Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08933/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 8 November 2018	**On 28 December 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

MUDIWA HANNAH MADZIMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Brown, instructed by JHI Limited
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Zimbabwe who was born on 3 December 1998. She came to the United Kingdom on 12 December 2010 with a cousin to visit her aunt in London. Her leave as a visitor was valid until 30 May 2011. Once in the UK, she was reunited with her mother (the sponsor) who had come to the UK herself in 2001. The appellant remained in the UK as an overstayer after her leave expired on 30 May 2011.

2. On 16 May 2017, the appellant made an application for indefinite leave to remain as the child of a parent (her mother) settled in the UK under para 298 of the Immigration Rules (HC 395 as amended). Her mother had been granted ILR in July 2016, having previously been granted discretionary leave on the basis of her relationship with her husband, a British citizen.

3. On making her application for ILR, the appellant and her mother (who accompanied her to the respondent's Premium Service Centre in Cardiff to make the application) were granted a period of time until 4 July 2017 to submit further supporting documentary evidence in respect of her application under para 298.

4. On 8 August 2017, the respondent refused the appellant's application for leave under para 298 and on the basis of Art 8 both under the Rules (para 276ADE(1)) and outside the Rules.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The hearing took place before Judge M Loughridge on 8 January 2008. The appellant was not legally represented and appeared in person.

6. It was readily apparent before Judge Loughridge that the appellant could not succeed under para 298 because she could not meet the requirements in para 298(vii) that she had been admitted to the UK under either para 302 or Appendix FM or para 319R or para 319X of the Immigration Rules. The judge accepted the Presenting Officer's submission that she had been admitted as a visitor and that, therefore, her appeal could only succeed if she could establish a breach of Art 8 outside the Rules.

7. Judge Loughridge found that any interference with her private and family life protected under Art 8.1 of the ECHR was proportionate and therefore not a breach of Art 8.

The Appeal to the Upper Tribunal

8. The appellant, now legally represented, sought permission to appeal to the Upper Tribunal.

9. Permission to appeal was granted by the First-tier Tribunal (Judge Lambert) on 5 June 2018.

10. On 26 July 2018, the respondent filed a rule 24 notice seeking to uphold the judge's decision to dismiss the appellant's appeal.

11. In addition, on 23 July 2018 the appellant filed further submissions, specifically in relation to Ground 1 following disclosure by the respondent pursuant to a Data Protection Act request received on 8 June 2018.

12. Thus, the appeal came before us.

The Issues

Ground 1

13. Ms Brown, who represented the appellant and who drafted the grounds and the further submission made following the grant of permission, accepted that Ground 1 could not be relied upon. That ground contended that the judge had been wrong to conclude that the appellant had not been granted entry clearance under para 302 of the Immigration Rules as a child seeking limited leave to enter with a view to settlement as the child of a parent who herself had limited leave to enter. Ms Brown accepted that as a result of the Data Protection Act disclosure made on 8 June 2018, the appellant had, indeed, been granted leave to enter as a visitor when she arrived in the UK on 12 December 2010 and had not, as required by para 298(vii), been granted leave to enter under para 302 of the Immigration Rules.

14. As we indicated at the hearing, there was some uncertainty, until the Data Protection Act disclosure, as to the basis upon which the appellant had entered the UK on 12 December 2010. Whilst that, no doubt, justified the appellant raising Ground 1 in her application for permission to appeal, Ms Brown entirely properly and correctly recognised that she could no longer place any reliance upon it.

15. Ms Brown, nevertheless, placed reliance upon Grounds 2-4. Those grounds may be summarised as follows.

Ground 2

16. The judge was wrong to state in his decision (at [4]) that the respondent had refused the appellant's application under the Immigration Rules because the requirement in para 298(vii) was not met. In fact, the respondent's decision relied, instead, upon para 298(i)(c) and (d), namely that the appellant had failed to establish that her mother had "sole responsibility" for her (para 298(i)(c)) or that there were "serious and compelling family or other considerations which make exclusion of [the appellant] undesirable" (para 298(i)(d)). Ms Brown submitted that that error was material as it prevented the issues arising under para 298(i)(c) and (d) being addressed by the appellant and her witnesses at the hearing.

Ground 3

17. The judge applied too restrictive a notion of what constituted "family life" in finding that the appellant's relationship with her mother did not amount to "family life". Ms Brown maintained before us that in [21] and [33] the judge erred in law in finding that there was no family life between the appellant and her mother on the basis that she was now an adult.

Ground 4

18. Finally, the judge erred in law in reaching findings which were perverse or unsupported by evidence in three respects.

19. First, in assessing what would be the appellant's circumstances on return to Zimbabwe, he found that her aunt could provide her, at least, temporary accommodation and support such that she would not be "destitute or homeless" on return (at [35]). Relying on the grounds, Ms Brown submitted that there was no evidence that the appellant's aunt was in a position to assist the appellant.

20. Secondly, the judge was wrong to take into account, in assessing the public interest, that if the appeal were allowed it "may encourage others to obtain a secondary education in the UK" (at [36]). Ms Brown submitted that the circumstances of the appellant were "unique and almost impossible to deliberately replicate" such that the judge's view was "completely baseless" when applied to the appellant.

21. Thirdly, in assessing proportionality, the judge was wrong to take into account that it was the appellant's intension to go to university since that was only an aspiration and not a fact as at the date of hearing. It was wrong, therefore, for the judge to have regard to that when assessing the impact upon her family in the UK by looking at her future circumstances on the basis that she would leave home to go to university in the UK or, alternatively, if the decision was upheld, she would return to Zimbabwe.

The Response

22. On behalf of the respondent, Mr Howells relied upon the rule 24 notice. He submitted that the judge had been correct to find that the appellant could not meet the requirements of the Rules and her only claim was under Art 8 outside the Rules. He submitted that the judge had properly dealt with the evidence and made sustainable factual findings, including that the decision to refuse her leave was not disproportionate and, therefore, was not a breach of Art 8.

Discussion

23. We take each of the three grounds relied upon in turn.

Ground 2

24. There is no doubt that the judge misstated the basis upon which the respondent in his decision letter concluded that the appellant could not succeed under para 298 of the Rules. At [4] of his decision, the judge wrongly stated that the refusal was under para 298(vii). In fact, the basis of the refusal was that the appellant had not produced evidence to establish that she met the requirements of para 298(i)(c) or (d). What the judge said in [4] reflects, instead, the position of the Presenting Officer before the judge. It is a position which Ms Brown, entirely properly, accepts is correct. The appellant could not meet the requirement in para 298(vii). We do not, however, consider that the misstatement by the judge of the basis of the respondent's refusal in [4] of his determination was, in any way, material to his decision to dismiss the appeal.

25. The judge correctly identified that the appellant could only succeed under Art 8 (which was the only relevant ground of appeal) outside the Rules. He, correctly, approached that issue on the basis that the appellant could not meet the requirements of the Rules, namely para 298. We do not accept Ms Brown's submission that the judge's misstatement of the basis of the respondent's refusal in any way prejudiced the appellant at the hearing. Reaching a decision in respect of Art 8 outside the Rules, the judge was required to consider all the appellant's circumstances both in the UK and if she were returned to Zimbabwe. The public interest was, undoubtedly, engaged on the basis that she could not meet the requirements of the Rules and that the public interest in effective immigration

control applied (see s.117B(1) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002")). The judge was required to determine whether there were "compelling" circumstances such that the appellant's removal would result in "unjustifiably harsh consequences" sufficient to outweigh the public interest in effective immigration control (see, R (Agyarko and Another) v SSHD [2017] UKSC 11 at [60]). Subject to the specific points made by Ms Brown in respect of Grounds 3 and 4, it is clear to us that the judge did consider all the circumstances. The judge heard oral evidence from the appellant, her mother (the sponsor) and "uncle". The judge set out their evidence in some detail at [6]-[13] and [15]. He could, of course, not do other than proceed on the basis that she did not meet the requirements of para 298(vii). Ms Brown was unable to identify for us any matter which the appellant was denied the opportunity to address before the judge. For these reasons, we reject Ground 2.

Ground 3

26. Ms Brown submitted that the judge was wrong to find in [33] of his determination that the relationships between the appellant and her family in the UK, in particular her mother, stepfather and half-brothers were: "properly characterised in my view as private life rather than family life, bearing in mind that the Appellant is now an adult."

27. At [21] of his determination, the judge set out the following in relation to "family life" and "private life" under Art 8:

> "21. Family life is normally taken to mean relationships between spouses/partners, between parents/children and between minor siblings. Private life is normally taken to mean the network of social ties established by a person outside his/her immediate family, relationships between parents and adult children and relationships between adult siblings."

Ms Brown submitted that this statement was not incorrect insofar as it goes but it failed, in the light of the case law, to take into account that family life could exist between an adult child and other family members if there was "evidence of further elements of dependency, involving more than normal emotional ties" (see Kugathas v SSHD [2003] EWCA Civ 31 at [14]).

28. The relevant legal principles in determining what constitute "family life" for the purposes of Art 8 is not controversial. The principal case law was helpfully summarised in the judgment of Lindblom LJ (with whom Beatson and Henderson LJJ agreed) in Rai v ECO, New Delhi [2017] EWCA Civ 320 at [17]-[20] as follows:

> "17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past,

and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

> "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults - Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

29. In this appeal, Judge Loughridge's statement at [21] that family life is "normally" taken to mean relationships which, in effect, do not involve an adult child whilst "private life" is "normally" taken to include relationships between, amongst others, parents and adult children and relationships between adult siblings is not, in our judgment, a statement inconsistent the law as set out above in Rai. It does not exclude the possibility of family life existing with an adult child, such as the appellant. As the authorities establish, there is no blanket rule that prevented an adult (such as the appellant) establishing family life with her family member, including her mother.

30. In this appeal, the evidence was that the appellant lived with her mother, stepfather and half-brothers in the same household and had done so since shortly after she came to the UK. It was also part of the evidence that she provided care "fairly extensively" for the two half-brothers. These circumstances undoubtedly were capable of meeting the "close ties" or relationships involving more than "normal emotional ties" that is the yardstick for establishing "family life" between the appellant (as an adult) and her family. We are not persuaded, however, that the judge's finding was perverse or irrational and, therefore, legally flawed.

31. But, even if it were, any such error would not be material to his decision to dismiss the appeal under Art 8. In Singh and Singh at [25], Sir Stanley Burnton (with whom Richards and Christopher Clarke LJJ agreed) reasoned that a failure to characterise a relationship as amounting to "family life" would not affect the legality of a judge's assessment of proportionality providing that all the relevant factors were assessed as part of the individual's "private life". He said this at [25]:

> "However, the debate as to the whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case,

> in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in *AA*, in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the Appellants' private life rather than their family and private life. In my judgment, she took all relevant factors into account, and her conclusion on proportionality is not open to challenge."

32. In our judgment, that reason is equally applicable to Judge Loughridge's consideration and assessment of the impact upon the appellant and her family under the rubric of "private life".

33. First, the judge accepted that the appellant could not be blamed for her unlawful status in the UK, as she had come to the UK as a child and it was not even her fault that she did nothing about that status, despite having discovered it when she was about 14 or 15 years old, until she made her application in May 2017 (at [29]).

34. Secondly, the judge also accepted that the sponsor had not been deceitful when the appellant came to the UK in 2010 as a visitor and remains in the UK (at [30]).

35. Thirdly, at [32] the judge considered the "little weight" provision in s.117B(4) of the NIA Act 2002. However, given his finding that the appellant was not to blame for her status, he said that:

> "it would be wrong to give her private life only little weight in consequence of s.117B(4), because the absence of dishonesty on her part mitigates to a considerable extent the effects of that provision."

36. That approach and finding, which is consistent with the required "flexibility" in applying s.117B following Rhuppiah v SSHD [2018] UKSC 58 at [49], afforded full weight to the appellant's "private life".

37. In respect of her private life, the judge dealt with it in [33]-[36] in assessing the proportionality of the decision as follows:

> "33. I have little hesitation in concluding that the Appellant has an extensive, and extremely rewarding, private life in the UK. I have considered the various documents relating to her time at Hayesfield School. She is described as an independent young lady who has a strong moral compass; someone who contributes well to tutor activities, always wanting to get involved; and a great asset to the school – joyful and hard-working. She has worked hard, and has achieved good results in her exams. She also has good relationships with her family, principally her mother, step-father and half-brothers but also her aunt and 7 cousins in Wolverhampton, who she sees regularly during the holidays. For the avoidance of doubt, these relationships are properly characterised in my view as private life rather than family life, bearing in mind that the Appellant is now an adult.

34. It is notable that what prompted the application in May 2017 was the Appellant's realisation that she wished to go to university after completing her A-levels, and that she needed to regularise her immigration status in order to do so. If she remains in the UK her plan is to move away from the family home, essentially embarking on the next phase of her life. This would inevitably have consequences in terms of her mother and step-father needing to make alternative arrangements for the care of their two children, care which has, to date, been provided fairly extensively by the Appellant.

35. It is also relevant that the Appellant remains in contact with various individuals in Zimbabwe including her aunt with whom she lived whilst she was attending school in Harare prior to coming to the UK. Although it may not be appropriate for her to stay with her aunt on a long-term basis, it seems likely that if she returns to Zimbabwe she will at least have a roof over her head, and provision of the basic amenities of life until such time as she is able to establish herself. I accept Mr Arkless's submission that she would not be destitute, or homeless.

36. I must make a decision based on the facts as they stand at the date of the hearing and, as I have said, weighing the various competing factors. It is easy to see why the Appellant says that her life is now in the UK. Nevertheless, I conclude that, whilst it may perhaps seem rather unfair on her, it is not disproportionate to expect her to leave the UK and to return to Zimbabwe. I accept that this will involve some interference with her private life but the importance of immigration control is such that requiring her removal to Zimbabwe at this stage cannot be said to be disproportionate. It is critical not to undermine immigration control by cases where a 'fait accompli' is presented to the Respondent, and such cases can be legitimately resisted, not least because allowing them may well encourage others to follow a similar course, including to obtain a secondary education in the UK just as the Appellant has received and which, ultimately, represents a very considerable cost to the public purse. The reality of the situation is that now that she has completed her 'A' levels she is ready to progress to the next chapter in her life and, whilst it is understandable that she would prefer this to be in the UK, there is no fundamental reason why it cannot be in Zimbabwe. Indeed, it could be said that now is an ideal time for her to return to Zimbabwe, between the completion of her secondary education and the commencement of her tertiary education. Article 8 is not a matter of someone being given a choice between two countries and that is, ultimately, what the Appellant is effectively asking for. Even though the weight to be given to her private life is not materially reduced by section 117B(4), the importance of immigration control outweighs her private life in the UK. For the avoidance of doubt I have taken into account the best interests of her two half-brothers, but those interests have relatively little bearing on the decision in the sense that it will not make any significant difference to them whether she returns to Zimbabwe or goes to university in the UK. She can continue her relationships with them via modern methods of communication, and visits, just as she can in respect of certain other aspects of her private life. Overall, therefore, I find that the decision is not in breach of Article 8 as an unnecessary/disproportionate interference with private/family life."

38. In our judgment, Ground 3 reflects the very "arid and academic" issue which Sir Stanley Burnton identified at [25] of his judgment in Singh and Singh. In our judgment, Judge Loughridge took fully into account all the circumstances, including the nature and substance of the appellant's relationships with her family members in the UK in assessing proportionality albeit under the rubric of "private life". For these reasons, we reject Ground 3.

Ground 4

39. Ground 4 relies rely upon a contention of perversity or lack of supporting evidence. None of the three points are, in our judgment, made out.

40. First, it was the appellant's evidence that she had lived with her aunt prior to coming to the UK in 2010. Although it was her case before the judge that she could not rely on her aunt "because she has her own family to look after", nor on her uncle whose family farm was in a rural area (see [15]), the judge found that the appellant remained in contact with her aunt. It was, in our judgment, a reasonable inference that her aunt who had previously, in effect, brought up the appellant until she came to the UK would be able, at least on a temporary basis, to support the appellant until such time, as the judge put it, that "she is able to establish herself". There was no good reason for the judge to assume that the family support which the appellant had previously enjoyed until 2010 would no longer be available, at least on a temporary basis, on return to Zimbabwe.

41. Secondly, Ms Brown criticises the judge for the following observation he made in [36] of his determination:

> "It is critical not to undermine immigration control by cases where a 'fait accompli' is presented to the Respondent, and such cases can be legitimately resisted, not least because allowing them may well encourage others to follow a similar course, including to obtain a secondary education in the UK just as the Appellant has received and which, ultimately, represents a very considerable cost to the public purse."

42. This, in our judgment, is no more than a statement, albeit using a particular illustration, of the public interest engaged by s.117B(1) of the NIA Act 2002, namely in effective immigration control. It was engaged in respect of the appellant and the judge was entitled to weigh this factor against the appellant's circumstance in assessing proportionality under Art 8.2.

43. Thirdly, Ms Brown submitted that the judge was wrong, taking the facts as at the date of the hearing, to look at the future prospect of the appellant going to university in the UK. That, in our judgment, is entirely unsustainable. The appellant's own evidence was that she wished to attend university. It was neither speculation by the judge nor a failure to assess the appellant's circumstances as at the date of hearing, for him to take that into account. It was founded in the appellant's own evidence and was a relevant matter which the judge was entitled to take into account in assessing the impact upon her family members (in particular her half-brothers) if she left home to attend university in the UK or, if the decision was maintained, she was removed to Zimbabwe.

44. In her oral submissions, Ms Brown made an additional submission that the judge had failed properly to have regard to the "best interests" of the appellant's half-brothers. However, she accepted that the only evidence concerning that issue was in the evidence given at the hearing. It is plain that the judge took that into account, including that she provided "fairly extensive" care for the children and took into account the impact upon them if she were removed (see [35] and [36] set out above).

45. For these reasons, we also reject Ground 4.

Conclusion

46. In our judgment, the judge did not materially err in law in dismissing the appellant's appeal under Art 8 of the ECHR.

Decision

47. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law. That decision stands.

48. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

14, December 2018

TO THE RESPONDENT
FEE AWARD

As the appeal has not been allowed a fee award is not appropriate.

Signed

A Grubb
Judge of the Upper Tribunal

14, December 2018