



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

Appeal Number: IA092022015

THE IMMIGRATION ACTS

**Heard at Field House
On 16 May 2016**

**Decision & Reasons
Promulgated
On 25 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

L M V

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr D Lemer, instructed by Platt & Associates

DECISION AND REASONS

The Appellant

1. This is an application by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Miss L M V as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of the Philippines born on 28 June 1961 and she made an application on 5 December 2014 which was refused by the Secretary of State on 23 February 2015 under paragraph 322(1) of the Immigration Rules. An appeal to the First-tier Tribunal was allowed by Ftt Judge James on 22 September 2015.
3. Essentially the appellant had been the carer for both a mother and children and she made an application to remain in the UK outside the rules in order to look after both the mother, who was dying of cancer, and the two children S and R born on [] 2002 and [] 2006 respectively, aged at the date of the hearing 13 years and 9 years old. Sadly their mother died on 21st May 2015. The First-tier Tribunal Judge considered the appeal on the basis of Article 8 only as the application was made outside the Immigration Rules and allowed the appeal although it was not clear on what basis the judge did allow the appeal.
4. The challenge by the Secretary of State ran essentially to three grounds. It was not clear whether the judge allowed the appeal on the basis it was not in accordance with the law or whether it was allowed outright. Secondly, that there needed to be compelling circumstances not sufficiently recognised under the Rules to allow the decision to move on to an Article 8 assessment and, thirdly, that Section 117 of the Nationality, Immigration and Asylum Act 2002 had not been applied.
5. These are unfortunate circumstances and I preserve the factual finding that have been set out in the decision of Judge James but I find that there is an error of law in that the judge was not been clear as to how this appeal has been determined. For example at paragraph 47 the judge states
'it is clear the substantive duty has not been performed by the respondent thus I do not find the reasons for refusal are in accordance with the law in regards to the two minor children and the appeal is also allowed on this ground alone'.
6. If that were the case the judge would not be in a position under **Razgar v SSHD** [2004] UKHL 27 to proceed to determine the proportionality of the decision but would stop at the third question in **Razgar** which is whether the Secretary of State's decision was made in accordance with the law.
7. I find that the decision of the Secretary of State was in accordance with the law. The original refusal did acknowledge albeit cursorily the position of the children and in accordance with **MK (Section 55 of the Tribunal) Sierra Leone** [2015] I find that the judge was in a position to, and should have, in these circumstances, determined the appeal forthwith.
8. The facts were not disputed in this case and there was no challenge to credibility. I preserve the following findings of fact from the decision which were as follows;

'11. The background to this appeal is that the appellant has worked for the L family for a number of years in Singapore and Hong Kong (since 2002), for a period of 13 years. The appellant lawfully entered the UK with a domestic worker visa on 18 June 2014 when Mrs L's [the mother] cancer had spread and she required intensive care, so Mrs L returned home. The appellant's visa was valid to 5th December 2014 and she applied for leave to remain outside the rules prior to the expiration of that visa.

12. The respondent refused the application, noting that Mrs L was in receipt of support from nurses and carers as well as childcare, and was eligible for NHS or private health care if required. Other family members could help out with support and daily tasks (such as shopping and cooking)...

...

16' Since the application was lodged, sadly Mrs L has died leaving the children motherless and her husband bereft. The appellant is also in mourning for her employer who she lived with as part of the family. Significant life changes and decisions have taken place so that her husband has now relocated to Edinburgh which allows him to continue to undertake his international legal work... The father has taken steps to ensure that wherever possible the children's lives are made as stable as possible despite the loss of their mother. This includes ensuring that the appellant is in full time attendance, as a live in carer for the children, to provide them with continuity of care and a continuity of their previous lives overseas.

17. The appellant made a decision to enhance the opportunities of her own children's lives by making the sacrifice of separation, in order to obtain sufficient income to further their own educational ambitions. Her children are now grown up and independent. During this period of 13 years, she has been in continuous presence in the lives of the children of Mrs L [and] for the entirety of their lives.

18. Despite their tender years, the children have both submitted witness statements which confirm the following:

S[Elder child]: "Auntie L joined our family when I was 5 months old... someone who loves us and takes care of us... my dad took lots of time off work to look after us but he had to get back to work and he needs to travel. Our family come and see us when they can but our grandparents are old and my dad's sister and brother have busy jobs... I would be extremely upset if Auntie Lucita had to leave us... I don't think I would be able to cope if Auntie L left us now".

R [Younger child]: "I want Auntie L to stay with us because she has always helped to look after me and I would be very upset if Auntie leaves us... nothing has been right since mum went to heaven. Everything has changed but Auntie makes it easier for us to cope".

19 That the father spent a lot of time at the hospital during Mrs L's treatment and illness, meant during this difficult time the appellant was the children's mainstay'.

...

20. There are witness statements from the sister, brother and mother of the father who confirm their limited ability to provide the 24/7 care the children need. The sister works full time as a social worker, which involves extensive travel in the Scottish rural areas. The children will live 1.5 hours drive from where she lives, in their new home. The brother confirms he is a police officer (thus presumably works shifts) and his job prevents him from caring for the children but he confirms the appellant's full involvement in the social life of the family throughout her employment'.

...

22. It is clear the appellant made Mrs L a 'death bed promise' in regards to the care of her children'.

9. The judge also noted that the appellant observed [23] that

'if my leave is not extended, the children would suffer significant additional trauma from losing another constant presence in their lives, at a time of great distress for the family. Jackie [Mrs L] wanted me to look after the family'.

And recorded

'24. In his updated witness statement the husband/father states : "My children continue to be very distressed as a result of their mother's death ... I have significant concerns that losing their second maternal figure at this stage - losing their Auntie L - would cause additional and significant trauma as she has been a central figure in their lives throughout their childhood. This has been particularly the case in the last 3 years when my wife was unwell for so much of this terrible time...her presence as a maternal figure after Jackie's death is even more essential to my children's psychological welfare... we genuinely consider her to be an immediate member of our family. Her loss would significantly damage the well-being of our family.

'26. It is clear to me that the appellant forms a strong part of this intertwined modern family structure, with ties of genuine affection and psychological dependency of the children on the appellant...

'27. '... the appellant has fully complied with immigration rules to date...'

'28. The appellant is a fluent English speaker...and there is no question of any reliance on public funds'.

'29. The reasons for refusal simply puts forward a misconceived idea that people can be replaced simply by paying another person to do the same duties and that the husband/father can easily do so due to his income bracket; failing to take into account the long term genuine ties of affection this will have on the children at this precarious stage of their emotional development and their current emotional state of bereavement.'

'30. ... the family have lived outside the UK all their lives and the only continuity of relationship they have had is with their parents and the appellant'.

10. The judge accepted that the appellant played an important role within the family both emotionally and practically and acknowledges that at a delicate stage in their life their mainstay was the appellant. The judge noted that the mother had stated

'31 ...L also acts as full time carer for our children as my husband is often required to travel for his employment...'

'36. This is corroborated by Dr Kinniburgh in his letter of 27 August 2015 which confirms that the appellant is a "very important member of the family...the children are at a vulnerable stage in their lives and are obviously adjusting to the loss of their mother and I think it could be potentially detrimental to the children if L's visa was not extended. I think there would be significantly more emotional and psychological harm to the children".

37. Dr Evelyn Millings in her letter of 31 August 2015, confirms she is a clinical psychologist and had contact with the father prior to the death of his wife about how to break the news she had terminal cancer to their children. She goes on to state he contacted her again after his wife died and she arranged an appointment with his children. She concludes:...

...Ms V's as a maternal figure for the children after their mother's death is integral to the children's psychological welfare and development'...'if the children lose their second maternal figure at this early stage of bereavement this could cause additional and significant trauma as she has been a central figure in their lives throughout their childhood...'

11. As I noted at the hearing, before this was an appeal outside the rules and thus any assessment with regard Article 8 would have to be 'outside the rules'. What therefore should be factored in is that there is no provision for applications of this nature within the rules. Pausing there, even if compelling circumstances was the settled test, as submitted by the Secretary of State, further to **SS Congo v SSHD** [2015] EWCA Civ 317, the factors set out before me, and which I have recited above do disclose

compelling and exceptional circumstances. The removal of the appellant would on the facts as accepted cause unjustifiably harsh consequences on both the children and the appellant.

12. **Singh v SSHD [2015] EWCA Civ 74** at Paragraph 64 sets out when the matter should be considered outside the Immigration rules.

*'In my view that is a mis-reading of Aikens LJ's observation. He was not questioning the substantial point made by Sales J. He was simply saying that it was unnecessary for the decision-maker, in approaching the "second stage", to have to decide first whether it was arguable that there was a good article 8 claim outside the Rules – that being what he calls "the intermediary test" – and then, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Sales J as intending to impose any such intermediary requirement, though I agree with Aikens LJ that if he was it represents an unnecessary refinement. **But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that 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 the issues have been addressed in the consideration under the Rules.***

13. Further, I find that not all the factors had been taken into account such as the death of the mother and the pressing needs of the children. The application was made by the appellant both on the basis of care for the mother when she was alive and also on the basis of her relationship with the children and her role within the family unit. Sadly, their mother has passed away. There was certainly a death bed wish on the part of the mother that the appellant stay with the children and look after them while their father who supports and cares for the family when he can is earning to keep the family.
14. I apply the structured approach in the guidance given in **R (Razgar) v SSHD [2004] UKHL 27** (and in particular at paragraph 17) and most recently in **Quila [2011] UKSC 45** and have regard to the following questions:

"In a case where removal is resisted in reliance on Article 8, these questions are likely to be:

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?

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

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

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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?

If so, is such interference proportionate to the legitimate public ends sought to be achieved?"

15. On the basis of the findings which I have preserved from Judge James's decision it is clear that the appellant has a firm and settled relationship with the children in this case and which falls within the ambit of protected Article 8 family and private life. She is clearly central to the wellbeing of the children and their father and has been a part of their family in a role more akin to mother than merely employee or nanny. She has looked after since they were born. She cares extensively for the children and I find that more exists than normal emotional ties between an employee and her charges. The appellant has cared for the children since they were born and latterly in very distressing circumstances for them. The children clearly depend on the appellant and she is attached to them and is part of the family unit.
16. There is an interference with that family life under the second principle of **Razgar v SSHD [2004] UKHL 27** bearing in mind that the threshold is not high. The decision was made in accordance with the law. I can appreciate that in the decision making by the Secretary of State there is a legitimate aim in the protection of the rights and freedoms of others through the maintenance of immigration control.
17. However moving on to proportionality I find that the interests of the children although not paramount are of a primary factor to be taken into consideration. Following paragraph 25 of **ZH (Tanzania) v SSHD [2011] UKSC 4**

"The important thing is to consider those best interests 'first'" and this is what I have done.
18. **ZH (Tanzania)** established that consideration of the best interests of the child is an integral part of the Article 8 balancing exercise (and not something apart from it), but it is a matter which has to be addressed first and as a distinct stage of the inquiry. The decision maker has first to make a decision on what is in the overall best interests of the child and only then to assess whether those interests are outweighed by countervailing factors such as those concerned with the rights and freedoms of others.
19. Within the bundle there is the evidence of the father, the evidence of the psychologist and a doctor and not least the evidence of the deceased mother herself who has stressed the importance of the relationship between the appellant and the children. I take into account the fact that

there has never been a breach of any form of immigration control and that the leave required was for temporary purposes. Even if that were not the case I would still consider that the interests of these children are such that they demand consideration and the presence of the appellant in order to care for them and continue to play a central caring role in their lives. The children are still young aged 13 and 9 years old, have moved recently to a country with which they are not familiar and away from friends abroad. Most importantly their mother died less than a year ago and they are still grieving.

20. I place emphasis on the report of the psychologist who alluded to the trauma that further separation could cause these children should they be parted from another mother figure. The father needs to continue to work in order financially maintain his family and cannot care for the children on a 'waking day' basis and even if he could the report of the psychologist makes clear that the children need the appellant with them. There was no challenge by the respondent to that report at any stage.
21. I also apply Section 117 of the Nationality Immigration and Asylum Act 2002 and have regard to the following factors.

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.

22. There is no suggestion that the appellant cannot speak English. There is no suggestion that she is reliant on any public funds and that is quite clear from the evidence within the papers. As pointed out by Mr Lemer, the relationship between the appellant and the children for whom she has cared on a daily basis and since they were born, was not formed whilst she was in the UK but formed in Hong Kong and prior to her coming, legally, to the UK. Even if that were not the case, Section 117B (4), makes no reference to family life established when immigration status is precarious. In this instance I have found that the appellant has established both family and private life. I give the interests of the children significant weight.

23. I also take into account the impact that the removal of the appellant would have on the father who has no doubt undergone immense stress both through the loss of his wife and having to continue to work in pressured circumstances without her assistance **Beoku-Betts v SSHD** [2008] UKHL 39.

24. **Huang v SSHD [2007] UKHL 11** makes clear the consideration is one of proportionality.

'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'.

25. I am aware that the appellant applied outside the Immigration Rules and that she entered the United Kingdom as a carer for the deceased mother and children. However, I find that there are very limited countervailing factors that outweigh the interests of the children in the proportionality assessment.

26. For the reasons given above, I find that the decision by the Secretary of State was disproportionate and the appeal of the appellant should be allowed.

27. The First-tier Tribunal Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007

Notice of Decision

I allow the appeal of Miss L M V under Article 8 of the ECHR.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. This order is made because there are minors involved.

Signed

Date 20th May 2016

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award.

Signed

Date 20th May 2016

Deputy Upper Tribunal Judge Rimington