Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05522/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
On 22 January 2019	**On 04 February 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MONA [F]
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mrs Pettersen Senior Home Officer Presenting Officer
For the Respondent: Mr T Ogunnubi T M Legal Services.

ERROR OF LAW FINDING AND REASONS

1. The respondent appeals with permission a decision of First-tier Tribunal Judge Mensah who in a decision promulgated on 4 July 2018 allowed Ms [F] appeal against the respondent's decision to refuse an application for leave to remain in the United Kingdom on human rights grounds.

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Background

2. The Judge notes Ms [F] is a citizen of Jamaica born on 21 November 1973 who entered the UK as a visitor on 9 March 2001. Ms [F] overstayed, was joined by her daughter on a similar Visa in December 2001, choosing to remain with her daughter and latterly with her daughter's British partner since. An application for leave on the basis of human rights was granted on 14 October 2010 and Ms [F] and her daughter granted 3 years discretionary leave. Ms [F] daughter had lived in the United Kingdom for 9 years at that time and it was accepted it was unreasonable to expect her to leave the United Kingdom. Since that leave expired Ms [F] has failed to gain any further leave. Ms [F] daughter has been recognised as a LGBT person and granted leave in her own right. Ms [F] argued that she had lived with her daughter for 21 years without separation and could not have family life if returned to Jamaica because of the stigma/danger for LGBT people and the rejection of her daughter by the rest of the family in Jamaica. Ms [F] claims to have been shunned by her own family for supporting her daughter's sexuality and claims she will have to live in isolation in Jamaica with no family support.
3. The Judge sets out findings of fact from [7] in which it is found Ms [F] cannot succeed under Appendix FM or 276ADE, relying instead on two matters; being whether she can integrate into life in Jamaica and whether she has family life with her adult daughter in the United Kingdom and whether any interruption with such would be disproportionate.
4. The Judge notes the factual matrix is not disputed. The Judge accepts Ms [F] has lived with her daughter throughout her time in the United Kingdom and that they have a close bond. The Judge finds it would be unreasonable to expect her daughter to live in Jamaica if her mother is returned in a situation where she was unable to access support on return as a single woman with no family support who has been ostracised by her own family making reintegration difficult. The Judge also notes that Ms [F] is only 44 years of age, has spent the majority of her life in Jamaica, and found it had not been made out that she had shown she would face very significant obstacles to integration if returned to Jamaica.
5. At [16] the Judge finds that given her daughter's sexuality and rejection by the family both in Jamaica in the UK Ms [F] and her daughter would have developed an emotional dependency beyond the normal emotional ties of adult child and parent depending very much upon each other emotionally and that whilst the daughter is now married the Judge finds it appears Ms [F] emotional dependency upon her daughter has not diminished leading to a finding that they have family life recognised by article 8.
6. The Judge's core findings are set out at [21 – 22] in the following terms:

> "21. It would not be reasonable to expect the appellant's daughter to leave her partner or for them both to relocate to

Jamaica in the circumstances. The appellant speaks English and there appears to be no reason she cannot work in the UK or Jamaica, other than her status prevents it currently in the UK. The appellant's private life was developed at a time when she had a precarious status in the UK and if this was a private life only I would have dismissed the appeal.

22. There is a public interest in removing the appellant and that is the maintenance of immigration control and the public purse as set out above. However, given the circumstances of this case, I am just willing to accept it would be disproportionate for mother and daughter to now be forced to live separately and I accept modern means of communication cannot replace a family life."

7. The Secretary of State sought permission to appeal on the following grounds:

"1. The FTT concluded that there would not be significant obstacles to the appellants reintegration into Jamaica (Para 11 the determination). The FTT has however concluded that the appellant retains a family life with her daughter and that there is an emotional dependence (Para 16 of determination). The respondent submits that the FTT has not properly factored in why the appellant and her daughter retain this dependency given the daughter has now married and clearly has established her own family life.

2. The FTT notes in Para 21 that if this had been a case of private life only the appeal would have been dismissed. It is submitted that the FTT has given no proper or proper reasons for concluding that a family life still exists. The fact the appellant has been financially dependent on her daughter is essentially due to her not being permitted to work.

3. The FTT makes a factual error at Para 12 that the appellant and her daughter have been living together in the UK for 21 years - given the appellant and her daughter arrived in 2001 this cannot be correct, and clearly the FTT has mistakenly factored this into the assessment about family life and proportionality.

4. It is not clear how the removal of the appellant would have unjustifiably harsh consequences for the individual such that refusal would not be proportionate. It is submitted that there is nothing disproportionate to the appellant returning to Jamaica and leaving her daughter here with her partner.

8. Permission to appeal was granted by a Designated Judge of the First-Tier Tribunal on the basis that the grounds are arguable as the decision appears to contain misapprehensions of fact as identified in the grounds and also to lack rigour.

Error of law

9. It is important to remember the purpose of article 8 ECHR. It is a provision which is designed to prevent unwarranted interference in family or private life of an individual within the territory of a Higher Contracting State. Not all relationships fall within the ambit of article 8 which is clearly designed to recognise close relationships between individuals akin to marriage with a degree of permanence (whether heterosexual or same sex) or the birth of children within or who subsequently form part of such relationships or individuals with a parental relationship even if not in any form of partnership/relationship. It is therefore not designed to cover each and every relationship and individuals who may have previously fallen within the ambit of article 8 will not necessarily be entitled to such protection if the nature of their relationships change. Whether article 8 is engaged in any particular case is a question of fact.
10. Families and/or others can have de facto family life which is not sufficient to engage article 8. In *S v UK [1984] 40 DR 196* Sedley LJ made it clear that "Neither blood ties nor the concern and affection that ordinarily go with them are, by themselves altogether, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we have a family life with them in any sense capable of coming within the meaning and purpose of Article 8".
11. In *Berrehab v The Netherlands 1989 11 EHRR 322* the European Court said that "the concept of family life embraces, even where there is no co-habitation, the tie between a parent and his or her child regardless of whether or not the latter is legitimate".
12. It is not disputed that family life recognised by article 8 existed between Ms [F] and her daughter prior to the daughter forming an independent life of her own. It is not disputed that Ms [F] daughter has formed a new relationship with her partner with whom she is married and with whom she has family life recognised by article 8. Mr Ogunnubi was asked when this event occurred which he thought it was approximately 3 years ago when they married. It is not disputed that Ms [F] lives with her daughter and her daughter's partner in the same property. The question is whether the family life recognised by article 8 has continued between Ms [F] and her daughter notwithstanding the fundamental change in her daughter's status and family unit.
13. In *Kugathas v Secretary of State for the Home Department [2003] INLR 170* the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In *PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612* it was held that some tribunals appeared to have read *Kugathas* as establishing a rebuttable presumption against any relationship between an adult child and his parents or siblings being sufficient to engage Article 8. That was not correct. *Kugathas*

required a fact-sensitive approach and should be understood in the light of the subsequent case law summarised in *Ghising (family life – adults – Gurkha policy) [2012] UKUT 160 (IAC)* and *Singh [2015] EWCA Civ 630*. There was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 nor was there any requirement of exceptionality. It all depended on the facts. The love and affection between an adult and his parents or siblings would not of itself justify a finding of a family life. There had to be something more. A young adult living with his parents or siblings would normally have a family life to be respected under Article 8. A child enjoying a family life with his parents did not suddenly cease to have a family life at midnight as he turned 18 years of age. On the other hand, a young adult living independently of his parents might well not have a family life for the purposes of Article 8 (paras 23 – 26).

14. It is accepted there is a degree of financial dependency by Ms [F] upon her daughter, but this is a dependency of necessity brought about as a result of Ms [F] lack of immigration status and the fact she has no right to work in the United Kingdom. In *JB(India) and Others v ECO [2009] EWCA Civ 234* the Court of Appeal said that financial dependence “to some extent” on a parent did not demonstrate the existence of strong family ties between adult children and the parent nor did weekly telephone calls evidence anything more than the normal ties of affection between a parent and her adult children.
15. The Judge finds at [12] that Ms [F] has been living with her daughter in the United Kingdom for 21 years and since at least 2013 she has been totally dependent upon her daughter for all her financial needs. It is not disputed that the calculation of the 21-year period is factually incorrect. As noted in the grounds the appellant and her daughter arrived in 2001. It was submitted by Mr Ogunnubi that any error was not material as the Judge had not placed great weight upon this fact, but such submission has no arguable merit for this element is mentioned at [3], [7] and [12] of the decision under challenge. The Judge makes a factual error which is clearly considered a material aspect of the proportionality assessment and assessment of the existence of family life.
16. The Judge was required to examine and make specific findings upon the nature of the relationship. The Judge finds Ms [F] and her daughter have a close relationship [9] and at [16] that given her daughters sexuality and rejection by the family both in Jamaica in the UK they have developed an emotional dependency beyond the normal emotional ties of adult child and parents and that they clearly depend upon each other emotionally with Ms [F] emotional dependence upon her daughter not having diminished. In a case where family life is made out, and article 8 (1) satisfied, the Judge was required to consider whether the decision is proportionate pursuant to article 8(2).
17. The Secretary of State’s view of how human rights matters are to be assessed is that it should be through the lens of the Immigration

Rules, although it is accepted they are not a complete code. The Judge the Rules at [8] finding Ms [F] was unable to meet the requirements of Appendix FM and could not meet 276 ADE. The Judge finds she is able to work in Jamaica and at [11] *"I accept the appellant would be returning in circumstances where she would be unable to access family support on return. Therefore, the appellant will be returning as a single woman with no family support who has been ostracised by her own family. This would make trying to reintegrate difficult. The appellant is however only 44 years of age and spent the majority of her life in Jamaica. I cannot see how on the basis of the evidence before me she has shown she would face "very significant obstacles" to reintegration despite those difficulties. The appellant has not shown she meets the requirements of 276 ADE.*

18. The submission by Mr Ogunnubi that Ms [F] could satisfy this requirement of the Rules is not a submission that is open to him to make on the basis it amounts to no more than disagreement with the Judge's findings that she could not and because there is no cross-appeal against the Judge's rejection of the merits of the claim under the Immigration Rules. Ms [F] has not been granted permission to reopen this matter.
19. The Judge spends some time focusing upon the situation that Ms [F] daughter may face as a result of her grant of leave and the fact she is in a same-sex relationship with her wife in the United Kingdom. That is not, however, the issue. There is no protection claim raised by Ms [F] based upon family or societal hostility to her acceptance and support for her daughter and, even if she has been shunned by her own family in Jamaica, the finding of a lack of very significant obstacles to reintegration, despite such difficulties, means this is not a determinative issue.
20. The Judge does not adequately reason at [16] how emotional dependency upon her daughter is not diminished in light of the daughters own independent lifestyle and family unit but, if taken at face value, there is still the proportionality of any interference in such a right to be considered. At [21] the Judge finds it would not be reasonable to expect the Ms [F] daughter to leave her partner or for them both to relocate to Jamaica in the circumstances, which is accepted. The Judge finds any private life element would fail as a result of it being formed during the time Ms [F] presence in the United Kingdom has been precarious which is sustainable finding. At [22] the Judge writes:

> "There is a public interest in removing the appellant that is the maintenance of immigration control of the public purse as set out in part above. However, given the circumstances of this case I am just willing to accept it would be disproportionate for mother and daughter now to be forced to live separately and I accept modern means of communication cannot replace the family life.

21. The Judge, arguably, fails to properly consider or analyse this aspect of the case. Modern means of communication are used by many to maintain contact with relatives abroad and enable such individuals to

continue to communicate with each other and sustain relationships. No findings were made as to what is actually involved in practical terms in the Judge's assertion that Ms [F] emotional dependency upon her daughter has not diminished or the nature and degree of the same. Even though their face-to-face contact and life together would change if Ms [F] was removed from the United Kingdom, in the sense of that family life no longer existing, it was not made out on the evidence that the level of communication that can be facilitated would not meet Ms [F] emotional needs. There is insufficient evidence to establish that if removal occurred there would be any impact upon any member of this family unit sufficient to make the decision disproportionate.

22. It was submitted by Mr Ogunnubi that Ms Flemings had developed family life she seeks to rely upon at a time she has been in the United Kingdom legally, but this is not so as her immigration history recorded at [2] shows.

23. The basis of this Judges finding on the proportionality issue appears to be that as Ms [F] and her daughter continue to live together and their relationship is not changed, a comment that must he read, however, in light of the fact there has been some degree of change in light of the daughter forming her own family unit, that it will be wrong to change the status quo. There is also no consideration by the Judge in the findings that if Ms [F] daughter has provided financial support in the United Kingdom the same could be provided if Ms [F] is returned to Jamaica.

24. Section 117 B of the 2002 Act provides:

> **117B Article8: public interest considerations applicable in all cases:**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) 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.

(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.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

25. The fact Ms [F] speaks English is a neutral factor, but it was not made out, even though she has the ability to work, that she will be self-sufficient although clearly receives financial support from her daughter. The Judge accepts there is an argument for removal by reference to the public purse and requirement for valid immigration control. The basis on which Ms [F] argued an entitlement to remain is that she had lived with her daughter for 21 years without separation and cannot have any family life if she is returned to Jamaica because of the stigma/dangers for LGBT people and the rejection of her daughter by the rest of the family in Jamaica. Ms [F] stated she had been shunned by her own parents and family in Jamaica for supporting her daughter's sexuality and so will have to live in isolation in Jamaica with no family or other support. The Judge found that there are no very significant obstacles to reintegration despite the difficulties, as noted above.
26. The decision comes down to a finding by the Judge that the public interest is outweighed by the desire of the appellant to remain with her daughter. As noted in the grounds it is arguable the Judge did not consider in the assessment of the proportionality the weight to be given to the public interest with the required degree of rigour. It is not made out that the consequences of removal have been shown in the decision under challenge to be sufficient to displace the public interest in Ms [F] removal.
27. Having indicated at the hearing that the decision of the Judge is infected by arguable legal error for these reasons, submissions were made as to the remaking of the decision. Having taken the same and all other aspects of the evidence into account I find the Secretary of State has discharge the burden of proof upon him to the required standard to establish that the removal of Ms [F] and any interference with any protected right she has established is proportionate to the public interest.
28. If it was accepted that family life recognised by article 8 exists the appeal still fails as the Secretary of State's decision is proportionate. The grounds establish, however, that the nature of the relationship by reference to specific findings of the extent and degree of the same is insufficient to support the Judge's findings that the relationship is

beyond the normal emotional ties enjoyed by Ms [F] and her daughter. I make this finding recognising that family life recognised by article 8 can exist between Ms [F] and her daughter even though her daughter is now married. I find the Judge fails to adequately reason why this is the case. If Article 8(1) is not engaged on family life grounds the appeal fails too.

Decision

29. **The Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

30. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Although in the section of the decision headed Notice of Decision in which the Judge confirms she allows the appeal on human rights grounds the Judge writes “I make an anonymity direction” it is clear from the heading of the decision in which the Judge writes “anonymity direction is not made” and at [2] where the Judge writes “I make no direction for anonymity” that no such order was made.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 23 January 2019