IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16546/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 April 2015	**On 18 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SYLVIA KAHEE HANGERO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Magrath, Counsel instructed by Supreme Solicitors
For the Respondent: Mr T Melvin, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from decision of the First-tier Tribunal dismissing her appeal against the decision by the Secretary of State to refuse her leave to remain outside the Rules, and to make directions for her removal as an overstayer. The First-tier Tribunal did not make an anonymity direction, and I do not consider the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Namibia, whose date of birth is 7 March 1980. She arrived in the United Kingdom on 27 May 2003 with leave to

enter as a working holidaymaker. She had a two year visa which ran until 22 May 2005.

3. On 24 May 2005 she applied for leave to remain in the United Kingdom as a student. This application was refused with no right to appeal on 6 July 2005 because the appellant did not have extant leave at the time she lodged her application.

4. On 1 December 2008 the appellant gave birth to Moses, who took his father's surname. His father is a Namibian national, who has no lawful basis of stay in the United Kingdom and indeed it is not clear that he is still here.

5. On 4 April 2012 the appellant applied on behalf of herself and her child for leave to remain in the United Kingdom on a compassionate basis outside the Rules. The application was refused on 4 June 2013, without a right of appeal. On 7 October 2013 the appellant was served with an immigration notice IS151A, as was her child.

6. On 21 March 2014 the Secretary of State gave her reasons for deciding to remove the appellant as a person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999 (her human rights claim having been refused).

7. Her sister Meriam Hangero had said in the 2012 application that the appellant would experience "severe and extreme hardship" if she were to return to Namibia. No objective evidence had been provided which would corroborate that the appellant would be incapable of obtaining employment or accommodation in her home country, such as evidence of physical infirmity or disability and so forth. In any event, claims based on poor living conditions, high unemployment or lack of accommodation for an applicant in their home country did not ordinarily engage Article 3 ECHR. In the case of **MA (prove destitution) Jamaica [2005] UKIAT 0013**, the IAT concluded that for a claim based on destitution to engage Article 3 it would need to be proven by clear evidence from the applicant in question.

8. The appellant had previously claimed she lived with a sibling in the United Kingdom between 2006 and September 2011 before moving out to live in a rented apartment. But in her letter of support Ms Meriam Hangero claimed that the appellant had lived with her since November 2005. The appellant had not demonstrated the means of support that she seemingly had available to her in the United Kingdom would not continue to be available to her upon her return. Alternatively, it had not been demonstrated that any family members in Namibia could not offer the appellant and her child assistance or support should that be required. In the questionnaire form, the appellant stated that her parents and five siblings were currently living in Namibia. In addition to this, the appellant had also asserted in the same questionnaire that she had a sister and cousin living in the United Kingdom. Accordingly, it had not been

demonstrated that her claimed family members in the United Kingdom could not assist her from abroad following her return to her home country.

9. The appellant had spent the majority of her life in Namibia, including all her formative years. She was able to speak a native language of that country. She would be aware of the culture, customs and traditions of her home country on account of having lived in Namibia for her formative and adolescent years. She was approximately 23 when she left Namibia to come to the United Kingdom. She did not suffer from any medical ailments, or from any physical infirmity which prevented her from being able to relocate or adapt to life abroad.

10. There was no current evidence of contact between the appellant's child and his father, nor was there any evidence of assistance by him towards the child's day-to-day care and needs, or of any assistance or the financial costs of the child's upbringing. In any event, there was no evidence that the father had any lawful basis of stay in the United Kingdom, and as the child's father was a national of Namibia, he could relocate to that country and could continue to enjoy a family life with Moses in Namibia.

11. Prior to considering whether enforcement should continue against the appellant and her dependent child, the Home Office had had regard to whether there were any extenuating circumstances for the appellant and her child which would in turn demonstrate it would be unreasonable to expect them to leave the United Kingdom and return/relocate to Namibia. With regard to the above, that the Home Office had given consideration to the factors identified under Chapter 53 of the Enforcement and Instructions Guidance Manual. There were insufficient factors to justify allowing the appellant and her dependent child to stay in the United Kingdom.

The Hearing Before, and the Decision of, the First-tier Tribunal

12. The appellant's appeal came before Judge Colyer sitting at Nottingham Justice Centre in the First-tier Tribunal on 28 October 2014. The appellant was represented by Counsel, and the Presenting Officer appeared on behalf of the respondent. The judge received oral evidence from the appellant, her sister Meriam and from her brother-in-law Mr Gibrill Cham, a Belgian national.

13. The judge's findings were set out in his subsequent decision from paragraph [24] onwards. At paragraph 33, he found that the child's father did not have any status in the United Kingdom. At paragraph [34], he found that the appellant's departure with a dependent child would not significantly affect the relationship between the child and his father. At paragraph [38], the judge found that the child was of an age where he was dependent upon his mother for his care and support and he was young enough to be able to adapt to life abroad. He would continue to be cared for in Namibia in the same manner as he has been cared for during his time in the United Kingdom, namely by his mother.

14. It was in the best interest of the child to be cared for by his mother and his mother had no right to remain in the United Kingdom and was required to return to Namibia. So he found it was in the child's best interest to relocate to Namibia with his mother. There was no evidence to show he could not attend primary school in Namibia following his relocation there, and he would also be able to establish a private life with family members and friends that lived in Namibia.

15. The judge addressed the question of whether the appellant could bring herself within Rule 276ADE at paragraphs [52] to [55].

16. The judge addressed the prospects for the appellant and her child on return to Namibia at paragraphs [61] to [69] under the heading of "Return to Namibia".

17. The judge addressed the public interest at paragraphs [70] to [72], and further Article 8 considerations in paragraphs [73] to [83]. His conclusions were set out in paragraphs [84] to [87]. At paragraph [85], he found that the appellant's private and family life might be resumed in Namibia. She was mature enough to be able to adapt to life in her home country. The facts of the appeal revealed no substantial health or welfare issues. The situation in Namibia might be materially less good for the appellant than the UK and there might be a relative disadvantage. But any difference was not in itself a sufficient basis for allowing her human rights appeal.

The Application for Permission to Appeal

18. The appellant applied for permission to appeal to the Upper Tribunal. Some of the grounds did not specify clearly and coherently, with the appropriate particulars, the areas of law said to contaminate the decision under challenge: see **Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC)**. However, it is not necessary to explore this issue further, as in the event Ms Magrath only pursued before me two grounds of appeal. These two grounds were adequately formulated in the application for permission.

19. Ground 1 was that the judge had erred in law in his application of Rule 276ADE(vi). Ground 2 was that the judge had erred in law in failing to have regard to the fact the appellant might have an entitlement to reside in the United Kingdom as the extended family member of an EEA national.

The Grant for Permission to Appeal

20. On 26 January 2015 Judge Wellesley-Cole granted permitted to appeal on all grounds raised.

The Hearing in the Upper Tribunal

21. At the hearing in the Upper Tribunal, Mr Melvin relied on the Rule 24 response settled by his colleague Mr Tarlow on 16th February 2015, and also on an extended Rule 24 response which he had himself settled.

22. I explored with Ms Magrath the question of whether, and if so to what extent, there had been evidence before the First-tier Tribunal Judge as to prior dependency by the appellant on Mr Gibrill Cham, the Belgian husband of the appellant's sister.

Discussion

23. In the refusal letter, the respondent addressed the question of whether the appellant came within the requirements of Rule 276ADE(vi) in paragraphs [30] and [31]. As the refusal letter was written in March 2014, the respondent referred to the version of the Rules in existence at that date. Under this version, the applicant had to show that he/she had no ties to the country of return, including social, cultural or family ties.

24. Although the judge discussed the application of Rule 276ADE in paragraphs [52] to [55], he only considered sub-paragraphs (iii), (iv) and (v). He did not consider sub-paragraph (vi).

25. The judge effectively engaged with the old version of Rule 276ADE(vi) at paragraph [61] onwards, where he repeated and enlarged upon the reasons given by respondent in the refusal letter for asserting that the appellant continued to have social, cultural and family ties to Namibia. But, as correctly pointed out by Ms Magrath, the judge did not in terms direct himself to the new version of sub-paragraph (vi) of Rule 276ADE. Under the new version, which was introduced into the Rules from 28 July 2014, the test is whether there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK. Although the application was decided by the Secretary of State before 28th July 2014, Mr Melvin agreed that in his decision making the judge needed to apply the new version, not the old one.

26. Mr Melvin submitted that the judge's error was not material, as he in effect found that there would not be significant obstacles to the integration of the appellant and her child on return to Namibia. On the other hand, Ms Magrath submitted that, as a result of failing to apply the correct test, the judge had not given adequate reasons for finding against the appellant on Rule 276ADE(vi).

27. Judge Colyer fully addressed the case that was put to him by Counsel for the appellant in the First-tier Tribunal, namely that the child had no ties to Namibia, and his mother would have no support in Namibia. The closing submissions of Counsel are set out in the decision, and they did not include a submission that there would be very significant obstacles to the integration of the appellant or her child on return to Namibia.

28. Moreover, it is implicit from the findings of fact made by the judge in the section headed "Return to Namibia" that he was finding, among other things, that there were not very significant obstacles to the integration of the appellant or her child.

29. The reasoning of the judge was that the appellant had spent the formative years of her life in Namibia, and was able to speak a native language of that country. She was aware of the culture, customs and traditions of her home country on account of having lived in Namibia for her formative and adolescent years, and having left Namibia when she was aged approximately 23. She had family members living in Namibia. There was no evidence that she suffered from any medical ailments or from any physical infirmity. She and her child were citizens of Namibia. No objective evidence had been provided which corroborated the claim that the appellant would be incapable of obtaining employment or accommodation in Namibia.

30. Ms Magrath criticised two of the judge's findings. The first, in paragraph [67], was that the appellant could utilise any skills that she might have gained in the United Kingdom, including English language skills, to secure employment in Namibia. Ms Magrath submitted that the evidence did not disclose that the appellant had acquired any skills in the United Kingdom. But the appellant is likely to have improved her English language skills as a result of being here since 2003, and she came here as a *working* holiday-maker. So it was open to the judge to find the appellant's improved English language skills would enhance her employability in Namibia, as would any experience of working in the UK.

31. The second criticism relates to the judge's finding in the first sentence of paragraph [68] that there may be family and friends to whom the appellant may have access to on her return to her country of origin. Ms Magrath submits that this is speculative. But the judge goes on to say that it is clear from the evidence that there are still family members of the appellant in Namibia. So it was open to the judge to draw the inference that the appellant and her child might have access to such family members. Indeed, the judge can be said to have rather understated the position. Arguably, this was much more than a mere possibility. For the appellant and her child would not need to cross an international border in order to visit family members living in the same country of return.

32. Although this did not feature as part of the judge's reasoning, a further highly material consideration is that Mr Cham did not dispute the proposition that he could send money to the appellant and her child in Namibia. This was put to him in chief. He did not deny that he could send money. The thrust of his response was that the appellant and her child would not be deprived of financial support from him as a result of going back to Namibia, but that her child Moses would be deprived of his emotional support: see paragraph [14] of the decision.

33. In the light of the evidence (or lack of it), no reasonable Tribunal properly directed could have reached any other conclusion than that the appellant did not meet the requirements of Rule 276ADE(vi) of the Rules. Moreover, the judge gave adequate reasons in paragraphs [61] to [67] for finding that the appellant's relocation to Namibia would not be unjustifiably harsh. The significance of the unjustifiably harsh test is that it was the test which

found favour with the Upper Tribunal at [124] in **Ogundimu [2013] UKUT 00060** when addressing the equivalent provision in the old deportation rules to the old version of Rule 276ADE(vi).

> We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be 'unjustifiably harsh'.

34. The new version of Rule 276ADE(vi) reflects the guidance given by the Upper Tribunal in **Ogundimu** as to the true scope of the "no ties" test. The applicant did not have to show that literally he or she would have no ties to the country of return. The question was whether he or she had *effective* ties in the country of return such that they could lead an adequate private life there. Although the judge has applied the old version of the Rules, rather than the new version of the Rules, his approach is **Ogundimu** compliant. So he has given, by necessary implication, adequate reasons for finding that the appellant does not meet the requirements of the new version of Rule 276ADE(vi). Accordingly, no material error of law is made out.

35. The other ground of appeal lacks merit for two reasons. Firstly, the appellant was legally represented at the hearing, and so it was not for the judge to take a point which, if it had merit, could reasonably be expected to be taken by her Counsel. Secondly, the mere fact that the appellant resided in the same household as her biological sister and her Belgian EEA national brother-in-law did not of itself disclose a viable claim that the appellant was residing in the UK as the extended family member of an EEA national exercising treaty rights here. There is no suggestion in the evidence that the appellant had been a dependant of Mr Gibrill Cham *when living in Namibia.* As the essential element of prior dependency on an EEA national (or prior membership of the EEA national's household) was wholly missing from the evidence, the proposition that the appellant might qualify as an extended family member under the Regulations 2006 does not get off the ground.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly this decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson