Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26203/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 February 2014	**On 14th March 2014**
Prepared on 1 March 2014	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ANENNA CHIEME ASINYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Ofei-Kwatia, Counsel, instructed by Maus Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 12 January 1953. She was granted entry clearance as a visitor, and first entered on 6 August 2004. She returned

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to Nigeria but then came back to this country on 20 September 2004. Although she only had entry clearance until 28 July 2006, she did not return to Nigeria but remained in this country without leave.

2. The appellant claims that she stayed with her sister and her brother, both of whom are British citizens and both of whom have children. One of her brother's children, Shallom, has special needs. The appellant claims that she looked after her nieces and nephews, and was particularly close to Shallom, whose mother had abandoned her and her siblings.

3. On 6 July 2012, having overstayed for several years, the appellant applied for indefinite leave to remain in the United Kingdom outside the Immigration Rules, on compassionate grounds. This application was considered by an official acting on behalf of the respondent but refused on 13 June 2013. The refusal letter is dated the same day. The appellant was also notified under Section 10 of the Immigration and Asylum Act 1999 of the respondent's decision to remove her as a person subject to administrative removal.

4. The respondent's reasons for refusing the application and for making the decision to remove the appellant were set out in the refusal letter. The respondent considered that there were no factors justifying leave being granted on exceptional grounds, and that the appellant did not qualify for leave under the Rules.

5. The appellant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Thorne, sitting at Hatton Cross on 26 November 2013, but in a determination promulgated on 5 December 2013, Judge Thorne dismissed her appeal, both under the Immigration Rules and under Article 8.

6. The appellant now appeals against this decision, having been granted leave by First-tier Tribunal Judge Hemingway on 30 December 2013.

Grounds of Appeal

7. At paragraph 1 of the grounds, a challenge is made to Judge Thorne's statement at paragraph 44 of his determination, that "the Article 8(2) ground of prevention of disorder or crime has regularly been held by the courts to cover the maintenance of effective immigration controls". It is said that this is a material error of law "as the need to maintain an effective system of immigration control arguably falls within the 'economic wellbeing'". This, it is submitted, "will arguably impact upon the proportionality assessment where "prevention of disorder and crime" would arguably attract more weight than economic wellbeing."

8. The next challenge to the determination, at paragraph 2 of the grounds, is that although at paragraph 40, Judge Thorne accepted that the appellant had a family life in the UK with her brother and sister and their children, at paragraph 49(v) and (vi) he finds that the evidence does not establish on the balance of probabilities that he has family ties either with her adult siblings or with her nieces and nephews in the UK "that go beyond the normal ties to be expected" between such family members.

It is asserted in the grounds that this is a contradiction, which amounts to a material error of law.

9. It is also asserted that this conclusion is "contrary to the evidence", especially because the relationship between the appellant and the children "does not have to meet the *Kugathas* definition of family life, as that definition applies to adults".

10. Then, it is asserted that at paragraph 49(x) of the determination, the judge's finding that "the appellant has a familial relationship with her nephews and nieces who are all children and British citizens" also contradicts the finding at paragraph 49(vi) (that on a balance of probabilities it has not been established that the family ties go beyond the normal ties to be expected between such family members).

11. With regard to the judge's finding (at paragraph 49(x)) again that "I conclude that it is in the best interests of the children to remain with their parents" it is asserted that this is clearly wrong because the appellant's brother was a single parent, and thus reference to parents in plural is "misconceived".

12. Complaint is then made that while it may be correct to take account of the fact that the adults knew that the appellant had no right to be in the UK, "that logical reasoning does not apply to the children".

13. It is asserted that for these reasons it cannot be said that Judge Thorne properly carried out the balancing exercise, or that he had considered all the evidence in the round or had taken into account all the relevant factors in this appeal. Further, it is asserted that he failed to make "adequate, if any, credibility findings in respect of the evidence given by the appellants of the witnesses".

14. When granting permission to appeal, Judge Hemingway stated as follows:

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> 3. It may be felt [that] much of the grounds are taken up with mere disagreement and that some of the points made focus upon peripheral matters. However, it is arguable the judge erred in failing to provide reasons for his findings as to the nature and depth of the family relationships the appellant has with various UK based family members including her sibling's child Shallom. In particular, it is arguable no proper reasons are given for the findings from paragraph 49(v) to (viii) of the determination and that no assessment as to credibility of the appellant and her two witnesses has been undertaken. ..."

The Hearing

15. I heard submissions on behalf of both parties. As my notes of these submissions, which I made contemporaneously, and in which I attempted to record everything which was said to me, are contained within my Record of Proceedings, I shall not set out below everything which was said to me in the course of the hearing. I have,

however, had regard to everything which was said, as well as to all the documents contained within the file, whether or not the same is set out specifically below.

16. At the outset, I indicated to the parties that it was the provisional view of the Tribunal that although, clearly, the need to maintain an effective system of immigration control is for the purposes of the "economic wellbeing" of the country rather than the prevention of disorder or crime, this did not seem to the Tribunal to be a material error. However, if Ms Ofei-Kwatia wanted to persuade the Tribunal that this provisional view was not correct, she was free to do so.

17. Ms Ofei-Kwatia did not seek to reinforce the argument which had been made regarding this point in the grounds, but asked the Tribunal to find that essentially there were several cumulative errors in the judge's determination, such that when these were considered in the round, they pointed to a determination that ultimately contained a material error of law.

18. The evidence of neither the appellant nor her two witnesses had been considered in "a satisfactory way" and no findings had been made as to credibility. In an appeal of this kind, findings of credibility were crucial when assessing what weight to attach to the evidence.

19. Further, there was a discrepancy, as ventilated in the grounds, between the judge finding at paragraph 42 that there would be an interference with the appellant's right to family life in this country with her brother and sister and their children and the findings at paragraph 49 that this family life did not go beyond the normal ties to be expected between such family members. In answer to a question from the Tribunal as to whether or not this was just the judge's way of distinguishing between family life and family life which engaged Article 8, Ms Ofei-Kwatia submitted that if this was so it should have been made clear in the determination. Obviously there was the issue with regard to the family life enjoyed between the appellant and her adult siblings as had been discussed in *Kugathas* , but in relation to the children, especially Shallom, there was no such test or definition of the level of relationship which should be recognised.

20. The oral evidence before the judge had been such that it took account of the dependence that Shallom had on her aunt, so in the absence of any conclusion about credibility, such as would affect the weight that the judge should have attached to the evidence he heard about the level of dependence, it should have been accepted that Shallom depended on her aunt. Essentially this led to an inference that there had been an incomplete assessment under Section 55.

21. There was another mistake that the judge had made in relation to Section 55 when at paragraph 49(x) he had found the best interests of the children was to remain "with their parents". This could not be right, because the mother had abandoned the appellant's brother's children. Also, this did not "fall within the evidence as given", which had dealt with the support that the appellant gives Shallom, on which no finding had been made.

22. There had not been a finding as to what effect the appellant leaving the country would have on the ability of the father to remain in full-time employment in light of the fact that in evidence he stated that it was because of the appellant looking after his children that he was able to work full-time (which evidence was recorded in the determination at paragraph 18).

23. On behalf of the respondent, Mr Wilding submitted that there had been absolutely nothing wrong with the judge's reasoning, analysis, or consideration of proportionality. With regard to the assertion that the judge had failed to make findings on credibility, these submissions got her nowhere. There had been no suggestion that the witnesses had been deliberately concocting a false case in terms of evidence and it was not an error of law to fail to make a positive finding when credibility was not in issue. It had not been argued on behalf of the respondent that the witnesses had been deliberately presenting a false case.

24. With regard to the submission that on one particular point the judge had made an error, because he had referred to it being in the best interests of the children to remain with their "parents", whereas the mother of the appellant's brother's children had deserted them, so these children only had a parent in the singular, it was clear that the nephews and nieces which were being referred to (these were "the children") were children respectively of the appellant's brother and sister, so they had different parents. Accordingly, when the judge concluded that it was "in the best interests of the children to remain with their parents", he was clearly referring to the different parents that these children had. Some of them were the children of the appellant's sister, while others were the children of the appellant's brother. That was the logical interpretation. It was said in respect of all these children that this appellant looked after them.

25. So when the judge found that it was in the best interests of the children to remain with their parents, this was an incontrovertible fact, and this statement did not contain any error whatsoever.

26. Ultimately, the judge had found that the evidence before him did not point to that dependency on the appellant which would be required for great weight to be placed on it and that was why at paragraph 49(vi) there was reference to the "normal ties to be expected". In other words, the value to be placed on the relationship was not sufficiently high, rather than that there was no such relationship at all.

27. The judge had carried out a text book *Razgar* approach, and what the judge was saying when he said that the ties did not go beyond the normal ties to be expected between family members is that this was not a factor which carried great weight in the proportionality assessment. When one looked at the proportionality assessment holistically, the judge had considered all the positive factors put before him and weighed those against the public interest in this appellant being removed, and there was a high public interest in maintaining effective immigration control, whether or not this was in order to advance the economic wellbeing of the country (which it was) rather than in order to prevent disorder and crime. Effectively, the challenge to

the determination did not amount to more than an attempt to reargue the appellant's case.

Discussion

28. As I indicated to the parties at the commencement of the hearing, while clearly the judge made an error by stating that the need to maintain effective immigration control was for the purpose of preventing disorder and crime, rather than advancing the economic wellbeing of the country, I do not consider that this error was in any way material to the decision which was made. Clearly, the need to maintain effective immigration control is important, and this factor must be given great weight.

29. The judge clearly considered carefully whether or not there were factors of sufficient weight to outweigh the need to maintain effective immigration control, and his decision that there were not is properly reasoned. There was no issue regarding credibility as such, but having considered all the evidence, the judge did not consider that the appellant had established on a balance of probabilities that her relationship with her nieces and nephews, including Shallom, went beyond the normal ties to be expected in a family.

30. The reality is that this appellant overstayed, knowing that she had no right to be here, but now seeks to argue that her relationship with her nieces and nephews is so important that even though clearly it is in the interests of maintaining a fair and effective system of immigration control to require her to leave, she should nonetheless be allowed to remain because her removal will have such a dire effect on her nieces and nephews, and in particular Shallom.

31. The judge did not agree, and he was entitled not to agree. He noted in particular that there was no independent medical evidence regarding precisely what it was that Shallom was suffering from, and he recorded accurately (there is no suggestion that this was misreported) that the evidence before him was that her father had said that "he did not know what the technical term for her condition was. It was something like autism and Downs syndrome" (at paragraph 18).

32. It was not at all clear from this evidence how it was that the removal of this appellant could be so crucial to the best interests of this child, who was receiving support from social services for two hours every day. The judge considered that it was not, and this was a finding which was open to him on the evidence.

33. With regard to the judge's conclusions that it was in the best interests of the children to remain with their parents (that is respectively the appellant's brother and sister) and that the decision to remove this appellant did not interfere with these best interests, that again was a finding which was open to him. As the judge finds at paragraph 51 "there is a strong public interest in maintaining effective and fair immigration control as well as protecting the economic wellbeing of the UK" (which shows that the judge did in fact have the correct test in mind, even though he had wrongly stated the purpose of maintaining effective immigration control as the prevention of disorder and crime earlier in his determination). He is also in my

judgement correct when he says that the appellant and her UK based family "knew when she arrived as a visitor that there was no guarantee that she would be allowed to live in the UK".

34. While it is obviously correct that the children would not be a party to any decision that she should remain, it is not correct that for that reason alone, this factor should not be given weight. If people were allowed to remain because they had young family members who would prefer them to remain, who cannot themselves be blamed for their relatives' breaches of immigration law, it would be very much harder to maintain a fair and effective system of immigration control, which is an important consideration.

35. Essentially, therefore, the judge made findings which were open to him, and carried out a proper proportionality assessment. In my judgement, the grounds do not do more than attempt to reargue the appellant's case which has already been rejected by the First-tier Tribunal, and do not identify any material error of law in the judge's determination. It follows that this appeal must be dismissed and I so order.

Decision

There being no material error of law in the determination of the First-tier Tribunal, the appellant's appeal is dismissed.

Signed: Dated: 11 March 2014

Upper Tribunal Judge Craig