



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00753/2016

THE IMMIGRATION ACTS

Heard at Field House
On 03 July 2018

Decision & Reasons Promulgated
On 12 September 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THERESA OTENG BOUHENG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms G. Thomas, instructed by Irving & Co. Solicitors
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 25 January 2016 to refuse a human rights claim.
2. First-tier Tribunal Judge Talbot ("the judge") dismissed the appeal in a decision promulgated on 30 November 2017. The judge heard evidence from the appellant, her daughter and her grandson. He considered the ties the appellant had established since her arrival on a visit visa in 2001. She overstayed the visa and did not seek to regularise her status until 2012. The judge also considered what remaining ties the appellant might have to Ghana. The judge concluded that there would not be 'very significant obstacles' to the appellant integrating in Ghana for the purpose of paragraph 276ADE(1)(vi) of the immigration rules. The judge went on to make the following findings relating to Article 8 outside the immigration rules.

- “20. As this appeal is on human rights grounds, the focus of my assessment must be on Article 8 itself. The Appellant is clearly very integrated into the family life of her daughter and grandchildren. One issue is whether this amounts to ‘family life’ within the ambit of Article 8. As established by the jurisprudence, family relationships, other than those between partners or between parents and minor children, must go beyond ‘normal emotional ties’ in order to meet the definition of ‘family life’. I accept that the Appellant in this case has played a very close role in the family life of the two elder children, the second of whom is only 17 years old (and thus still a minor). In these specific circumstances, I can accept that her involvement may cross the boundary into ‘family life’ under Article 8. In any event the Appellant’s role within the family would constitute the most important element of her private life in the UK. Other aspects of her private life include her activities with the church and the help that she provides for a friend’s disabled child. Given the length of time that the Appellant has lived in the UK, it is quite clear to me that her removal from the UK would constitute an interference with her Article 8 rights of sufficient severity as to engage the Convention.
21. I turn to the issue of proportionality. In making this assessment, I must take into account Section 117B of the 2002 Act and in particular the fact that the Appellant’s private and family life in the UK has been established over a period when she has been living here unlawfully. The Respondent’s legitimate aim in the maintenance of effective immigration control is in the public interest and particularly so in a case when the Appellant entered the country in 2001 on a six-month visit visa but overstayed and did not even seek to regularise her stay until some eleven years later. I fully accept that the Appellant has established strong ties in the UK and most importantly within the family of her daughter and grandchildren. Her granddaughter [A] is still a minor (as is her baby grandchild [B]) and Section 55 of the 2009 Act must therefore come into consideration. It could be said that it would be in the best interest of both these children for their grandmother to remain in the family household. However, [A] is at an age where she will be becoming more independent as she nears adulthood. The baby’s primary bond at this stage is likely to be with her mother (although I accept that she may also have built up a significant bond with her grandmother). The mother, who is currently on maternity leave, will be returning to work part-time and it is not unreasonable to expect her to make appropriate arrangements for childcare (including possibly by the use of a workplace crèche). Taking into account these Section 55 considerations and the overall strength of the Appellant’s private and family life in the UK, I still have to conclude that they are outweighed in this case by the public interest represented by the Secretary of State in the maintenance of an effective immigration policy. I therefore conclude that the respondent’s decision does not violate her Article 8 rights.”

3. The appellant appeals the First-tier Tribunal decision on the ground that (i) the judge failed to give adequate reasons to explain what weight was placed on various factors when conducting the balancing exercise; and (ii) failed to take into account the effect on other family members: *Beoku-Betts v SSHD* [2008] UKHL referred.
4. First-tier Tribunal Judge P.M.J. Hollingworth granted permission to appeal in the following terms:

“At paragraph 21 of the decision it appears that the Judge accepts that family life has been established. In relation to Section 55 the Judge states that it could be said that it would be in the best interests for both the children for their grandmother to remain in the family household. It appears that the Judge has concluded that in fact it would be in their best interests. It is unclear what conclusions the Judge has reached in the context specifically of the overall strength of the Appellant’s family life in the United Kingdom given the Judge’s reference at paragraph 21 of the decision to the overall strength of the Appellant’s private and family life in the United Kingdom given the use of the language employed at paragraph 20 in the context of family life. It appears that the Judge has attributed strength to the family life of

the Appellant the Judge still had to conclude that the private and family life were outweighed by the public interest. The actual weight attached to the family life of the appellant remains unclear given the contrasting language employed at paragraph 20 and 21. In these circumstances the actual weight attached to the conclusion drawn from the application of Section 55 is unclear given the circumstances related by the Judge appertaining to the application of Section 55. It is arguable that in the matrix of factors the Judge has attached excessive weight to whether or not the Appellant would receive assistance if she were to return."

Decision and reasons

Error of law decision

5. There is no challenge to the judge's findings of fact or his conclusion that the appellant did not meet the private life requirements of paragraph 276ADE. The judge heard evidence from the witnesses and concluded that the appellant's relationship with family members was sufficiently strong to amount to family life for the purpose of assessing Article 8(1) outside the rules. The only challenge is to the judge's proportionality assessment under Article 8(2).
6. The judge's findings relating to the interests of the two children who were still minors are unclear. At [21] he found that the appellant had played an important part in the upbringing of her grandchildren. He went on to note: "It could be said that it would be in the interests of both of these children for their grandmother to remain in the family household." However, he then went on to give reasons why the interests of the children might not be so affected. It is simply unclear whether the judge concluded that it was in the interests of the children for the appellant to remain part of the family in the UK or not. A clear finding needed to be made to then apportion correct weight to the interests of those children in the balancing exercise. If the judge concluded, as the judge who granted permission thought, that it was in the best interests of the children for their grandmother to remain in the UK, their interests were a primary consideration that should have been given significant weight. Nothing in the judge's findings at [21] indicates what his conclusion was regarding the interests of the children or what weight was given to their interests in the balancing exercise.
7. Although the fact of overstaying for such a long period clearly is a public interest consideration, the findings in [21] do not explain why the appellant's immigration history was sufficient serious to outweigh the best interests of the children, if that was in fact what the judge had found. For these reasons, I conclude that the First-tier Tribunal decision involved the making of an error of law. That part of the decision that relates to the Article 8(2) assessment is set aside.

Remaking

8. The appellant is a 64-year-old woman who has lived in the UK for a period of 17 years. The First-tier Tribunal judge found that she has established close ties with her family and that removal would have a sufficiently grave effect on her family and private life to engage the operation of Article 8(1).

9. The appellant lives with her daughter and her three grandchildren. She was closely involved in helping her daughter to bring up the two older grandchildren. Her grandson is now 20 years old. He gave evidence at the First-tier Tribunal hearing. His witness statement said that his grandmother was closely involved in his upbringing. She has lived with the family since he was three years old. He describes the practical and emotional support his grandmother has given him. He says that he would be devastated if she had to return to Ghana. She was firmly established with them in the UK. He saw her as a second mother.
10. The appellant's daughter said that she arrived in the UK in 1994 and is now a British citizen. She said that her father walked out when she was three years old and her mother raised her as a single parent. She has three children. Little is said about the role that their fathers might play in their lives, if any, save for the appellant's daughter saying that she has sole responsibility for the children. She brought the children up with the appellant's assistance. The appellant's daughter says that her family would be "terribly affected" if the appellant returned to Ghana. Her mother was now settled in the UK and was an important part of their lives.
11. The appellant's first granddaughter has now turned 18 years old. She is no longer a child. I bear in mind that there is not a bright line between childhood and adulthood and that the substance of their relationship is not likely to have changed in any significant way. One might expect older children to be moving towards independence. In this case both the oldest grandchildren would appear to still be living in the family home. There is no witness statement from the appellant's granddaughter, but it is reasonable to infer that the impact of removal is likely to be similar to that described by her brother.
12. In assessing the best interests of the youngest child, I have considered the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of the child are a primary consideration but might be outweighed by the cumulative effect of other matters that weigh in the public interest.
13. The youngest child is only two years old. The appellant appears to be involved in the child's upbringing in the same way she was with the older children. The child's primary bond is likely to be with her mother. However, it is reasonable to infer that the appellant is likely to have a close bond with her youngest grandchild if she is responsible for much of her day to day care while her daughter is at work. The importance of such a bond to a child of that age must be acknowledged and given weight. Although the youngest child has not yet had the long-standing relationship with the appellant that the older two children have clearly benefited from, I conclude that it is likely to be in the child's interests to maintain the continuity of a close family bond. Overall, it is in the child's interests for the appellant to remain in the UK although her interests do not point strongly in that direction given that the appellant is the child's grandmother and not her mother.

14. In addition to close family ties there are numerous references to the appellant's character and ties to the community. She works for the church and assists a friend in caring for disabled child. The evidence shows that the appellant has established a close family life and a private life outside the family home since her arrival in the UK in 2001.
15. However, the state can lawfully interfere with an appellant's family and private life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.
16. Section 117B of the Nationality, Immigration and Asylum Act 2002 sets out several public interest considerations that a court or tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate. In *AM (Section 117B) Malawi* [2015] UKUT 260 the Upper Tribunal found that the duty to consider section 117B only extended to the provisions that were relevant to the facts of the case.
17. The appellant entered the UK as a visitor and overstayed her visa. She established family and private life ties to the UK in the full knowledge that she had no leave to remain and could be asked to leave at any time. Little weight can be attributed to the appellant's private life established at a time when she knew she was remaining in the UK unlawfully. Aside from explaining that she remained in the UK to help her daughter bring up the children, nothing in the witness statement of the appellant or her daughter seeks to explain her poor immigration history. The appellant remained in the UK knowingly in breach of the immigration laws and appears to show no contrition for the fact. Her actions cast some doubt on the references from friends who claim that she is an honest person. However, I take into account the fact that there is no evidence to suggest breaches of immigration control at the more serious end of the scale e.g. fraud, deception or criminal offences. The appellant speaks English and would appear to have been supported by her daughter. Those matters are neutral. However, there is evidence to indicate that she has accessed healthcare at a cost to the public purse. Although the appellant has a close familial relationship with her grandchildren she does not have a 'genuine and subsisting parental relationship' for the purpose of section 117B(6) of the NIAA 2002. She has a genuine and subsisting grandparental relationship, but that does not meet the relevant requirement. For these reasons I conclude that the public interest in maintaining an effective system of immigration control must be given due weight.
18. I have found that it is in the best interests of the appellant's granddaughter for the appellant to remain in the UK. The child's best interests are a primary consideration

that should be given significant weight. On the appellant's side of the balance, she has lived in the UK for a significant period albeit that little weight can be placed on any private life that she might have established given that she remained in the full knowledge that she had no right to do so. I have also taken into account the effect that removal might have on the rest of the family. Although her older two grandchild are now young adults, it is clear that she has a long standing and close relationship with them. They continue to live with her in the family home. The impact of her removal on them might be somewhat lessened now that they are adults, but I have taken it into account as part of the overall balancing exercise.

19. I also take into account the fact that the appellant is 64 years old and has been financially dependent on her daughter for the last 17 years. It is unclear how she would support herself if she returned to Ghana although it is reasonable to infer that her daughter might be able to provide her with some financial support. Nevertheless, the appellant is of retirement age and would return to Ghana with her ties there having diminished since her arrival in the UK. She has little or no remaining family connections there and would return to an isolated situation. The guidance given by the House of Lords in *Huang v SSHD* [2007] UKHL 11 is of assistance:

“But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.”


20. This is a borderline decision. Taking into account the cumulative effect of the factors relating to the appellant's private and family life in the UK, including the weight that should be given to the interests of her grandchild, as well as the effect on other members of the family, I conclude that removal of the appellant in consequence of the decision would not strike a fair balance between the weight to be given to the public interest (as expressed in the relevant rules, statute and policy) and the impact on the individuals involved in this case (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*). The appellant's immigration history, while poor, is not sufficiently poor to outweigh the best interests of the child and the best interests of the child and the significant family ties she now has in the UK.
21. The removal of the appellant from the UK would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed 
Upper Tribunal Judge Canavan

Date 10 September 2018