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

THE IMMIGRATION ACTS

Heard at Field House | **Decision & Reasons Promulgated**
On 30 June 2016 | **On 28 July 2016**

Before

Mr H J E LATTER
DEPUTY UPPER TRIBUNAL JUDGE

Between

ROCIO GONZALEZ LOPEZ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Thoree, Solicitor, Thoree & Co Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing her appeal against the respondent's decision made on 5 October 2013 to remove her as an illegal entrant. The appeal has been remitted to the Upper Tribunal for further determination by order of the Court of Appeal dated 11 May 2016.

Background

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2. The appellant is a citizen of Colombia born on 4 September 1960. On her account she entered the UK in 2001 travelling overland from Spain by lorry, making a clandestine entry into the UK. She came to the UK to be with her daughter, who had arrived some months previously.

3. Her daughter is now naturalised and is a British citizen as is her husband, who also came to this country from Colombia. They have two children, a son born on [ ] 2001 and a daughter born on [ ] 2005, both British citizens. According to the statement of the appellant's daughter, she came to the UK in March 2000 and started a relationship with her partner. She became pregnant with their first child. The appellant came to the UK in May 2001 and moved in with her and her partner. She and her husband work regularly and the appellant has been like a full-time parent to the children, who have a special bond with and are very close to her.

4. The appellant made no attempt to regularise her status in the UK until 14 August 2009 when she submitted an application for leave to remain as a dependent relative under para 317 of the Rules. This application was refused in a decision dated 24 February 2010 but there was no right of appeal as no removal decision was made. On 11 March 2010 her representatives wrote to the respondent requesting "a proper immigration decision" which would attract a right of appeal. This was not forthcoming and the appellant's solicitors issued judicial review proceedings. Permission to apply was granted on 12 August 2010 and following a long delay the proceedings were settled by consent on 17 July 2013, when the respondent agreed to issue a removal decision within three months of the order.

5. Accordingly, a decision was made dated 5 October 2013 refusing the appellant leave to remain and making a decision to remove her. The appeal against this decision was heard by the First-tier Tribunal on 15 May 2014. The judge attached considerable weight to the fact that there was a discrepancy in the evidence of the appellant and her daughter as to whether the daughter had made an illegal entry into the UK. Whilst the appellant was clear in her evidence that her daughter had entered illegally overland via a lorry, it was her daughter's account that she had come to the UK on a tourist visa.

6. In the light of this discrepancy the judge took the view that she must give little weight to other features of the account such as the claim that the appellant had no other relatives in Colombia, a fact which underpinned the entire basis of the appeal. Accordingly, she dismissed the appeal. Permission was granted to appeal to the Upper Tribunal but it was found that the judge had not erred in law. There was a further appeal to the Court of Appeal which was settled by consent, the parties agreeing that the Upper Tribunal erred in law by endorsing the First-tier Tribunal's approach in using the discrepancy in relation to the daughter's mode of travel and entry into the UK as a basis for rejecting the appellant's other

evidence. In these circumstances, the appeal was remitted to the Upper Tribunal for a further determination in accordance with the law.

7. At the hearing before the First-tier Tribunal the judge had followed the judgment of the Court of Appeal in Edgehill v Secretary of State [2014] EWCA Civ 402 and considered whether the appellant was able to meet the requirements of para 317 of the rules before the amendments of July 2012. She found that the appellant could not do so. She then went on to consider article 8 but found, assuming article 8 applied, that removal would be proportionate to a legitimate aim.

8. Subsequent to the hearings before the First-tier and the Upper Tribunal, the Court of Appeal in Singh and Khalid v Secretary of State [2015] EWCA Civ 74 has resolved the position of whether and when there were transitional provisions requiring the Tribunal to consider the positions under the rules in force prior to the July 2012 amendments. In short there was a limited time window between 9 July 2012 and 6 September 2012 when transitional provisions were in force. In respect of decisions made by the respondent on any other date, applications were to be assessed by reference to the Rules in force at the date of decision. It follows that when the First-tier Tribunal considered this appeal the rules to be considered were the amended Rules as set out in the respondent's decision letter.

Submissions

9. At the hearing before me the appeal proceeded by way of submissions only. Mr Thoree did not seek to argue that the appellant could meet the requirements of the amended Rules but relied on article 8. He submitted that the appellant had established that she had family life with her daughter, son-in-law and in particular her two minor grandchildren. The appellant now had no family living in Colombia and if she had to return she would have nowhere to live and no-one to look after her. Taking into account her medical condition, the fact that she had been so involved in looking after her grandchildren and the nature and extent of the relationship between them it would be disproportionate for her to be removed.

10. Mr Walker submitted that the respondent had been clearly correct to refuse the application on private life grounds for the reasons set out in the decision letter of 5 October 2013. He accepted that there was evidence of long residence in the UK, although in the decision letter of 24 February 2010 the respondent had only found residence evidenced since 2004. He accepted that there was evidence of strong family ties and that the substantial issue was whether removal would be disproportionate.

Assessment of the Issues

11. It is accepted that the appellant cannot meet the requirements of the Rules. I must take into account the fact that the Rules as amended in July

2012 and subsequently amended are intended to reflect how the balance should be struck under article 8 between the right to respect for private and family life and the legitimate aims set out in article 8(2), in particular, protecting the economic well-being of the UK. I must therefore assess the appeal on the basis that the Rules maintain in general terms a reasonable relationship with the requirements of article 8 in the ordinary run of cases but there will be cases which disclose compelling circumstances such that there is a good claim under article 8 outside the Rules: see para 40 of Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387.

12. I must consider firstly whether there is family life within article 8(1). I remind myself that an assessment of family life requires a fact-sensitive approach: see paras 23 – 26 of R (Gurung) v Secretary of State [2013] EWCA Civ 8. I accept that the appellant has lived with her daughter and family since her arrival in the UK. She has taken on much of the day-to-day care of her grandchildren as her daughter and her son-in-law have both worked regularly. I accept the evidence that the children have a special bond with their grandmother noting the evidence of her grandson before the First-tier Tribunal at [53] – [54], evidence accepted by the judge at [82]. There is a further letter at 45 of the supplementary bundle and also a letter from the appellant's granddaughter at 44. The appellant, her daughter, her son-in-law and their children have to all intents and purposes lived together as a family unit in the same household since the appellant came to this country and for that reason I am satisfied that there is family life within article 8(1).

13. I am also satisfied that removing the appellant would be an interference with that family life, that the removal decision is in accordance with the law and is for a legitimate aim within article 8(2). The issue in contention between the parties is whether removal would be disproportionate to that legitimate aim in the particular circumstances of this family.

14. The appellant has taken a large part in the day-to-day care of her grandchildren. This has involved providing practical and emotional support to the family when her granddaughter was diagnosed with cancer in 2007. As the judge noted at [80], no evidence had been put in about her condition and she concluded that there was no continuing treatment and that it was more likely than not that she had been given the all clear but, nonetheless, she accepted that at the time it would have been a very difficult situation to deal with and that the appellant's absence from the family would have made a real difference to how they coped at that time.

15. I also take into account and give weight to the evidence and letters from the appellant's grandchildren about the current situation and how they still have a very close relationship with her. In this context I must take into account the best interests of the children in accordance with the guidance from the House of Lords in both ZH (Tanzania) v Secretary of State [2011] UKSC 4 and Zoumbas v Secretary of State [2013] UKSC 74. I accept that it

would be in the children's best interests for the appellant to remain as part of their family unit but remind myself that their best interests can be outweighed by the cumulative effect of other relevant factors.

16. I must also take into account the length of time the appellant has been in the UK. I accept that she arrived in 2001, a fact supported by the photographs showing her with her grandson, when he is clearly very young. She did not seek to regularise her position until 2009 receiving an adverse decision on 24 February 2010. However, that was not a decision against which there was a right of appeal as there was no decision to remove her. Her representatives sought such a decision so that there could be an appeal at that stage but it was not until after judicial review proceedings were instituted and the consent order of 17 July 2013 that the respondent agreed to reconsider the matter and if adverse to make a removal decision. Whilst it must be a matter for the respondent to decide whether and when to make a decision giving rise to the right of appeal, the fact remains that no such decision was made in 2010 with the result that an appeal was only heard by the First-tier Tribunal in May 2014. There have now been further delays arising from the successful appeal to the Court of Appeal with the result that the appellant has now been in the UK for about fifteen years.

17. I see no reason not to accept the appellant's evidence about her family background and circumstances in Colombia. I accept that she was a single parent of her daughter, her only child. In oral evidence before the First-tier Tribunal she said that she had no brothers or sisters and her parents, aunts and uncles had all died. There were nephews and nieces but they were living either in Spain or the United States. She said that there was no one in Colombia left to whom she could turn for help. I note that the appellant has not produced death certificates for any of these relatives but by itself does not lead me to the view that her evidence is unreliable on this issue.

18. I also note that in the decision letter the respondent was concerned by the fact that there were two addresses for the appellant disclosed in the evidence. In the letter dated 11 March 2010 the appellant's representatives explained that her son-in-law remained the owner of the property at [ ] Court, London when the family moved to their new home at [ ] House in about 2004 and some correspondence continued to go to the old address. I must also take into account that the appellant suffers from epilepsy. According to the evidence before the First-tier Tribunal she was around 25 years old when she had her first epileptic fit but she was able to continue to work and support her daughter until she left Colombia in 2000. The evidence before the judge suggests that the appellant's condition is stable and generally being managed successfully with drugs. It is also not disputed that medical treatment would be available in Colombia even if not to the same standard as in the UK. Her medical condition is therefore not a significant factor in the assessment of proportionality.

19. I must take into account the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 as amended. The appellant's primary language is still Spanish but she clearly has some ability in English. She is not financially independent but is dependent on her daughter and son-in-law. The appellant's claim is based on family life rather than private life and the fact that any private life has been established when her immigration status is precarious is of limited application in the present case. She is not able to benefit directly from the provisions of s.117B(6) because that relates to someone who has a genuine and subsisting parental relationship with a qualifying child where it would not be reasonable to expect the child to leave the UK. Her relationship, whilst not parental but grandparental, is nonetheless an important factor and must be taken into account accordingly.

20. I must balance these factors with the public interest in the maintenance of effective immigration control and protecting the economic well-being of the UK. These factors would normally outweigh the interference with the interference with the private and family life of the appellant and the other family members. As Lord Bingham said in Razgar, article 8 claims are only likely to be successful in a very small minority of cases. However, there are a number of factors, which lead me to the view that this case falls within that minority.

21. The appellant delayed in applying for leave to remain but the respondent did not make a decision to remove her in 2010 and then resisted an application on her behalf for such decision so preventing her from having a right of appeal at that stage. She had to resort to of judicial review proceedings and they were finally compromised in 2013 when the respondent agreed to make a decision to grant an in country right of appeal. There was a further delay when the decision in that appeal was challenged in the Court of Appeal. The upshot is that the appellant has now been in the UK for fifteen years and any delay subsequent to her application in 2009 cannot be attributed to any action or lack of it on her part.

22. If the claim simply related to the appellant's private life, I would not find that removal would be disproportionate even after fifteen years. However, it relates to family life where the evidence is that there has been and continues to be a close family unit, not only between the appellant and her daughter but also with her grandchildren such that it is in their best interests for her to remain in the UK. When these factors are taken with the circumstances which would face the appellant on return to Colombia where she has no home, no remaining close family and would remain financially dependent on her family in the UK, I am satisfied that there are compelling circumstances justifying further consideration outside the Rules under article 8 and that the decision to remove her would now be disproportionate to the legitimate aims relied on by the respondent. Accordingly, the appeal should be allowed under article 8.

Decision

23. The First-tier Tribunal erred in law for the reasons set out in the statement of reasons attached to the consent order made by the Court of Appeal. I re-make the decision by dismissing the appeal on immigration grounds but allowing it under article 8 outside the Rules. No anonymity direction has been made.

Signed H J E Latter Date: 28 July 2016
Deputy Upper Tribunal Judge Latter