



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU108922015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)
On 31 May 2017

Decision & Reasons Promulgated
On 12 June 2017

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ICILDA ALLEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Edwards instructed by Rotherham & Co Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Jamaica who was born on 19 February 1954. She entered the United Kingdom on 3 April 1998 as a visitor. On 29 March 2011, she applied for leave to remain but that was refused on 26 April 2011. On 21 February 2012, she applied for indefinite leave to remain but that was refused on 21 June 2012. However, the appellant was granted discretionary leave under the Secretary of State's "Discretionary Leave Policy" ("DLP") contained within the Asylum Policy Instructions. That leave was valid until 20 June 2015.

2. On 20 July 2015 the appellant made a human rights application seeking leave to remain on the basis of her family and private life in the UK. In particular, she relied upon her relationship with her adult daughter with whom she claimed to live and upon whom she claimed to be dependent.
3. On 26 October 2015, the Secretary of State refused the appellant's application for leave under the Immigration Rules, under Art 8 outside the Rules and, in addition, refused to grant the appellant further discretionary leave under the DLP.

The Appellant's Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal. Judge O'Brien dismissed the appellant's appeal.
5. The appellant sought permission to appeal to the Upper Tribunal in essence on the basis that in assessing her Art 8 claim the judge had failed properly to consider whether the appellant was entitled to a further grant of discretionary leave under the DLP.
6. Permission was initially refused by the First-tier Tribunal but on 14 December 2016 permission was granted by the Upper Tribunal (DUTJ Taylor).
7. On 10 January 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision to dismiss the appeal under Art 8.

The Submissions

8. On behalf of the appellant, Mr Edwards submitted that the judge had failed properly to consider the application of the respondent's DLP. That policy, he submitted, stated that a further period of three years' discretionary leave should normally be granted unless the circumstances prevailing at the time of the original grant of discretionary leave had materially changed. Mr Edwards submitted that the grant of discretionary leave to the appellant was based upon her living with her daughter and being dependent upon her. The evidence showed that she was still living with her daughter but the judge had made no finding upon that. Although he had found that she was now only partially financially dependent upon her daughter, as she had obtained part-time work, that was not a material change from the time when discretionary leave was granted in June 2012 when she was wholly financially dependent upon her daughter. He submitted that, therefore, the judge had erred in law in assessing the appellant's Art 8 claim (which was the only ground of appeal) by failing to take into account that she met the requirements of the DLP and that a further period of discretionary leave should, in those circumstances, "normally be granted".
9. Mr Mills, who represented the Secretary of State accepted that the evidence presented before Judge O'Brien supported a finding that both the appellant and her daughter continued to live together at a new address. However, he submitted that at the time discretionary leave was granted in 2012 the appellant was living with her

daughter but she was not working and was wholly dependent on her daughter. Even if the judge had not made a finding on whether they were living together, the policy did not apply because there was a material change of circumstances. The fact that the appellant was now working and therefore was not wholly dependent upon her daughter was a “material” change of circumstances such that the DLP did not apply. He also pointed out that in her witness statement at para 6 the appellant now stated that her daughter had stopped working in order to look after her third child.

10. In those circumstances, Mr Mills submitted there had been a change of circumstances; the DLP did not apply and the judge had correctly looked at the application of the Rules and Article 8 outside the Rules and had been entitled to dismiss the appeal.

Discussion

11. It was common ground between the parties that the relevant DLP was set out in section 10 of the Asylum Policy Instructions dated August 2015 at section 10.1 which is as follows:

“10.1 Applicants granted DL before 9 July 2012

Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing 6 years’ continuous DL (or where appropriate a combination of DL and LOTR, see section 8 above)), unless at the date of decision they fall within the restricted leave policy.

Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply a further period of 3 years’ DL should normally be granted. Caseworkers must consider whether there any circumstances that may warrant departure from the standard period of leave. See section 5.4.

If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused.”

12. In her decision, the Secretary of State considered the application of the policy and concluded that it did not apply in the following terms.

“Discretionary leave

On 21 June 2012 you were granted discretionary leave to remain in the United Kingdom, under Article 8 European Convention on Human Rights, on the basis that you were living in the UK with your daughter and was dependant on her. It has been noted that you no longer reside with your daughter and are living independently and you are able to financially support yourself. Therefore, after carefully reviewing your application for active review of discretionary leave, the Secretary of State is not satisfied that the grounds under which you were previously granted discretionary leave still persist and your application for further discretionary leave is refused.”

13. Mr Mills concedes that, on the evidence before the judge, the appellant had established that she had moved with her daughter to a new address. Mr Edwards submitted that the judge had failed to make a finding on that issue.

14. In his determination, the judge set out the relevant evidence about the living arrangements of the appellant and her daughter at para 10 as follows:

“The Appellant’s daughter, Annette Andrea Fyle, said that her mother had lived with her since arriving from Jamaica. They had previously lived at 20 Willow House, Bristol until moving 3 years ago to the present address. She confirmed that she paid the rent and that her mother contributed £200 a month.”

15. In reaching his findings in respect of the policy the judge said this at para 22:

“The Appellant appeals against the Respondent’s decision principally on the basis that the Respondent has failed properly to exercise his discretion. Of course, such a ground of appeal is no longer available to the Appellant; however, in any event the circumstances present at the date of the earlier grant of discretionary leave to remain no longer subsist. The appellant is now in a part-time employment and is not, therefore, wholly dependent on her daughter.”

16. Whilst the judge made no reference to whether the appellant and her daughter were living together, it is palpably clear that he accepted that they were living together. It was part of the Secretary of State’s case, as set out in her decision letter, that one of the material changes in circumstances was that the appellant and her daughter were no longer living together. Judge O’Brien made no reference to that as being a basis for his decision that the appellant could not demonstrate she met the requirements of the DLP. His reasoning was based rather upon a change in the scope of the appellant’s dependency upon her daughter. Consequently, I reject Mr Edwards’ submission that the judge erred in law by failing to make an explicit finding (which is implicit in his reasoning) on whether the appellant and her daughter were still living together.

17. In any event, even if that were an error, it is immaterial to the judge’s finding that the appellant cannot take advantage of the DLP. The original grant of discretionary leave was based, in part, upon the appellant being wholly financially dependent upon her daughter. As the judge found in para 22, the appellant was now employed part-time and was no longer “wholly dependent on her daughter”. That was a material change in the circumstances since the initial grant of discretionary leave. Mr Edwards placed some reliance upon the judge’s finding in para 29, when considering s.117B(3) of the Nationality, Immigration and Asylum Act 2002 that the appellant was “not financially independent”. That is entirely consistent with the judge’s finding in para 22 that the appellant is no longer “wholly dependent” on her daughter. I accept that in order to establish a material change of circumstances, such that the DLP would not apply, it was not necessary to demonstrate that the appellant who was once “wholly dependent” upon her daughter was now ‘wholly independent’ financially of her daughter. Nevertheless, there was a change in circumstances from total to only partial dependence. It was open to the judge to find that given that change in the appellant’s financial circumstances, namely that she was

in part-time employment and no longer wholly reliant upon financial support from her daughter that there was a material or significant change in the circumstances from those which prevailed when discretionary leave was initially granted in June 2012.

18. Consequently, although Judge O'Brien's reasoning in para 22 is relatively brief, his findings were properly open to him on the evidence and he was entitled to find that the DLP no longer applied because of the change in the appellant's circumstances.
19. Mr Edwards did not seek to challenge the judge's findings under the Rules or under Art 8 outside the Rules if he had correctly found that the DLP did not apply.
20. Consequently, for the above reasons the judge did not err in law in dismissing the appellant's appeal on human rights grounds.

Decision

21. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law and, therefore, stands.
22. The appellant's appeal to the Upper Tribunal is dismissed

Signed

A Grubb
Judge of the Upper Tribunal

Dated 9 June 2017

TO THE RESPONDENT **FEE AWARD**

The appellant's appeal was dismissed and therefore no fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 9 June 2017