Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05166/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 August 2015	**On 25 August 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MISS NIRIA MARIA HERRERA AGUDELO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rene, Counsel
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. The Appellant is a national of Colombia. She arrived in the UK on 11 April 2000 with leave as a visitor. On 10 June 2013, she applied for leave to remain as the parent of a person present and settled in the UK. The Respondent refused her application on 18 December 2013 and she was thereafter given notice of removal which gave her a right of appeal.

2. The Appellant was born on 20 July 1946 and is therefore now aged 69 years. She has two adult children, Reinaldo Velazquez and Sandra Velazquez. Both are resident and settled in the UK. The Appellant lives with Reinaldo, who, however, works away during the week. Reinaldo has a child of a previous relationship, Jacob, who was born on 8 February 1999 and is therefore now aged 16. He lives with his mother but stays with his father and grandmother every week or two for the weekend. His grandmother looks after him, cooks for him and the two have a close, loving relationship. Sandra Velazquez lives with her own family in a property separately to the Appellant. She has two children. Daniela was born on 12 December 1996 and is now aged 18 years. Angelica was born on 22 January 2012. The evidence is that Sandra and the children see the Appellant every week and they have a strong bond. The Appellant took Daniela to and from school between the ages of 5 and 12 years (therefore some 6 years ago).

3. The Appellant has an elder brother in Colombia. She has occasional telephone contact with him but they are not close. He has two children living in Colombia. The Appellant has no property or assets in the UK or Colombia. She is financially supported by her son with whom she lives and who is able to meet all her financial needs, including paying for private healthcare.

4. The Appellant's appeal came before First-Tier Tribunal Judge Grice on 19 March 2015. It was accepted that the Appellant could not meet the requirement of the Rules on which she relied. The appeal turned therefore on Article 8 ECHR and whether the Appellant's removal would breach her human rights. The Judge accepted the evidence as set out at [2] and [3] above but found that the Appellant was unable to meet the Rules as set out in Appendix FM or paragraph 276ADE. She went on to consider Article 8 ECHR outside the Rules but held that the decision to remove the Appellant was not disproportionate. The appeal was therefore dismissed in a decision promulgated on 27 March 2015 ("the Decision").

5. Permission to appeal was granted by First-Tier Tribunal Judge Nicholson on the basis that the Judge should have considered the Appellant's case on the basis of both family and private life and that the Judge had not considered the best interests of the Appellant's grandchildren. The Judge found that the other grounds were less meritorious but did not confine the grant of permission. The matter comes before the Upper

Tribunal to determine whether the First-tier Tribunal decision involved the making of an error of law.

Submissions

6. Mr Rene drew my attention to [62] of the Decision where the Judge indicated that "this is a private life appeal with weak evidence to support it". That was inconsistent with [58] where the Judge accepted that the Appellant's close ties were "almost entirely in the UK". The Respondent and Judge accepted that the Appellant is entirely financially dependent on her adult son in the UK. That, Mr Rene submits, falls squarely within the test laid down in Kugathas for dependency going beyond the usual ties between adults. The Judge should therefore have considered family life as well as private life. If the Judge had done so, she would have to consider the factors cumulatively under both family and private life and her failure to do so amounted to a material error of law.

7. Mr Rene also submitted that the Judge erred at [74] by speculating as to the burden which the Appellant might be to the State if leave were granted. He submitted that, as a dependent relative, her sponsor would be required to sign a form providing financial sponsorship. I pointed out that the Appellant could not succeed as a dependent relative and whilst leave would be granted, if she succeeded, on the basis that she should not have recourse to public funds, this would not generally preclude access to the NHS. Mr Rene pointed out, though, that the evidence was that in the past when the Appellant experienced health problems, her son paid for private treatment [23]. He therefore submitted that the Judge had embarked on impermissible speculation.

8. Turning to the Appellant's relationship with her grandchildren, he submitted that the Judge had not considered section 55. The Judge noted that the children's parents are in the UK [51] and noted that there would be impact on the grandchildren at [45] and [46]. The Appellant plays an important role in the lives of her grandchildren. Section 55 should therefore be considered.

9. In relation to section 117B, Mr Rene submitted that due to the Appellant's age, she would not be required to be proficient in English in order to settle in the UK and therefore the Judge erred in taking the fact she speaks no or little English into account when considering the public interest. I noted that this was a rather different consideration, namely whether the Appellant would be able to integrate and the fact that there would be no formal requirement to obtain an English language certificate under the Rules did not seem to me to mean that this was not a factor which could and should be taken into account when considering the public interest.

10. Mr Walker submitted that the Judge had properly considered both family and private life. He drew my attention to the conclusion at [76] that removal would be a proportionate response when balanced against both private and family life. Consideration was given to the impact on the Appellant's family at [75] and the Judge noted at [70] that there was an issue whether there was family or private life before going on to consider proportionality.

11. In relation to the grandchildren's best interests, Mr Walker submitted that the Appellant's direct family i.e. her children are now adults (as noted at [65]). The welfare of the Appellant's grandchildren lies with the parents who care for them. He accepted however that when looking at family life, that family life was enjoyed with all the family and not just with the adult son on whom the Appellant is dependent. He submitted though that, in any event, consideration of family life in addition to private life would not affect the proportionality balance. The Appellant was supported by her son before she came to the UK and the Judge noted that this would continue if she returned [75].

12. In response to a question from me and in reply, Mr Rene very fairly accepted that he was not saying that the outcome would necessarily be any different if family life and section 55 were considered but he submitted that the errors were material because it was possible that I could reach a different view and conclude that there would be a breach of Article 8 when considering the close family relationships and the fact that the Appellant had developed those relationships over a period of fourteen to fifteen years.

13. Both representatives accepted that, if I were to find an error of law, I could go on and re-make the decision. There was accepted to be no need for any further evidence, there was no issue of credibility in relation to the evidence and there was no need for further submissions as those made to the First-Tier Tribunal Judge were fairly recorded in the Decision and I had heard all further submissions about the correctness of the Decision in the context of the error of law submissions.

14. I indicated that I would reserve my decision in relation to whether there is an error of law in the Decision and would provide that with reasons and would also re-make the decision with reasons in the event that I found a material error of law. I therefore turn to do that.

Error of law decision and reasons

15. After having considered the grounds of appeal and oral submissions, I am satisfied that the First-Tier Tribunal Decision involved the making of an error of law.

16. The Judge did not properly consider whether there exists a family life which deserved to be given due consideration in the Article 8 proportionality balance. There are references to family life in the

conclusion at [76] and at [70] and [71] when referring to the Razgar test. However, I cannot find on the basis of the very brief consideration of the impact on the Appellant's family at [75] that, even if the Judge thought that family life was relevant, she has properly considered it. I also find that the Judge erred in failing to consider section 55 when looking at the impact of removal of the Appellant on her minor grandchildren. It may be that this is a further indication that the Judge did not consider family life to be relevant.

17. In this case, the Appellant is clearly entirely financially dependent on her son (as indeed she appears to have been when she was in Colombia). There is therefore an additional dependency beyond the usual emotional ties which justifies a finding that the Appellant has family life with her adult son. It would be artificial for these purposes to find that family life is only with that son and I therefore accept Mr Walker's concession both that this case does require consideration of the Appellant's family life and that this family life is with her whole family.

18. I do not accept that there is any error in the Judge's consideration of the relevant section 117B factors but that is irrelevant in any event in light of the above findings as I will need to reconsider section 117B when re-making the decision as family life will now need to be encompassed in the balance with the public interest.

Decision and reasons

19. Having found an error of law, I therefore set aside the Decision and proceed to re-make it. The representatives agreed that no further evidence was required and the Judge found the Appellant and her family entirely credible. I have therefore taken into account when re-making the decision, the evidence as set out at [13] to [48] of the Decision. I have also read and taken into account the written statements of the Appellant, her son Reinaldo, her daughter Sandra, her granddaughter Daniela, the letter from her grandson Jacob and the documents in the Appellant's bundle. I do not repeat what is recorded in the Decision but I do note that in fact the relationship between the Appellant and her now adult granddaughter is probably closer than the Judge recorded as it is said that Daniela lived with her uncle and grandmother between the ages of 5 and 12 years so that the bond between them is probably even closer than the Judge recorded.

20. I accept that the Appellant has a close family life with her children and grandchildren. I also find that in the fifteen years that she has lived in the UK she will have developed a private life here although I find that the evidence shows that this is intertwined with and inseparable from her family life as her life generally revolves around her relationships with her children and grandchildren. There is no evidence of interaction with friends or the wider community. She does not speak English which is bound to make such interaction difficult. I accept also that, in

Colombia she has few relations, limited it appears to her brother and his family with whom she has little contact. She would also find it difficult to reintegrate and to survive financially although her son has indicated that he would continue to maintain her as he used to do.

21. I accept that removal of the Appellant will impact on her family. Both her son and daughter very understandably wish her to remain in the UK and express concern about her future if returned to Colombia. Her grandson, Jacob, notes that his grandmother cooks for him and does his washing when he visits his father and her at weekends and that he would be "extremely happy" if she could stay. He also says that it would be difficult for him to travel to Colombia so he would completely lose the connection with her. I find that this probably overstates the position as his father has visited his grandmother in Colombia from the UK and could no doubt do so again and take his son with him. Jacob is also now aged 16 years and within a few years will be an independent adult who could take the opportunity to visit his grandmother in her home country. However, I accept that travel to Colombia for the family members in the UK is costly and involves travelling a significant distance so that visits would probably not be frequent.

22. Daniela lived with her grandmother for seven years of her life and she therefore understandably considered her "like a mother" during those years. She sees her grandmother on a weekly basis. She says that she does not want her grandmother to be removed and is concerned about the lack of family in Colombia to look after the Appellant in her old age. Daniela is of course no longer a child but I recognise that the removal of the Appellant would impact on her no less just because she has reached adulthood. She is though now of an age where she could visit her grandmother on her own if her circumstances allow.

23. In relation to section 55, the Appellant's removal would undoubtedly have an adverse impact on Jacob and Angelica who the Appellant also sees on a weekly basis. Angelica is at a very young age and may be less affected; there is no evidence about the care which the Appellant gives to Angelica beyond visits. However, I accept that there would still be some impact. Best interests are of course a primary although not the primary consideration. In terms of best interests, whilst I do not doubt the genuineness of the affection which the Appellant's grandchildren have for her and she for them, and that they would prefer for her to stay in the UK, I am quite unable to find that removal would significantly interfere with the grandchildren's best interests. None of them live with the Appellant on a permanent basis and their main carers are their own parents (Sandra in the case of Daniela and Angelica and Catherine and to a more limited extent Reinaldo in the case of Jacob). That situation will continue without any real disruption if the Appellant is removed. In any event, the best interests of a child, whilst a primary consideration, can be outweighed by other countervailing interests which I consider below in the context of the public interest.

24. Article 8 of the European Convention on Human Rights protects the right to private and family life. However, it is not an absolute right. The state is able to lawfully interfere with an appellant's private and family life as long as it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. The starting point is the basic principle that a state has the right to control the entry and residence of people within its borders. There is a strong public interest in maintaining an effective system of immigration control. The immigration rules, which set out the requirements for leave to enter and remain in the UK, are the main guide to what decisions are likely to be considered reasonable and proportionate. It is still possible for cases that fall outside those requirements to engage the operation of Article 8 but only if there are compelling circumstances that are not sufficiently recognised under the immigration rules: see Huang v SSHD [2007] UKHL 11, Patel & Others v SSHD [2013] UKSC 72, R (on the application of MM & Others) v SSHD [2014] EWCA Civ 985 and SS (Congo) v SSHD [2015] EWCA Civ 387.

25. The Appellant cannot succeed under Appendix FM to and paragraph 276ADE of the Immigration Rules. It is not suggested that there would be "very significant obstacles" to reintegration in Colombia for the purposes of paragraph 276ADE. The Respondent did not dispute that the Appellant's Article 8 claim should be considered outside the Rules and there are elements of her claim which cannot adequately be considered within the confines of the Rules (particularly in relation to family life). I therefore turn to consider whether removal would breach the Appellant's Article 8 rights when considered outside the Immigration Rules.

26. In the case of Razgar, Lord Bingham set out a step by step approach to the consideration of an Article 8 challenge to removal as follows:-

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    (2) If so, will such interference have consequences of such gravity as potentially engage the operation of Article 8?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

    (5) If so, is such interference proportionate to the legitimate public end sought to be achieved."

27. In this case, the first four questions are clearly to be answered in the affirmative. The only issue which remains, therefore, is whether

removal is proportionate when the Appellant's private and family life as set out above is balanced against the public interest in this case.

28. In relation to the public interest, Parliament introduced via section 19 of the Immigration Act 2014, a number of public interest considerations to which I am bound to have regard when considering whether an immigration decision breaches a person's Article 8 rights. Those are set out at sections 117A-B of the Nationality, Immigration and Asylum Act 2002 as follows:-

> **Article 8 of the ECHR: public interest considerations**
>
> **117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B Article 8: 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.

29. As section 117B(1) makes clear, maintenance of effective immigration control is in the public interest. In this case, as the Judge noted in the Decision, the Appellant and her family gave a very honest account as to the Appellant's immigration history. She came to the UK as a visitor with a clear intention not to return to Colombia. She accepts that she lied to the immigration officer on entry and she knew it was wrong for her to stay. Her son admitted that he had not made any application on the Appellant's behalf shortly after her leave expired or indeed for a further thirteen years because, as he candidly accepted, "she was too young and was unlikely to be accepted – [they] would not be able to demonstrate a strong family connection in such a short space of time".

30. Section 117B(2) also weighs against the Appellant. I do not accept Mr Rene's submission that the public interest in a person speaking English is reduced or irrelevant in this case because the Rules would not require the Appellant to be proficient in order to settle. The purpose of section 117B(2) is to set out the public interest in those being allowed to remain in the UK being able to integrate into society. I fully accept that the consideration at section 117B(2)(a) may be less relevant in this case as that is aimed at the impact of an (in)ability to speak English on a person's employment prospects. Due to the Appellant's age there is no suggestion that she would be able to work. However, I consider that the Appellant's inability to speak English is a factor which does weigh in the balance against her in relation to her ability to integrate. I also note that there is no evidence of the Appellant's integration into UK society in the fifteen years that she has been in the UK which reinforces the relevance of this factor in the public interest.

31. Section 117B(3) is largely neutral in this case. The Appellant is not, strictly speaking, financially independent as she is completely reliant on her son to maintain her. It is also possible that, given her advanced age, she would need to have increasing recourse to the NHS in the coming years although to date she has not and when she has needed healthcare, her son has paid for this privately. That does not though

mean to say that she would not have need for the public health service or even recourse to benefits, particularly if her son's circumstances were to change. Clearly she could not be expected to work at her age. Even if she is considered to be financially independent and would not have recourse to public funds in the future, this factor does not weigh in the Appellant's favour as a positive consideration in the public interest balance (see AM (S117B) Malawi [2015] UKUT 0260 (IAC).

32. Sections 117B(4) and (5) are of particular importance in this case. As set out at [29] above, this is a case where the Appellant with the assistance of her family have flouted UK immigration laws, knowing that they were doing so and have deliberately delayed in making an application for leave to allow the Appellant to build up a family and private life in the UK whilst here unlawfully. They knew full well that her presence has been unlawful and deliberately did not apply for leave sooner on the basis that they did not consider that she could succeed until she was older and had formed closer ties in the UK. In those circumstances, I give little weight to the family and private life which I have set out at [20] to [23] above.

33. I have carefully considered the Appellant's family and private life, and also the impact of her removal on her family in the UK. I take account of the closeness of the relationships which the Appellant has in the UK and that she does not have close relatives in Colombia. She would of course be able to continue her ties with her family in the UK via modern means of communication but that is not the same as day to day contact in person. Her family would be able to visit her in Colombia and she may be able to visit the UK (although her immigration history may well make that difficult). Removal of the Appellant would no doubt be upsetting for her family in the UK. I also take account of the fact that it would be very difficult for her to reintegrate in Colombia but she would have the financial support of her son, she speaks the language and would be able to make friends and possibly re-establish contact with her brother and his family.

34. Removal of the Appellant will undoubtedly interfere to a not insignificant extent with her family and private life and will impact also on her family members in the UK including her minor grandchildren. However, taking account of all of the considerations set out at [20] to [23] above and weighing in the balance the public interest considerations set out at [28] to [32] above, I find that removal of the Appellant is nonetheless a proportionate response when weighed against the maintenance of immigration control. I therefore dismiss this appeal.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by dismissing it. For the avoidance of any doubt, I dismiss the appeal under the Immigration Rules and on human rights grounds.

Signed  Date 21 August 2015

Upper Tribunal Judge Smith