from her mother amounted to no more than normal emotional ties.

27. Overall therefore, there is no relevant private or family life to which more than "little weight" can be given.

28. The next question is whether there are any exceptional or compelling circumstances outside the Rules to which the *Nagre* principles apply. In this respect, it is right that the Judge set out the test, but made no finding whether any exceptional or compelling compassionate circumstances exist. I have been taken to the decisions of the Court of Appeal in *Nagre* at [29] and [49], *MS (Nigeria)* at [42] and [46], *MM (Lebanon)* at [129] and [135], *Dube* at paragraph (e) of the head note, *Sunassee* at 27 and 36, *Vikas Singh and Another* at [24]-[25] and *Singh and Khalid* at [3] and [64] thereof. The thrust of all of the Article 8 authorities is that there must be something compelling over and above the matters covered by the Rules and that it is a question of fact for the relevant decision-maker whether such factors exist.

29. The most useful formulation is probably in *Singh and Khalid* at [63]-[64]:

> "63. The first case is the decision of this court in *MM (Lebanon)*. The only substantive judgment is that of Aikens LJ with whom the Vice-President, Maurice Kay LJ, and Treacy LJ agreed. Most of the issues with which the case is concerned are wholly remote from those in this appeal, but in one section of his judgment Aikens LJ had to consider *Nagre*. In paragraph 129 he refers to Sales J having said that 'if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules': that is evidently a paraphrase of the second half of paragraph 29 of Sales J's judgment. He continues:
>
> > 'I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is

> or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.'
>
> Mr Malik submitted – this being his second ground of appeal in Ms Khalid's case – that this short passage undermined the entirety of Sales J's point about a full separate consideration of Article 8 not always being necessary.
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> 64. In my view that is a mis-reading of Aikens LJ's observation. He was not questioning the substantial point made by Sales J. He was simply saying it was unnecessary for the decision-maker, in approaching the 'second stage' to have to decide first whether it was arguable that there was a good Article 8 claim outside the Rules – that being what he calls 'the intermediary test' – and then, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Sales J as intending to impose any such intermediary requirement, though I agree with Aikens LJ that if he was it represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that there is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules." [Emphasis added]

30. It would have been open to the First-tier Tribunal to decide that no separate Article 8 ECHR examination was required, or to insert a further paragraph making the decision outside the Rules. No such paragraph exists and the next paragraph is the dismissal of the appeal. Given the other errors in the decision, in particular the failure to set out the medical evidence, I am not satisfied that the First-tier Tribunal's reasoning is sufficiently sound to be sustainable. I set aside the decision and proceed to re-make it on the basis of the material before me.

Remaking the decision

31. As already stated, the Judge was entitled to find, and I find, that there was no family and private life unaffected by the 'little weight' requirement in section 117B(4) and 117B(5). Nor, on the evidence, were there exceptional or compelling circumstances: the only exceptional circumstances advanced relate to the appellant's adult daughter who has short-lived problems with anxiety and depression which were successfully treated in 2014 and which were asserted, but not shown, to have recurred in 2015.

32. Any dependency by the appellant's daughter on her mother does not approach the high standard required for Kugathas dependency. This young woman still lives at home but she has her father, also her brother and her half-sister living there too, and in addition, at the date of decision, she was in a relationship with another person as a result of which she is now a mother herself. She can depend on her partner, as well as other members of her family, should she need to in the future, and she also has the support of her NHS Trust if required.

33. Nor do I consider that these circumstances are exceptional or compelling compassionate circumstances, for which the Secretary of State should consider exercising her discretion outside the Rules. The case is simply too weak and the evidence too poor on that point to amount to exceptional circumstances. I therefore substitute a decision dismissing the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. I re-make the decision in the appeal by dismissing it.

Signed: Judith AJC Gleeson Date: 25 January 2016
Upper Tribunal Judge Gleeson