



**Upper Tribunal
(Immigration
Chamber)**

and

Asylum

Appeal Number: HU/18406/2019

THE IMMIGRATION ACTS

**Heard at Field House (via MS Decision & Reasons Promulgated
Teams)**

On 15 December 2021

On 20 January 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**JOSEPHINE ACHIENO OUMA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Pamma, of City Law Immigration Limited

For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted by Upper Tribunal Judge Martin, against First-tier Tribunal Judge Shore's decision to dismiss her appeal on human rights grounds.

Background

2. The appellant is a Kenyan citizen who was born on 17 June 1982. She arrived in the United Kingdom in 2018, holding entry clearance as an overseas domestic worker. Her leave to enter was due to expire on 30 December 2018. Prior to the expiry of her leave, she applied for further leave in the same capacity. That application was refused and the respondent upheld that decision on review.

3. On 17 July 2019, the appellant applied for leave to remain on human rights grounds. The representations which were made on her behalf highlighted the relationships which she had developed with her employers and with their son, who was eight years old at that time. It was said that the appellant had been employed by the family for many years and had become close to them. That was particularly so in respect of their son, for whom she had cared for most of his life. The removal of the appellant was said to be contrary to the best interests of her employer's son because the mother would be required to give up work in the event that the appellant was required to leave the United Kingdom.
4. The respondent refused the application, holding that the appellant was unable to meet the Immigration Rules, whether on private or family life grounds, and that her removal would not be contrary to Article 8 ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. Her appeal was heard by Judge Shore ("the judge") on 4 September 2020. As was commonplace at that time, the proceedings were conducted remotely, using the Cloud Video Platform ("CVP"). The appellant was represented by a legal representative – Mr Nadeem – but there was no appearance by or on behalf of the respondent.
6. Mr Nadeem provided a skeleton argument. There was short discussion of the issues at the start of the hearing. The judge then heard oral evidence from the appellant and from her employers. Mr Nadeem made his closing submissions, after which the judge reserved his decision.
7. The judge's reserved decision is carefully and logically structured. Having set out the background and the documents before him, he noted at [16] that he had narrowed the issues with Mr Nadeem at the start of the hearing. He noted:
 - [16.1] The decision maker had not looked at family life and had not considered Appendix FM;
 - [16.2] The appellant's suitability had been accepted;
 - [16.3] The appellant accepts that the conditions required for private life under paragraph 276ADE(1)(vi) are not met;
 - [16.4] The employers do not have family in the United Kingdom, contrary to the findings of the decision maker;
 - [16.5] The appellant does not suggest that she has parental responsibility, and;
 - [16.6] The respondent accepted the emotional impact on the child and the appellant's case is about the emotional impact on the child.
8. At [17], the judge noted that the effect of this discussion was 'to limit my consideration of the appellant's appeal to Article 8 outside the Rules based upon the effect that removal would have on [the employer's daughter].'

9. The judge set out a summary of the evidence given by the appellant and her employers at [19]-[25]. There was a summary of the submissions at [27]-[32]. The judge then conducted his analysis at [32] *et seq.* That analysis began with the judge restating that he was only concerned with Article 8 ECHR outside the Rules. He nevertheless noted, in sub-paragraph [32.1], as follows:

The appellant offered no evidence as to what very significant obstacles existed that made her removal unlawful, other than the lack of work in Kenya. No location evidence to support her assertion was provided and I therefore find that the appellant has not shown the existence of very significant obstacles under paragraph 276ADE(1)(vi) and her appeal under that ground is dismissed.

10. The remainder of the decision concerned what the judge understood to be the only live issue before him: Article 8 ECHR. He directed himself to domestic and ECtHR authority on the existence of a family life at [34]-[39]. He expressed 'some empathy' for the appellant and her employers and accepted that she had been employed by them for seven years, during which she had developed a strong and caring relationship' with their son. The family had come to depend upon the appellant. The judge did not accept that they would be bereft without the appellant, however, as the appellant's female employer was a highly paid banker who could make alternative arrangements for childcare, including relying on her husband, who was at that time unemployed: [39]-[40]. The judge did not accept that the emotional impact on the child would be as serious as had been suggested. He held that he would be very upset but that there was nothing more than the natural affection which would be expected in these circumstances: [42]. The best interests of the child were to remain with his parents in the UK and there was no prospect of them being removed:[44]. The judge held that the appellant's relationship with the child did not engage s117B(6). He held that the appellant was financially independent but that her private life had accrued at a time when her stay in the UK was precarious: [45]. Having considered the matters which militated in favour of removal and those which militated against that course, the judge concluded that the appellant's removal would not bring about unjustifiably harsh consequences: [46]-[50].

The Appeal to the Upper Tribunal

11. Grounds of appeal were settled by Mr Nadeem on 28 September 2020. It was submitted, firstly, that the judge had mistakenly recorded a concession about paragraph 276ADE(1)(vi). It was submitted that no such concession had been made orally or in writing. This was a material error, he submitted, because the appellant had actually developed a case under that provision of the Immigration Rules in her statement and in her oral evidence.
12. The second ground of appeal targeted the judge's assessment of the appellant's Article 8 ECHR claim. It was particularly submitted that the judge's assessment of the best interests of the child was deficient and that he had given inadequate or legally unsustainable reasons for concluding that the emotional impact on the child would not be more serious.

13. The appeal came before me in March and June 2021. It could not proceed on either occasion. Mr Nadeem attended to represent the appellant when he was quite plainly a witness to the events before the FtT and the judge had not been asked to provide his Record of Proceedings (“RoP”) or his comments on the assertion in the grounds that he had mistakenly recorded a concession.
14. The Principal Resident Judge duly made contact with the judge, who provided his handwritten RoP and a typed version of the material part of that document. He also provided comments on the allegation in the grounds. For present purposes, I need only record that his response to the first ground of appeal was as follows:

I attach a scan of my handwritten Record of Appeal [sic] that was made at the hearing. My decision records that I had a discussion with Mr Nadeem at the start of the hearing. As can be seen in the penultimate note on page 1, I recorded that “C accepts private life is not met”. I believe that I recorded the proceedings accurately.

15. The appeal was listed to be heard before me on 15 December 2021. Shortly before the hearing, the Upper Tribunal received an application to adjourn the proceedings again on account of the fact that Mr Nadeem was unfit to attend as a witness for Covid-19 related reasons. I directed that the appeal should remain in the list so that I could consider with the advocates whether his attendance was necessary. I made that direction principally because I had been given to understand that I would be able to obtain the CVP recording of the proceedings, which I thought would be likely to resolve the first ground without needing to hear from Mr Nadeem.
16. The CVP recording was provided to the Upper Tribunal by the staff at the FtT (Taylor House) shortly before the appeal was called on at 2.30pm. It was very clear. I was able to locate the relevant part of the recording, which I played to the advocates at the start of the hearing. The discussion which took place between the judge and Mr Nadeem at the start of the hearing occurred after the judge had introduced himself to the participants and had stated that he was ready to hear from the appellant. This discussion then occurred:

Mr Nadeem: Before we begin, sir, I was just wondering if I could completely narrow the issue down, just to assist you when you come to write up your determination, sir. The refusal letter makes certain points and some we agree with. I can actually narrow down the point to perhaps one or two points, really, in addressing this appeal, sir,

Judge: OK, that would be very helpful. Thank you.

Mr Nadeem: Sir, um, refusal letter dated 22 October 2019

Judge: Yep

Mr Nadeem: Sir, it doesn't look at family life because it doesn't come under Appendix FM and so they have made no findings in relation to that. Erm, they accept Suitability; the application

doesn't fall foul of suitability. Erm, we accept that private life is not met because of 20 years of residence here. I think the only point is very significant obstacles to integration, that we intend to deal with.

But when it comes to the assessment of Article 8 outside of the Rules, the Home Office have made - if I can just highlight this at this stage - they say at page 4 of 8 of the refusal letter, page 10 of the appellant's bundle, you have a copy of that in there as well, sir, they say that there is nothing preventing family or friends visiting and there is also a mention that the sponsors have family in the UK. That must be an error because there is nowhere in the evidence that suggests that they have any family in the United Kingdom. Erm, and that is clarified in the appellant's statement in any event. But I just thought to narrow the issues down, sir, really.

Judge: Yep

17. I have added emphasis to the relevant part of this discussion. As Ms Isherwood accepted upon hearing the recording, it is quite clear from the underlined words that Mr Nadeem did not concede that the appellant was unable to meet paragraph 276ADE(1)(vi) of the Immigration Rules (whether there were very significant obstacles to her integration to Kenya). He did make an express concession that she was unable to meet other parts of that Rule (20 years' residence in particular) but in respect of paragraph 276ADE(1)(vi) his submissions chimed with the oral evidence which the appellant was to give about her circumstances on return to Kenya. In her oral evidence, the appellant stated that she had left Kenya because of a lack of employment opportunities and that she had been the main breadwinner for the family after her father had retired.
18. Ms Isherwood accepted that the judge had erred insofar as he had recorded that Ms Nadeem had conceded paragraph 276ADE(1)(vi) at the start of the hearing. In light of that concession, Ms Pamma decided not to renew her application for an adjournment of the hearing and I proceeded to hear submissions.
19. Ms Isherwood opposed the appellant's appeal. She submitted that the error into which the judge had fallen was not material, since he had in any event considered the claim under paragraph 276ADE(1)(vi), such as it was, at [32.1] of his decision. There had been no aspects of that claim, she submitted, which had justified any fuller consideration. As to the appellant's second ground of appeal, the judge had reached a finding about the existence of a family life and the best interests of the child and that finding had been in accordance with the authorities and open to the judge on the evidence before him.
20. Ms Pamma submitted that the judge's error as to the concession was a material one. The judge had failed, she submitted, to consider the point in any detail because he believed that it had been conceded. The appellant was the main breadwinner for her family and had left Kenya because she had been unable to find work. Matters would only have become more difficult because of her absence from the country and the pandemic. As to

the second ground, the judge had erred in his consideration of the appellant's role in the child's life. She was more of a mother figure to the child than the judge had considered. The impact upon the child had not been properly considered and [39] in particular was legally insufficient as a consideration of the best interests of the child.

21. I reserved my decision.

Analysis

22. It is common ground between the parties, having listened to the recording of the proceedings before the FtT, that the judge fell into error when he recorded that Mr Nadeem had conceded at the start of the hearing that the appellant could not satisfy the requirement in paragraph 276ADE(1)(vi) of the Immigration Rules, for very significant obstacles to re-integration to the country of nationality. I have some sympathy with the judge for falling into that error, not least because the skeleton argument before him developed no such argument. Mr Nadeem addressed him briefly at the start of the hearing on paragraph 276ADE(1). He accepted that part of that Rule was not met but he indicated that he would rely on sub-paragraph (vi). It seems that the judge's handwritten note of that exchange did not accurately record the scope of the concession which was being made.

23. Insofar as there was a factual disagreement before me as to the recollection of Mr Nadeem and that of the judge, it is clear that Mr Nadeem's recollection is to be preferred. Undeterred, however, Ms Isherwood submitted that this error was not a material one, since the judge had in any event turned his mind to paragraph 276ADE(1)(vi) and nothing more than that short paragraph was required on the facts of this case.

24. I accept Ms Isherwood's submissions in this respect. The evidence given by the appellant orally and in her statement came nowhere near establishing a case that there would be very significant obstacles to her re-integration to Kenya. The meaning of that sub-paragraph has been considered in authorities including SSHD v Kamara [2016] EWCA Civ 813; [2016] 4 WLR 152 and Parveen v SSHD [2018] EWCA Civ 932. In Kamara, Sales LJ said:

The idea of integration calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it so as to have a reasonable opportunity to be accepted there, to be able to operate on a day by day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

25. In Parveen v SSHD [2018] EWCA Civ 932, Underhill LJ disapproved the Upper Tribunal's approach to the test of 'very significant obstacles' in Treebhowan v SSHD [2017] UKUT 13 (IAC). He considered that the Upper Tribunal had placed an unhelpful gloss on the words and that the task in any given case was to consider the obstacles relied upon and to decide whether they could properly be regarded as very significant

26. It is impossible, on the basis of these authorities, to see how the judge could have reached any other conclusion than that which he expressed at [32.1]. The appellant has family in Kenya. She is familiar with the language and the culture of that country and she lived there for much of her adult life. Given the appellant's background and circumstances in Kenya, the only conclusion reasonably open to the FtT was that she would be an insider in that country, in that sense contemplated by Sales LJ (as then was) in Kamara. Even accepting that the appellant is the main breadwinner for her family, the only evidence about how difficult it was to find work in Kenya was the appellant's and there was simply no basis upon which the FtT could properly have concluded that she would be unable to support herself and her family on return to Kenya, albeit potentially not to the standard she has been able to provide with her recent earnings.
27. Whilst I accept, therefore, that there was a procedural error on the part of the judge, I do not consider that it was material failing in the sense contemplated in IA (Somalia) v SSHD [2007] EWCA Civ 323. Any judge properly directing himself to the evidence in this case would inevitably have come to the same conclusion as the judge reached at [32.1].
28. As for ground two, I consider that it represents nothing more than disagreement with the findings of the judge. He was clearly cognisant of the test to be applied insofar as Mr Nadeem had submitted that the appellant enjoyed a family life with her employer's nine-year-old son. With respect to Mr Nadeem, I am bound to observe that this was an ambitious submission to make in respect of a child who lived with both of his parents. The appellant and he might - during the years that she has been caring for him - have developed a strong bond but to submit that such a bond had developed into a family life was, frankly, a bridge too far.
29. The real issue raised by this ground, however, is the adequacy of the judge's treatment of the child's best interests. In that respect also, however, the judge was clearly aware of the relevant principles, even if he did not cite extensively from relevant authority. He proceeded on the basis that the best interests of the child were ordinarily to be with his parents in the country of his nationality. He accepted that the child would be very upset in the event that he lost the nanny with whom he is familiar. He nevertheless rejected, for good and proper reason, the suggestion that the family would not be able to manage without the appellant or that the child's mother (a banker) would be required to give up her job in the event that the appellant could not remain in the UK. The judge was entitled to find that other arrangements for the child's case would be found and that the difficulties which the family were likely to encounter had been exaggerated.
30. The 'balance sheet' assessment taken by the judge at [46]-[49] was clear and cogently reasoned. Amongst other matters, he balanced the disruption which the child was likely to face against the public interest in the removal of the appellant. To approach the matter in that way was to adhere to the approach required by the authorities including EV (Philippines) v SSHD [2014] EWCA Civ 874. The question was not, as suggested in the grounds, simply whether it would be in the best interests of the child for the status quo to persist; it was, instead, the impact of the appellant's removal upon the child's best interests as a whole, and whether that impact was outweighed by the considerations on the opposing side of the scales. There

was no expert evidence on that question and the judge was entitled to reject the account given by the appellant and her employers of the dire situation which her removal would bring about.

31. The judge was therefore entitled to conclude that the impact on the child's best interests was not such as to outweigh the public interest as expressed in Part 5A of the Nationality, Immigration and Asylum Act 2002. In the circumstances, I do not accept that the judge's consideration of section 55 of the Borders, Citizenship and Immigration Act 2009 or of Article 8 ECHR was legally deficient.

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 January 2022