



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16473/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9th July 2018

Decision & Reasons Promulgated
On 2nd August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMY CYNTHIA PAMELA JOHNSON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Howell, Home Office Presenting Officer
For the Respondent: Mr J Gajjar, Counsel instructed by A2 Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Abebrese promulgated on 30th January 2018 following a hearing at Hatton Cross on 12th January 2018 in which the learned First-tier Tribunal Judge allowed the Appellant's appeal outside of the Immigration Rules on human rights grounds under Article 8 of the ECHR.
2. For the purposes of clarity within this decision I will refer to Mrs Johnson who was the Appellant before the First-tier Tribunal as being "the Claimant" and the Secretary

of State I will refer to as being “the Secretary of State”, given the fact the Secretary of State is in fact the Appellant before the Upper Tribunal.

3. The Claimant was born on 24th January 1941 and was therefore 76 years old as at the date of the decision before First-tier Tribunal Judge Abebrese. She is a citizen of Sierra Leone. Judge Abebrese first of all considered the Claimant’s appeal against the Secretary of State’s original refusal through the lens of paragraph 276ADE of the Immigration Rules and found that she had not resided in the UK for a continuous period of twenty years for the purposes of paragraph 276ADE(1)(iii). Nor did he consider that there would be very significant obstacles were she to return to Nigeria on the basis that she returned to Nigeria, where she had resided with her husband until his death, and that she had lived in Nigeria for a considerable amount of time and she was accustomed to the culture and lifestyle of the country and was integrating into the culture. He found that she had found life difficult since the death of her husband, but he did not consider that would amount to very significant obstacles to her being able to return to that country.
4. Judge Abebrese then went on to consider the case outside of the Immigration Rules for the purposes of Article 8, and quite properly set out the five stage of the **Razgar** test at paragraph 21 of the decision. At paragraph 22 he stated that he was of the view that proposed removal would be an interference with the private and family life of the Claimant, and on the facts the Claimant had established a strong relationship with her daughter, son-in-law and granddaughter in the UK, and found that because of the decision, the result was that they had actually been separated on the basis that the appeal had been certified and the Claimant having returned to Nigeria where she had previously been living, despite her being a citizen of Sierra Leone.
5. Judge Abebrese went on to find that the decision was not in accordance with the Law (paragraph 23) because on the evidence the circumstances have changed since the death of the Claimant’s husband and she was reliant upon the family in the UK and she did not have established family connections in Sierra Leone, because she had lived outside of that country for a substantial amount of years. He also found that he was of the view that it would not be in the public interest for her not to be allowed to live in the UK with her family on the basis that she is 77 and reliant upon her daughter and son-in-law financially for all her needs and also emotionally dependent upon them since the death of her husband.
6. He went on at paragraph 24 to find the position was one which had not been made in the public interest and was not a decision which would be made in the interests of legitimate immigration control. He said he had taken account of Section 117B of the Immigration Act 2014, which I take him to mean Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act in that regard. He also went on to find the decision of the Secretary of State was not proportionate in all the circumstances because the Appellant, since the death of her husband, had felt vulnerable living by herself in Nigeria in a part of the country where Boko Haram operate and that the Appellant faced a risk because of the

security situation similar to other members of the public there, but because of her age and loss of her husband she will feel more vulnerable and there was no evidence of any family members being willing or in a position to assist her from her husband's side of the family. He found that there were no other close family members who she could return to. He therefore allowed the appeal under Article 8 of the ECHR.

7. The Secretary of State seeks to appeal that decision for the reasons set out within the Grounds of Appeal, but within the Grounds of Appeal it is sought to be argued that the Judge made a material misdirection in law and argued that the Judge allowed the Claimant's appeal on the basis of the Claimant being dependent upon her daughter and son-in-law, but failed to engage with the dependent relative route under Appendix FM of the Immigration Rules, in light of the fact that she was in Nigeria. It was argued that it was incumbent upon the First-tier Tribunal Judge to assess the weight of the public interest when assessing proportionality through the lens of the Immigration Rules and there was no evidence the Claimant could meet the dependent relative route and that the Court of Appeal in the case of ***Britcits* [2017] EWCA Civ 368** rejected arguments that the DR Rules were unlawful or defective and that the Judge's failure to take account of those Rules essentially undermined the proportionality assessment.
8. Permission to appeal in this case had been granted by First-tier Tribunal Judge Holmes on 30th May 2018 in which he found it was arguable that the Claimant did not meet the requirements of the Dependent Relative Rules, but he went on to find that moreover the Judge arguably erred in his conclusion that the Claimant had family life or private life in the UK that outweighed the public interest in removal. He stated that she had only ever been a family visitor to the UK for the purposes of a short holiday and that if she intended to settle then she misled the ECO in gaining entry clearance and that as an adult she did not have "family life" with her adult daughter upon arrival. The Judge's decision, it was said, offered no reasons for any conclusion that this had been created subsequently. He went on to find in granting permission that the Claimant had lived in Nigeria before entry to the UK and had returned there following the decision under appeal and that arguably Article 8 was not engaged at all, or if it was, refusal was the only proportionate response.
9. There is no Rule 24 reply by the Claimant in this case and Mr Gajjar on behalf of the Claimant quite properly concedes that effectively Rule 24 does not apply only to the Secretary of State, it applies to any Respondent in an appeal before the Upper Tribunal and there should therefore have been a proper Rule 24 reply, but there is not, but he has quite properly told me that the appeal is contested. He submits that the Claimant did not need to meet the Dependent Relative Rules as this was an Article 8 case with a Claimant who at the time when she made her application was still in the UK. It was not an application from abroad seeking entry clearance, and that further he argues that the Judge's findings in respect of Article 8 proportionality when considered in the round and taking the decision in the whole, he argues are sustainable and do not reveal a material error of law.

10. Mr Howell on behalf of the Secretary of State quite properly conceded that the original decision made by the Secretary of State was taken on the basis of consideration of Article 8, both under the Immigration Rules and outside the Rules on the basis of any exceptional circumstances, rather than under the dependent relative route on the basis that at that time when the decision was made the Claimant was still in the UK and was then subsequently removed after the decision under appeal. Thereafter he quite properly concedes that in effect the Judge was not looking at the appeal in terms of an application for entry clearance under the dependent relative route, the Judge was looking at this as an appeal on the basis of Article 8, both through the lens of the Rules and in outside of the Rules to find whether or not there is a breach of Article 8, but that still has to be viewed through the prism and/or lens of the Immigration Rules itself that were applicable at the time.
11. Although the consideration of the Judge's findings under Article 8 has not been specifically pleaded by the Secretary of State in the Grounds of Appeal, it was one of the reasons as to why permission to appeal was granted by First-tier Tribunal Judge Holmes on 30th May 2018 and his concerns regarding the Judge's consideration of Article 8. In my judgement the arguments regarding Article 8 in this case do amount to arguments which are **Robinson** obvious, such that the Tribunal can and should take account of the same in this appeal. No objection in that regard was raised by Mr Gajjar on behalf of the Claimant. In terms of those arguments he sought just to deal with those arguments within his submissions.
12. The Judge in dealing with Article 8 has set out the five stage **Razgar** test, but in my judgement has erred in his application of that test to the facts of this case. Here we are clearly talking about an adult Claimant who was living in the UK with her daughter and son-in-law and granddaughter, and although at paragraph 22 the Judge stated that in his view the proposed removal would be an interference with the private and family life of the Claimant because she had established a strong relationship with the daughter, son-in-law and granddaughter in the UK and because of the decision they had been separated and went on at paragraph 26 to find that he accepted that the Appellant's daughter and son-in-law did maintain her financially in the UK.
13. The Judge has not, actually, at anywhere properly considered the test in the case of **Kugathas** and subsequent case law as to whether or not there is family life existing between this Claimant and her relatives in the UK. Obviously the degree of dependency, both emotional and financial, is something that the court can and should take account of, and also there still has to be as set out in **Kugathas** ties that go distinctly beyond the norm in order for family life to exist between an adult Claimant and her family members in the UK, but in reality not only has the Judge not referred to the case of **Kugathas**, nor has he referred to the test that has to be applied in respect of adult Claimants in terms of whether or not family life exists with other members of their family.

14. Although the Judge has set out what could well have been reasons as to why he could have found that there was family life, it seems the Judge simply has not turned his mind effectively to the test at all. It is simply an assertion that there is family life rather than a full analysis of the circumstances of this case. Whether at paragraph 22 or 26 or elsewhere the test simply is not mentioned. Further, in my judgement the Judge also errs in paragraph 23 of the judgment in stating that:-

“I am also of the view that the decision to move the Appellant from this country is not in accordance with the law because on the evidence the circumstances have changed since the death of the Appellant’s husband and she is completely reliant on her family in this country. On the evidence she does not have established family connections in Sierra Leone as she has lived outside of that country for a substantial amount of years”.

15. As Mr Gajjar quite properly concedes that is an error, although he does not concede that it is material. Effectively the question of about whether or not the decision is in accordance with the law is a consideration as to whether or not the decision has been legally taken, not as to whether or not the Claimant agrees with the outcome or whether or not effectively it is proportionate. The third stage of the **Razgar** test is considering the lawfulness of the decision, not whether or not it is ultimately proportionate or disproportionate.
16. Then in paragraph 24 the Judge also went on to find that he was of the view that it would not be in the public interest for the Appellant not to be allowed to live in this country with her family. He relied upon the fact that she was aged, he found, 77, and relied upon her daughter and son-in-law financially for all of her needs and was emotionally dependent upon them since the death of her husband and found that her presence in the UK would not be at the expense of the public and therefore the decision was not one that was made in the public interest and not a decision that had been made in the interests of legitimate immigration control. He said in reaching that decision he had taken account of Section 117B. In fact, other than saying he has had regard to Section 117B, although the Judge is not required to actually enunciate each of the considerations there specifically and set out the words of the Section, the Judge is duty bound to consider the factors in Section 117A-D as applicable and can simply not say that he has taken account of that Section. Obviously, any decision has to be sufficiently clear to enable the losing party to know why they have lost. Here there is no sufficient consideration of the statutory considerations under Section 117B.
17. Section 117B(1) makes it clear that maintenance of effective immigration control is in the public interest and in particular the interests and economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English and are financially independent under Section 117B(2) and (3), and further under Section 117B(5) little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious, and Section 117B(4) little weight should be given to a private life established by a person at a time when the person is in the United Kingdom unlawfully. The Judge has not gone on to consider those factors or how they actually apply or impact upon the public interest in this case and seemingly, in my judgement, he has not

adequately set out what the public interest is in this case or taken an account of any factors that there are in terms of the Claimant not being allowed to live in the UK.

18. In such circumstances I am not satisfied the Judge has fully and adequately explained his reasoning such as to fully justify the decision that has been reached and clearly has misapplied the consideration as to whether or not the decision was in accordance with the law and has failed to explain adequately the consideration of the **Kugathas** test as to whether or not there is family life in this case. I cannot say on the evidence before me that the Judge would necessarily have reached the same decision had the Article 8 consideration been conducted properly and the errors I have identified not been made. In such circumstances I do find that the errors do amount overall to a material error of law such that it is appropriate for the decision of First-tier Tribunal Judge Abebrese to be set aside and in light of the fact that the decision making process will need to be done again as a balancing exercise. It is appropriate in this case for the case to be remitted back to the First-tier Tribunal for the case to be heard afresh by a First-tier Tribunal Judge other than First-tier Tribunal Judge Abebrese.

Notice of Decision

The decision of First-tier Tribunal Judge Abebrese does contain material errors of law and is set aside in its entirety, the case to be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Abebrese.

No anonymity direction was made by the First-tier Tribunal and no such direction was sought before me and in such circumstances I do not make any anonymity direction.

Signed

Date 10th July 2018



Deputy Upper Tribunal Judge McGinty