Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46607/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 23 July 2015	**On 14 August 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Siphathisiwe Sarah Ndlovu
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr A Jafar, instructed by Kothala & Co
For the respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Chapman promulgated 17.2.15, allowing, on human rights grounds, the claimant's appeal against the decision of the Secretary of State, dated 19.11.14, to refuse her application made on 5.6.14 for settlement on the basis of 10 years continuous lawful residence, pursuant to paragraph 276B of the Immigration Rules. The Judge heard the appeal on 2.2.15.

2. First-tier Tribunal Judge Saffer granted permission to appeal on 16.4.15.

3. Thus the matter came before me on 5.6.15 as an appeal in the Upper Tribunal. Mr Jaffar was content to proceed to deal with the error of law hearing in the absence of the appellant.

4. It transpired at the hearing before me on 23.7.15 that neither party had received or seen the error of law decision. It is not clear why. However, both sides were given a copy that I printed off immediately prior to the decision and allowed time to consider the decision before proceeding.

5. At noted at §5 to §7 of my error of law decision Judge Chapman found that:

   (a) The claimant could not meet the requirements of paragraph 276B for long residence because she had remained in the UK without lawful leave for a period in excess of 28 days;

   (b) The Secretary of State was entitled to exercise her discretion to refuse the application under paragraph 322(2), because of false representations in a previous application;

   (c) The claimant did not meet the requirements of paragraph 276ADE in respect of private life, as there were not very significant obstacles to her integration into South Africa.

6. I noted in my error of law decision that there had been no appeal or cross appeal against any of those findings and that they must therefore stand, and the appeal remains dismissed on immigration grounds. What was placed in issue by the appeal of the Secretary of State was the allowing of the appeal on human rights grounds, notwithstanding the claimant's immigration history, including the finding that the appellant had previously used deception in an immigration application.

7. For the reasons set out in my decision dated 11.6.15, I found that there was such error of law in the making of the decision of the First-tier Tribunal that the decision of Judge Chapman should be set aside to be remade. In essence, I found the article 8 ECHR proportionality assessment was flawed in attaching positive weight in the claimant's favour to her immigration history and failing; failing to properly recognise that her status in the UK was precarious and/or unlawful; and failing to give appropriate weight to the use of deception in a previous application and remaining in the UK without lawful leave since 23.12.12. On that history, I found that it was manifestly perverse to treat the claimant as being generally compliant with immigration control. I also found that there were insufficient reasons to demonstrate that, in the absence of partner or dependent child, the claimants relations with her adult children were anything more than the normal emotional ties to be expected between such relatives and which do not in the normal course of affairs require the continued presence of the claimant in the UK.

8. I then adjourned the remaking of the decision in the appeal, retaining and preserving the findings not in issue, as set out above, and directing that the single issue in the remaking of the decision is whether it is necessary to conduct an assessment outside the Rules on the basis of private and/or family life under article 8 ECHR, and if so, the basis of that assessment. I issued directions for the service of

9. At the outset of the hearing on 23.7.15, Mr Jaffar sought an adjournment in order, he said, to cross-appeal the decision of the First-tier Tribunal on the issues listed above,

asserting that the evidence that was before the Tribunal demonstrated that there had been no deception on the part of the claimant and that therefore the application should not have been refused under paragraph 322(2) of the Immigration Rules.

10. I refused the adjournment application, made at this very late stage. The claimant did not apply at any stage for permission to appeal the dismissal of the appeal on immigration grounds. Mr Jaffar had conduct of the appeal at the error of law hearing in the Upper Tribunal on 5.6.15 and did not raise any such issue then and was content to proceed with the error of law hearing in the absence of his lay client. Any application now would be grossly out of time and in my view any application to the First-tier Tribunal for permission to appeal unlikely to succeed. However, I pointed out that as I had set the decision aside and that this hearing was to remake that decision it was still open to him to demonstrate within this hearing that the decision of the Secretary of State relying on paragraph 322(1A) of the Immigration Rules was not in accordance with the law.

11. Mr Jaffar then took me to the evidence, in particular that relating to social services or social work, which he submitted demonstrated that there had been no deception on the part of the claimant and that the application should not have been refused. However, having given consideration to that evidence, as set out below, I am not satisfied that it makes the point he claims.

12. The detailed immigration history is set out in the refusal decision of 19.11.14 but the relevant history can be briefly summarised as follows. The claimant first arrived in the UK in 2000 with leave as a visitor. Subsequently she was granted leave to remain as a student, later varied to work permit employment, valid until 23.12.10. On 8.6.11 the Secretary of State refused a further in-time work permit ILR application. When the claimant appealed, the decision was withdrawn, for the purpose of remaking it with consideration under section 55 of the Borders, Citizenship and Immigration Act 2009 of the dependents listed in the claimant's application. The application was then refused on 3.8.11.The claimant's appeal against that reconsidered refusal decision was allowed to the limited extent that it was "remitted" to the Secretary of State to consider paragraph 276B of the Immigration Rules, with regard to the claimant's length of residence in the UK. The refusal decision was upheld in the decision issued 6.3.12, and the claimant became appeal rights exhausted (ARE) on 23.3.12. Her out of time application to appeal was refused, and time to appeal was not extended.

13. Since then, the claimant made an out of time application on 9.5.14 for Indefinite Leave to Remain (ILR) on the basis of long residence was rejected as invalid. The application that is the subject of this appeal was lodged on 5.6.14.

14. It follows from the above that the claimant has had no legal basis to remain in the UK since 23.3.12, yet she has remained in the UK unlawfully.

15. The refusal decision of 19.11.14 sets out the issue Mr Jaffar now takes issue with. The claimant's previous application for ILR made in December 2010 was refused under paragraph 322(1A). She had stated in that application that KN (male) and KN (female) were her dependents and that they lived with her. The refusal decision of 19.11.14 states, "However, a social services report determined that the dependents

listed had not lived with you since 2007 and were residing with another family member. In view of this the Secretary of State was satisfied that you had made false representations in relation to your application. In light of this, your current application for settlement has been refused under paragraph 322(2) of the Immigration Rules."

16. A copy of the refusal decision of 6.3.12 is with the case papers. This states that, "On 26 January 2011 a social services report determined that the children had not lived with you since 2007. In view of this the Secretary of State is satisfied that you have made false representations in relation to your application." Later in the refusal decision it is stated, " It is noted that you do not hold a criminal record, however you declared that two of your dependants on this application lived with you, but you informed social services, as outlined in their report of 26 January 2011, that the children had not lived with you since 2007. This somewhat discredits your character."

17. A copy of that application is with the case papers. Section 2 states, "If you have a partner and/or any children under 18 who are living with you in the UK and who are applying for indefinite leave to remain as your dependents, this is where you give their details." The claimant has then set out the details of the two children referred to above. The application also shows that she was applying in the category of work permit holder. It is quite plain that the application was made on the basis that these two children, together with a third child name in the application, were living with the claimant. That was patently untrue.

18. Mr Jaffar relies on various documents to try to draw a distinction between some kind of joint family responsibility for these children and the refusal based on false representations that the children were living with her. I find no merit in this submission and do not accept that the documents reveal what Mr Jaffar claimed.

19. An email of 13.1.11 relating to a fostering assessment for the children reveals that on a visit of 12.1.11 the claimant claimed to be the guardian of the children. It became clear that (the claimant) is not the carer for the children. She told us that since the children have been in the UK they have lived with another of their cousins and they spend school holidays with her." However, she was unable to name the school they attended. The email confirms that the children had never lived with her on any permanent basis, but she maintained they did stay with her at times. It wasn't clear where they would sleep if they did.

20. There is a very small typeface assessment report. This states that the children came to the UK in 2004 and originally lived with the claimant but in 2007 moved to live with another cousin in Hemel Hempstead. It also states that the children are supported by two other relatives, part of the extended family and that the claimant was expecting to look after them again when her own children have left home. It suggests that the female child was being looked after by a different cousin, "with support from three other relatives who she describes as 'aunts' as is common in her culture." It appears to have been this report which was referred to in the refusal decision.

21. I take the point that the cultural background may mean that a number of relatives participate or have some part of the responsibility for the care of children whose own mother has died, but that is a far different situation from a quite obviously dishonest assertion in the application form that the children were dependents living with her. I also reject as unfounded any suggesting that she was in any real sense joint parenting the children. It is obvious she didn't even know what school they attended. Neither does having the children stay occasionally amount to parental control, regardless of the so-called cultural norms of Zulu culture. I have taken into consideration the claimant's assertion that she didn't intend to deceive and that it was simply a misunderstanding. I have also considered Mr Jaffar's suggestion that the claimant stood to gain nothing from the deception, but I reject that explanation as clearly inconsistent with the application made.

22. In the circumstances, there is absolutely no merit in Mr Jaffar's submission on this point. I do not accept that the decision of the Secretary of State was made in error of fact. I find to a high standard of proof that the claimant did make false representations and that the former application was thus correctly refused under paragraph 322(1A) and in consequence the application that is the subject of this appeal was also refused, in reliance on paragraph 322(2). In the circumstances, I find that the decision was correctly made with regard to this issue.

23. Since 23.3.12 the claimant has had no lawful basis to be or remain in the UK, her appeal rights being exhausted at that date. Her subsequent application for leave to remain on the basis of long residence was lodged over 800 days after the expiry of even her section 3C leave. She has remained in the UK in breach of immigration laws.

24. Before considering private and family life issues, the sole remaining issue in the appeal, I have first considered the Immigration Rules.

25. As explained in the refusal decision, the claimant does not meet the long residence requirements of paragraph 276B of the Immigration Rules, even though she had accrued a period of 10 years continuous lawful residence, as she does not meet the character and conduct requirements of that provision, because of her attempted deception in her December 2010 application. In addition, she falls for refusal under the general grounds of refusal, and because of her illegal status she cannot satisfy the requirement of 276B((v) that she must not be in the UK in breach of immigration law.

26. The claimant does not have a child under 18 or a partner in the UK and it is clear that she cannot therefore meet the requirements of Appendix FM in respect of family life.

27. Neither does the claimant meet the requirements of paragraph 276ADE of the Immigration Rules in respect of private life. It seems to me that the Secretary of State may have relied on the suitability requirements, but did not do so. Instead, it is clear that the claimant has not lived in the UK continuously for 20 years but cannot demonstrate that there would be very significant obstacles to her integration in South Africa. She has not lived there since 2000, but she spent the majority of her life there. I note that she has friends and family in the UK, but I do not accept that she has no ties remaining with South Africa. There may be difficulties in reintegrating given her

absence since 2008 (the date of her last visit), but I do not find that these can properly be described as very significant. She has trained as a health professional in the UK, although she has had no right to work here since 2012, and thus will be able to use her skills and qualifications to seek employment in South Africa. The Immigration Rules do not guarantee employment or the same social and economic conditions the claimant has enjoyed in the UK, including the 3 years since 2015 that she has been her illegally. She also owns property in the UK, which can be realised to help establish herself in South Africa.

28. In the claimant's favour I have, amongst other factors set out herein, taken particular attention of the following non-exhaustive list:

(a) That the claimant has been in the UK since 2000, and came here and remained entirely lawfully until 2012. However, as stated herein the fact that she complied with immigration laws is not a factor that can enhance her article 8 rights;

(b) That the claimant used her time in the UK to become educated and gain employment as a qualified nurse. She is a specialist in autism and aspergers syndrome, with a master's degree;

(c) The claimant worked for the NHS and purchased her own home in 2003 and is therefore considerably settled in the UK;

(d) That the claimant has some health issues, including hypertension and heart palpitations;

(e) That most of the claimant's family is in the UK and that she has either no or very limited family members still residing in South Africa;

(f) That the claimant holds her then legal advisor for failure to lodge in time an appeal against the refusal decision of 6.3.12. However, for the reasons set out herein, I have found that there was no merit in the argument the claimant wanted to raise in that appeal;

(g) That the claimant has had some sort of involvement with or taking of part of the responsibility for the two children, and thus there will be a degree of emotional relationship between them;

(h) That the claimant has adult children and grandchildren settled in the UK. I accept that and that they are a close family, of which there is no reason to doubt, especially since the claimant has effectively been a one-parent family and I accept that from time to time they visit and perhaps stay with each other;.

(i) I accept that the claimant has the relationship with her grandchildren she describes in her witness statement. However, that is no more than one might expect in the circumstances and does not amount to family life that is protected by Appendix FM;

(j) That the claimant has some form of romantic relationship with a British citizen. However, they no longer live together, even though the claimant states she hopes that they will soon marry;

29. I have also given carefully consideration to the claimant's witness statement and the statements of others on her behalf.

30. Before addressing article 8 ECHR and the Razgar proportionality assessment, I should consider whether the private and family life circumstances of the claimant are so compelling and insufficiently recognised in the Immigration Rules so as to render the decision of the Secretary of State unjustifiably harsh so as to require, exceptionally, the appeal to be allowed outside the Rules under article 8 ECHR.

31. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. However, if the Rules have already adequately addressed the private and family life circumstances, there is no purpose in doing so again under article 8 ECHR.

32. This approach has subsequently been endorsed by the Court of Appeal in Singh v SSHD [2015] EWCA Civ 74, and again in SSHD v SS (Congo) & Ors [2015] EWCA Civ 387, where the Court of Appeal held that it is clear that whilst the assessment of Article 8 claims requires a two-stage analysis, and there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules.

33. More significantly, in SS (Congo), after reviewing the authorities, the Court of Appeal stated, "It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see Nagre, paras. [38]-[43], approved by this court in MF (Nigeria) at [41]-[42]."

34. The claimant is not even in as strong a position as that outlined above, having no family life with a partner and her private life having always been precarious.

35. Whilst there was no proportionality assessment under Appendix FM, though there was a full paragraph 276ADE private life assessment, as stated above, the tests under the Rules, designed from 2012 to be the Secretary of State's response to private and family life claims are relevant and helpful in establishing where the balance lies between the rights of the claimant and the public interest in immigration control. Under EX1 as defined under EX2, the claimant would have had to show insurmountable obstacles to any family life continuing outside the UK. She claims to have been in a relationship with a British national for about 5 years but admits that she is not currently living with him and thus there is no family life with a partner to found an application under the Rules. That she has employment and family members in the UK and does not want to relocate to South Africa does not demonstrate insurmountable obstacles or significant difficulties she would face in continuing family life with a partner outside the UK and which could not be overcome or would entail very serious hardship for either of them.

36. Similarly, in relation to private life, I have first to take into account that pursuant to section 117B of the 2002 Act immigration control is deemed by statute to be in the public interest, and that as her status has been precarious throughout, little weight should be given to any private life the claimant has developed whilst in the UK, even though she was here with leave until 2012. As far as her relationship with a British citizen, he is not required to leave the UK and it will be his choice whether to do so in order to continue any relationship, though it cannot be presently described as family life. In any event, I am not satisfied that the claimant has demonstrated anything which could be properly described as family life to the extent that the removal decision would engage article 8 ECHR as a grave interference. In relation to any prospective relationship with a British citizen, on the basis of section 117B, little weight should be given to such a relationship given that her immigration status has been unlawful since 2012.

37. There is nothing in her circumstances that is particularly compelling to justify, exceptionally, allowing the appeal outside the Rules under article 8 ECHR on the basis that otherwise the decision would be unjustifiably harsh. In reaching this conclusion, I have taken into account all the information and evidence now present in the case papers before me and in particular those matters urged upon me by Mr Jaffar, as well as the factors specifically referenced in this decision.

38. However, even in conducting the Razgar stepped approach to article 8 private and family life, I am satisfied, for the reasons set out herein, that the proportionality balancing exercise between on the one hand the rights of the claimant and her extended family, including adult children and grandchildren, and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control, falls firmly in favour of removal and the conclusion that removal is proportionate and not disproportionate to the rights of the claimant and her family.

39. In reaching that conclusion, I also bear in mind that article 8 is not a shortcut to compliance with Immigration Rules and claimant is not entitled to remain in the UK just because that is now her desire or choice. I also have to bear in mind as a

significant factor in favour of removal the claimant's attempted deception in her December 2010 application. Her immigration history provides little assistance, having remained her since 2012 without any lawful basis to do so. It is not clear how she manages to support herself, unless she is working illegally, given that she has had no right to work since 2012 and has significant outgoings including a mortgage to pay. As stated above, her immigration status has always been precarious and thus pursuant to section 117B little weight accrues to any private life considerations.

40. Although I have set aside the decision of the First-tier Tribunal, the findings in relation to the Immigration Rules are preserved. These includes findings that the claimant has previously used deception and, at both §31 and §33, that her evidence attempting to justify that deception was not credible. The claimant had previously fabricated the appearance of family life by claiming to live with two children as their guardian. This was dishonest. It would in the circumstances be manifestly perverse to treat the claimant as being generally compliant with immigration control.

41. In respect of the claimant's relationship with her adult children, or her three grandchildren, there is insufficient evidence to demonstrate that these relationships are anything more than the normal emotional ties between such relatives, which in the normal course of affairs do require the continued presence of the claimant in the UK. That the claimant's wider family network is in the UK is not a cogent reason for allowing the appeal on family life grounds. She came to the UK as a visitor and later was granted leave to remain as a student and later still under a work permit. However, she became appeal rights exhausted on 6.3.12 and did not make the present application until over two years later, on 5.6.14. It is clear that the claimant has been determined to remain in the UK despite having no proper basis to do so.

Conclusion & Decision:

42. In all the circumstances and for the reasons set out herein, I find that the claimant does not meet the requirements of the Immigration Rules. Neither have I found the decision disproportionate to the family and private life rights of the claimant or her family members in the UK.

The appeal is dismissed on both immigration and human rights grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup