



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

Appeal Numbers: IA/23287/2012
IA/23286/2012
IA/23288/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 14 June 2013**

**Determination
Promulgated
On 10 July 2013**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

**MS SANDRA THERESA SMITH (FIRST APPELLANT)
MISS JANESIA AMANDA SMITH (SECOND APPELLANT)
MISS JANELL ALICIA SMITH (THIRD APPELLANT)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Finch, Solicitor
For the Respondent: Mr S Walker, HOPO

DETERMINATION AND REASONS

1. This is a rehearing of the appeals of the appellants under Article 8 of the ECHR following the Upper Tribunal's decision on 1 May 2013 that the first Tribunal erred in law in not dealing with several very important issues relevant to the assessment of proportionality. The Upper Tribunal also

found that the First-tier Judge restricted his assessment of proportionality to the strength of the private lives of the appellants and whether they could reasonably be expected to enjoy their private lives in Guyana. In doing so, he omitted to consider other factors including the effect of the closure of the Tier 2 route to settlement and the length of time the appellants have lawfully been in the UK.

2. The Upper Tribunal further found that although the judge referred to the changes to the Immigration Rules (HC 194) effective from 9 July 2012, he failed to consider whether or not any of the appellants could satisfy the requirements of those Rules. This error was not pursued at the hearing before me today.
3. The appellants are citizens of Guyana. They are a mother and her two daughters, born on 4 March 1960, 27 November 1993 and 8 November 1987 respectively. The second and third appellants were dependants on the first appellant's application for leave to remain as a Tier 2 Migrant. They continue to remain as dependants on the appellant's appeal under Article 8 of the ECHR. Their appeals against the respondent's refusal on 15 August 2012 to vary their leave to remain in the United Kingdom were dismissed by First-tier Tribunal Judge Howard.
4. The appellants submitted a bundle of documents including various witness statements and documents. Mr Finch submitted a skeleton argument for the appellants dated 13 June 2013 and an index to supplementary bundle of the same date.
5. The facts of this case are as set out in the respondent's Reasons for Refusal Letter and the statements of the appellants. The first appellant arrived in the UK on 9 November 2005 as a work permit holder valid until 27 October 2008. The second and third appellants entered the UK with the first appellant as her dependants.
6. The first appellant was recruited in Guyana by a recruitment agency because there was a shortage of nurses in the UK. It was her understanding that after four years she would be granted settlement. At the time she was working in Guyana at the Linden Hospital Complex as a nurse/midwife. She had been in that job since 1984 when she qualified as a nurse and gave up that position to come to the UK. Before she left Guyana she sold all her household furniture in order to raise money for the move.
7. The work permit entitled her to work at the Donness Nursing Home. She left in 2005 because of the treatment she was receiving from the staff there. She suffered harassment and bullying from other members of staff for racial reasons. The home withheld a week's salary from her and eventually paid it to her in July 2009.

8. In or about the end of January 2006 she went to the Home Office in Croydon to let them know that she was no longer with Donness Nursing Home. The Immigration Officer told her that there was three years left on her visa, and she should be sure to obtain another employer in the next couple of months. She was not informed that her leave was curtailed.
9. She worked as a bank nurse at Prime Care Group in South Croydon from 18 April 2006. In September/October 2006 she went to Brendon Care also as a bank nurse until October 2008. During that time they applied to the Home Office for a work permit. The Home Office refused it on 1 May 2009. A further application was refused on 29 June 2009.
10. When she left Brendon Care she was unable to work until December 2009 when she was able to get a work permit to be employed as a Registered General Nurse with Vigcare. She worked for Vigcare until 31 March 2012 when the contract ended and that was the date her leave to remain as a Tier 2 (General) Migrant also ended.
11. Before her contract ended she applied for employment with different homes and hospitals. She had an interview with Lynton Hall Nursing Centre in March 2012 which was successful, and they said they would sponsor her for a work permit. However they failed to make the application and told her they could not sponsor her because they were obliged to advertise the job for 28 days, and the 28 days would have been the next Tuesday, 3 April 2012. Her solicitors made an application prior to the expiry of her leave to remain and sent details of her employment with Bupa to the respondent. In April she received a phone call from Bupa recruitment team apologising for what had happened and saying they were prepared to help her and offer her a position for a home in Clapham Common. She went for the interview which was again successful and they offered her a job again. Bupa sent her an offer letter on 30 April 2012 which she accepted. She was however told that she could not start work until she had the sponsorship from UKBA, but they called her in for induction and training in June 2012. On the morning she started the induction she was told by Bupa that they would not be able to sponsor her without the original passport and original bank statements which the appellant had already submitted to the UKBA. On 9 October 2012 she went to her solicitors and they told her that her application had been refused on 15 August 2012. She felt she had been badly let down by Bupa and would never normally have continued on and become an overstayer. Since then she has been trying to get another sponsor. In the supplementary bundle was a letter from the Managing Director of the Abbey Total Care Group Limited dated 13 June 2013. The letter stated that the first appellant had applied for the post of registered nurse at their nursing home in Cheam, Surrey. They had interviewed her and she had been successful and had been shortlisted. They have done the necessary checks for the purpose of employment and wish to sponsor the first appellant on Tier 2 (General) category as per UKBA guidelines and subject

to the successful outcome of the Tribunal hearing of her appeal. The appellant confirmed in oral evidence that this was the case.

12. In cross-examination she said that she was successful because Abbey Total Care Group Limited needed someone with her experience as an Intermediate Care Nurse. It is a mixed care home with dementia patients, physically fragile patients and those who need rehabilitation with a view to returning home or into the community. She would be working with all three types of patients.
13. The second witness to give evidence was Janell Smith. She relied on her statement dated 21 January 2013. She said in her statement that she lived in Guyana until she was 18. Her father Richard Smith left when her younger sister Janesia was about 3 years old. She has not seen him since. She came to the UK on her eighteenth birthday. She was at secondary school at the time they moved to the UK. Since she came to the UK she has been working and studying. She started studying when she was 19. Her first job was as a junior waitress in a restaurant, then a waitress and also training new staff. She was in this job for a year and a half after which she did various jobs in the hospitality industry. She left her last job as a waitress/supervisor shortly before their visas expired. She has not worked since because of their immigration problem.
14. She went to South Thames College in 2006 and studied IT, BTEC Level 1 and gained an award in July 2007. At the same time she did a Key Skills Certificate course in Maths and English and completed that in August 2007.
15. In 2010/11 she studied at Croydon College and did Level 2 of the BTEC course and gained an award in August 2011. At the same time she did a BTEC Level 1 in Work Skills and got an award in September 2011.
16. With reference to paragraph 8 of the statement she said that she was still studying for a BTEC Level 3 National Diploma in IT at Croydon College. She is due to finish this course at the end of July this year. She had hoped to study for a degree in Information Technology Management for Business but she has been unable to apply through UCAS because of her uncertain immigration status.
17. She would prefer to stay in this country because going back to Guyana would be difficult for her. She has lived in the UK for seven years and sees the UK as her home now. Having studied IT in the UK she would not be able to use it in Guyana. The way of life in Guyana is completely different from the UK. When she left Guyana she was a teenager. Anything they have built here in the UK in the last seven years will be gone and they would have to start again.

18. The next witness to give evidence was Janesia Smith. She relied on her statement dated 18 January 2013. She came to the UK in November 2005 and has lived with her mother and sister since they arrived here.
19. She completed her sixth form education in the UK in the summer of 2012. She had been hoping to do psychosocial studies at University of East London. She had five offers of places at university and chose UEL. She found out in September 2012 on enrolment day that she would not be able to start because of her uncertain immigration status. She would be classed as an international student and would not be able to afford the university fees.
20. She has not yet worked in the UK. She provided evidence of an invitation to a recruitment day being organised by Elite Advertising and Marketing Limited for a position as a sales executive. She was offered a job but was unable to take up the offer because of their uncertain immigration status. She has also been invited by another company to attend a recruitment day on 17 June at 2pm in Tolworth.

Findings

21. I concur with Mr Walker's submission that the appellants have been credible witnesses.
22. The immigration history of the appellants speaks for itself. The first appellant Mrs Sandra Smith was recruited by an employment agency based in the UK to come and work in the UK at a time when there was a shortage of nurses in the UK. The first appellant had at the time worked at a hospital in Guyana for 21 years, since 1984 when she qualified as a nurse. She was told that she would after four years be granted indefinite leave in that category. She therefore sold up everything and moved with her two children, Janell who was yet to complete her secondary school education and a younger daughter who was also in school to the UK in order to work as a nurse at the Donness Care Home. Unfortunately the appellant suffered racial abuse and discrimination and harassment by staff at the care home. This led her to resign from her employment.
23. The appellant did the right thing by going to the UKBA to tell them about her resignation. She was told by one Immigration officer that she had three years left on her work permit and should try and obtain employment in the next couple of months. In the interim another officer took a decision to curtail her leave to enter. The appellant was not aware of the curtailment of her leave until 2009.
24. The appellant for some time tried to obtain employment and get the employers to apply for leave for her without success. She managed to get leave to remain from about December 2009 until March 2012. Thereafter she was disappointed by Bupa.

25. I agree with Mr Walker that the first appellant has suffered a catalogue of misfortunes which has resulted in the position she now finds herself in.
26. I find on the evidence before me that the appellant has established a private and family life with her two daughters who continue to live with her. One daughter is studying and the other is attempting to find employment. Janesia has found employment but cannot take up the offer because of her lack of immigration status. The first appellant has also found employment because of her experience as an Intermediate Care Nurse but cannot also take up the offer of employment because of her lack of immigration status.
27. I find that the respondent's decision amounts to an interference with their right to family and private life. Their interference will amount to grave consequences for the appellant and her daughters if they had to leave the UK. The decision is however lawful for the maintenance of immigration control.
28. I now consider proportionality. I find that the catalogue of misfortunate has had a serious consequence on the appellant's ability to carry on her work as a nurse in the United Kingdom. She sold everything and uprooted herself and her daughters from Guyana leaving behind a secure job at a hospital where she had worked since she qualified as a nurse in 1984. She has now found employment due to her experience and background and she should be given the opportunity to take up that employment. Her two daughters are at a crucial stage in their lives. Janell wants to attend university but was unable to apply to UCAS because of her immigration status. Janesia has finished her education and cannot accept an offer of employment because of her immigration status. It would not be reasonable to require the appellant and her family to return to Guyana where they have no home because they had to uproot themselves in order to come here because there was a shortage of nurses and with the promise of indefinite leave to remain after four years. I find that she did have a legitimate expectation that things would go well for her in the UK but that was not to be because of the series of misfortunes that she has suffered. I find in the particular circumstances that it would be disproportionate for the appellant and her two daughters to be removed to Guyana.
29. The facts before me are such that the appellants' appeal under the Article 8 provisions under the new Immigration Rules cannot succeed.
30. I have therefore determined their appeal under Article 8 of the ECHR applying the **Razgar** principles. I allow the appeal of the appellant and her daughters under Article 8 of the ECHR.

Signed

Date

Upper Tribunal Judge Eshun