



IAC-AH-KRL-V1

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

Appeal Number: OA/11683/2014

**THE IMMIGRATION ACTS**

Heard at Centre City Tower, Birmingham  
On 31<sup>st</sup> March 2016

Decision & Reasons Promulgated  
On 13<sup>th</sup> April 2016

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FRENCH**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT  
(ON BEHALF OF ECO PRETORIA)**

Appellant

**and**

**NANCY KASEMA  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer  
For the Respondent: Mr B Caswell of Counsel

**DECISION AND REASONS**

1. Nancy Kasema is a citizen of Zambia who was born on 1<sup>st</sup> March 1989. I will refer to her as “the Claimant”. She is the daughter of the Reverend Robert Jilenda Kasema whom I will refer to as “the Sponsor”. He is a qualified minister of religion who on 14<sup>th</sup> August 2014 left Zambia with his four younger children, who were at the time under the age of 18. The three youngest children were born respectively on 3<sup>rd</sup> February 2002, 22<sup>nd</sup> October 2007 and 1<sup>st</sup> August 2011. The names of those three children are Elijah, Alfa and Hannah. The Sponsor’s wife, mother of all the children, had died shortly after Hannah’s birth, of liver failure. It is the Claimant’s case that she was very close to Hannah in particular and was entrusted with the care of the younger children by her dying mother. At the time the Sponsor and the younger children came to the United Kingdom, the entry clearance application in respect of the Claimant was still outstanding but it was refused on 18<sup>th</sup> August 2014.
2. The Claimant’s appeal against that refusal was heard before Judge of the First-tier Tribunal Myers, who allowed the appeal under Article 8 ECHR, in a decision promulgated on 21<sup>st</sup> April 2015. The Sponsor gave evidence at the hearing before Judge Myers and was found to be entirely credible. The judge found that there were exceptional circumstances justifying her going beyond the Immigration Rules and considering the appeal under Article 8. She found that the decision did interfere with the Article 8 rights of the Claimant, the Sponsor and the other children, that there would be no burden on the public purse should the Claimant join her family, that she was the mother figure for the children and that the separation was having a negative impact on the ability of the Sponsor to carry out his duties. She also commented that the separation had been detrimental to the Claimant’s health and to her well-being and to that of the youngest child Hannah.
3. The Secretary of State sought permission to appeal on behalf of the ECO. It was said in the grounds that the judge’s approach to Article 8 was arguably flawed, that she appeared to have taken account of post-decision evidence, she had not considered whether it would be reasonable for the family to return to Zambia to reside with the Claimant and had failed to provide adequate reasoning to establish that Article 8 was engaged. It was also contended that she had failed to take into account the Immigration Rules, had failed to take into account public interest considerations, notably under Section 117B of the Nationality, Immigration and Asylum Act 2002 and finally had failed to identify any compelling circumstances adequate to justify entry clearance under Article 8.
4. Permission was granted by Judge of the First-tier Tribunal Landes on 12<sup>th</sup> June 2015. She found it arguable that the judge had erred in taking into account post-decision circumstances and had failed to consider whether it was reasonable for the family to return to Zambia. Shortly before the hearing the Claimant’s representative put in a skeleton argument arguing that the current basis of challenge had not been argued at the First-tier Tribunal but that post-decision evidence could shed light on the true position as at the date of decision, citing **DR (ECO: post-decision evidence) Morocco [2005] UKIAT 00038**. The separation between the Claimant and the younger children had occurred prior to the date of decision and the degree of hardship

involved in a relocation would be high. The best interests of children were of fundamental importance.

5. At the commencement of the hearing before me Mr Mills said that the strongest of his grounds was that the judge had considered post-decision evidence. It was clear from Section 85A of the 2002 Act, in the form existing as at the date of decision under appeal, that the First-tier Tribunal could consider only the circumstances appertaining at the time of the decision. It was clear from the statute and from the decision of the House of Lords in **AS (Somalia) v SSHD [2009] UKHL 32** that the restriction applied not only to decisions under the Immigration Rules but also to those under Article 8. Any argument that a point had not been argued before the First-tier Tribunal could not take the matter further forward if it was one of statutory jurisdiction. Whether that was argued or not it still bound the Tribunal. He accepted that it might be appropriate to consider the issue of the separation of the Claimant from the younger children but it was not open for the judge to consider, as she had done, the difficulties encountered by the Sponsor in getting the children to school. The fact that Hannah was now withdrawn was a factual matter which the judge was not entitled to consider.
6. Mr Mills continued that the judgment of the Court of Appeal in **SSHD v SS (Congo) [2015] EWCA Civ 387** was declaratory of how Article 8 should be applied. It was clear from paragraph 57 and 58 of that judgment that if circumstances had changed a new application should be made. Post-decision evidence was irrelevant. He said it was also clear that the Rules did not provide for the adult child of a Tier 2 Migrant to come to this country. That he said was not an accident. The fact that there was no Rule to cover that circumstance was an expression of the public interest as expressed in the Rules. He asked me to set aside the decision of the First-tier Tribunal.
7. In response Mr Caswell said that if there was an error the matter should be resolved by a fresh Article 8 assessment in the Upper Tribunal. He accepted that the judge had recited evidence relating to subsequent events following the date of decision but the depth of tie between Hannah and the Claimant existed as at the date of decision.
8. Having heard these arguments I came to the view that reading the decision and reasons as a whole it was apparent that the judge had taken account of post-decision evidence relating to matters which did more than simply illuminate the correct situation as at the date of decision under appeal. I accept that mere recital of post-decision evidence was not necessarily injurious to the decision making process. However at paragraph 23, in her substantive findings, the judge referred specifically to Hannah having become withdrawn since being apart from the Claimant and the separation having a negative impact on the ability of the Sponsor to carry out his duties. As there was only a period of four days between the date of departure of the Sponsor and the other children for the United Kingdom and the date of decision under appeal, I found that the judge had indeed taken account of post-decision evidence to which she was not entitled to have regard, in breach of the guidance in **DR (Morocco)**. Accordingly I set aside the decision. I bore in mind what Mr Caswell had said concerning the future disposal of the appeal. No interpreter was necessary

and I was in a position to re-decide the appeal myself and proceeded to do so. I expressly preserved the positive credibility findings as to the evidence of the Sponsor made by Judge Myers.

9. In his evidence before me the Sponsor said that it would not have been possible in 2014 for him to have returned to Zambia to take up a position as a minister. He had transferred from a Pentecostal Church to the Methodist Church and had been released by the Pentecostal Church with a blessing. His position was no longer open to him and new positions in Zambia would be taken by recently graduating ministers, of whom there was no shortage. He would have no work were he to return. His intention had been to see how his ministry would evolve in the United Kingdom.
10. He clarified that when his wife had been ill, shortly after the birth of Hannah, she had requested Nancy to look after the children and the Claimant found herself in the situation that she felt that she was not doing what she had been entrusted to do by her dying mother. It was also culturally expected that the older sibling would take care of the younger. Prior to her mother's death the Claimant had been training as a teacher. She was currently at home trusting that the appeal would succeed. She had not considered coming in any other capacity as the main purpose of her entry would be to care for the younger children.
11. In submissions Mr Mills said that the judge at first instance had accepted that there were compelling circumstances warranting consideration beyond the Immigration Rules. That finding was not attacked. The facts were sufficiently compelling for Article 8 to be considered outside the Rules. As at the date of decision the Sponsor had been the carer for the younger children for two years. The younger children included a very young child and understandably there were strong ties. That argued in favour of allowing the appeal. Against that the Rules approved by Parliament did not include provision for an adult child of a Tier 2 Migrant to come to this country. The public interest was struck in the format of the Rules. A lot of what was now being argued was as a result of the separation and ensuing difficulties with childcare. He referred again to the judgment in **SS (Congo)** to the effect that if circumstances changed an applicant should make a further application for entry clearance. The Claimant could also seek to enter as a student or for work purposes.
12. Finally in response Mr Caswell said that the first application had merit. It was accepted by the Home Office that there were compelling circumstances warranting going beyond the Rules and there were strong ties between the Claimant and the children. He reminded me that it had been the mother's dying wish for the Claimant to take care of the children and he said that the interests of children were paramount. There would be no financial hardship for the United Kingdom treasury as the expenses were all met by the Methodist Church. The Sponsor had undergone higher education in English. Applying the guidance in the various leading cases on Article 8 he said that all pointed in one direction.

13. In considering the merits of this appeal I have borne in mind that the burden of proof of establishing the facts is upon the Claimant and the standard is the balance of probabilities. The relevant date for consideration of the merits is the date of decision under appeal, that is to say 18<sup>th</sup> August 2014. I accept the evidential findings made by the judge at first instance insofar as they are relevant to issues as at the date of decision. Having heard the Sponsor give evidence myself I accept that he was placed in a very difficult situation in August of 2014. He had given up his position with the Pentecostal Church in Zambia and had accepted a position with the Methodist Church in the United Kingdom and entry clearance had been granted both to him and to the four younger children. The decision for the Claimant had been referred and no decision had been taken as at the date that he left Zambia. He was not in a position to wait if he was to take up the position with the Methodist Church and find places for the other children in schools on his arrival. Whatever he decided involved an element of risk but arguably the risk that he took, to come to the United Kingdom with the other children was the lesser one. Be that as it may having heard his evidence I accept that his late wife entrusted the care of the younger children, in particular Hannah, to the Claimant and that would have been the normal cultural course to take in the society from which they came. I accept that the Claimant undertook that role and indeed cared for the children for two years prior to the Sponsor's departure. It does not take a great deal of imagination to envisage the very close bond which must have existed as at the date of decision between the younger children, in particular Hannah, and the Claimant who I accept was the surrogate mother of the children.
14. Mr Caswell in his submissions referred to the interests of the children being paramount. That is not correct but their interests are a primary consideration. On the evidence I find that the best interests of the children are served by being in the United Kingdom with their father but in the company of the surrogate mother, their older sister. As to the suggestion that the family should have decamped back to Zambia as at the date of decision I do not find that that was a reasonable or practical proposition. The Sponsor had responsibility for the children and no longer had any work in Zambia. He did have a position in Leicester with all expenses being met and where he had agreed to continue his ministry.
15. That Article 8 may be an available means for family entry is clear from various cases, including in particular **A (Afghanistan) v SSHD [2009] EWCA Civ 825**. Each case must be considered on its merits. It was not in dispute that it was appropriate to go beyond the Rules in this case as there were compelling reasons to do so. It was also not in dispute that there was sufficient interference or lack of respect for family life to engage Article 8. The remaining issue was therefore one of proportionality.
16. Mr Mills quite properly made the point that there was no provision in the Immigration Rules for over age children of Tier 2 Migrants to come to this country and that he said was an expression through Parliament of the public interest. That is a factor I bear very much in mind. In considering proportionality I of course have regard to Section 117B of the 2002 Act. This Sponsor was in a position to maintain the Claimant as at the date of decision and she would not have been a burden upon

the treasury. She had been to higher education, taught in English. She had a genuine and subsisting parental relationship with the younger children and as at the date of decision I have found that it would not have been reasonable for the family at that stage to have returned to Zambia to resume family life there. I have already found that it was in the best interests of the children for the Claimant to be in this country. Taking all of those factors into account I have come to the conclusion that refusal of entry clearance for this particular Claimant in her very particular circumstances was disproportionate. Accordingly the appeal is allowed under Article 8, ECHR.

**Notice of Decisions**

- (1) The making of the decision by the First-tier Tribunal involved an error on a point of law and I have set aside that decision. I have remade the decision and for the reasons set out above the appeal of Nancy Kasema is allowed under Article 8, ECHR.
- (2) There was no request for a fee award. The outcome of this appeal was not obvious and I have only reached the decision that I have in the light of argument and oral evidence. In the circumstances a fee award is not appropriate.
- (3) There was no request for an anonymity order and none is made.

Signed

Dated 11 April 2016

Deputy Upper Tribunal Judge French