Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02091/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th September 2018	**On 25th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

BERNITA [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Kouma (Solicitor), Migrant Legal Action
For the Respondent: Ms K Pal (Senior HOPO)

DECISION AND REASONS

1. This was an appeal against the determination of First-tier Tribunal Judge Abebrese, promulgated on 29th March 2018, following a hearing at Harmondsworth on 14th March 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary

of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matters comes before me.

The Appellant

2. The Appellant is a citizen of Jamaica, a female, and was born on 22nd September 1960. She appealed against the decision of the Respondent Secretary of State dated 1st February 2018, refusing her application for asylum and human rights protection pursuant to paragraph 339C of HC 395.

The Judge's Determination

3. At the hearing before Judge Abebrese, the Appellant's representative informed the Tribunal that she was no longer relying upon the asylum and humanitarian aspect of the claim, and that the sole basis of the Appellant's claim was now on her private and family life. This was based upon the Appellant's claim that she had resided in the UK since 30th June 2003, had no home to return to in Jamaica, would be unemployed there, and unable to support herself upon return, making her homeless and destitute. As against this, the Appellant was living with her daughter in the UK for the last fifteen years, was providing her with support and assistance, as documented in a psychologist's assessment report, by supporting her grandchildren there, who without her, would suffer significant disruption, because the Appellant was one of the primary carers for these children, given the mental health issues suffered by their mother (the daughter of the Appellant).

4. At the hearing before Judge Abebrese, the Appellant's daughter was not in attendance, although it was stated that she had intended to give evidence, but could not attend because of her medical condition. Reliance at the hearing was placed upon the Appellant's own evidence, what was set out by the daughter, and what appeared in the independent psychological assessment report. The Respondent Secretary of State accepted the relationship between the Appellant and her daughter was one of a parental relationship, but the daughter was an adult, had previously been living independently, and under the principle in **Kugathas**, there was no special element of dependency in relation to an adult daughter and her Appellant mother in this case. The Appellant could only succeed if there were exceptional circumstances which meant that removal would be unjustifiably harsh for the Appellant.

5. With respect to the Appellant's relationship with her granddaughters, the Respondent did not accept that she had assumed sole responsibility for any of the granddaughters.

6. In her oral evidence before Judge Abebrese, the Appellant explained her relationship, with the grandchild, [J] (referring to her witness statement at paragraphs 7 to 10), and pointing out that this is an extremely close relationship, in that the Appellant has been vital in the child's upbringing,

because of her medical condition, which has meant that it has been the Appellant who has been taking [J] to the doctor or the hospital for medical appointments. With respect to the Appellant's other three children, from a different father, in this case the father does assist with his children and takes them to school on some days during the week, and he has them in alternative weekends, but the Appellant takes his daughter's children to school two days a week. One of the Appellant's daughters, [T] (being one of the two who live with the Appellant's daughter in the same household) does not leave the house for several days because of her medical condition, and the circumstances of this child's condition are also set out in the psychological assessment, it being the case that she has been diagnosed with social anxiety, depression, and phobia since 2008. The Appellant gave evidence before the Tribunal that it is the Appellant's presence which mitigates the medical condition of the children. The Appellant also stated that she cannot reside with her siblings in Jamaica because they would be looking to her for "favours", and she has four siblings in Jamaica, where she worked as a domestic worker, before coming to the UK. She now has a defined role with her daughter as a full-time career because due to her condition, it is the Appellant that provides support, because her daughter is unable to leave the house.

7. Against this background, the judge made the following findings. He found the evidence of the Appellant and her daughter to be consistent and credible and found that there was evidence of a relationship between the Appellant and her daughter over and above the normal family ties as stated in **Kugathas**. (See paragraph 20). He found that the decision of the Respondent did not comply with the Section 55 BCIA 2009 obligations, given the reliance on the Appellant by her daughter, whose medical condition was not challenged by the Respondent at the hearing.

8. In addition, the conclusions of the independent assessment, in respect of the relationship between the Appellant and the daughter, together with the two granddaughters, especially [J], whose father left this country five years ago to return to Jamaica, means that the Appellant plays a key role in ensuring that the essential duties are carried out in the household which her daughter is unable to do because of her condition. In the circumstances it would not be in the best interests of the children to have the Appellant removed from this country (paragraph 20).

9. In terms of the application of the law, the judge went on to state that the Appellant's removal from the UK would contravene the provisions of paragraph 276ADE because her return to Jamaica would mean that "she would face very significant obstacles because even though she has family in Jamaica she has very little contact with them on the evidence and she would find it difficult to settle and obtain employment at her age and with very little skills". This was despite the fact that the Appellant "does have a clear sense of the culture and societal norms in Jamaica where she was born and lived in for the majority of her life", but it was the case that "she now has stronger ties in this country with her daughter and her

grandchildren and to remove her from this would have a devastating and everlasting impact on all concerned" (paragraph 21).

10. The judge then went on to consider the European Convention of Human Rights, and applied the **Razgar** principles (see paragraphs 22 to 24), observing that the Appellant spoke good English, had taken positive steps to engage and make a contribution to her community and society, and not been a burden on the taxpayer in this country. The judge especially pointed that, "I have not taken into account any period in this country where her immigration status was precarious" (paragraph 24).

11. Applying the **Razgar** steps, the judge concluded that the decision of the Respondent was not proportionate because the Appellant had formed strong ties in this country with her daughter and children and her presence in the country "is crucial because of the medical condition of her daughter which does require the presence of the Appellant in the household, the Appellant's daughter has four children. The relationship which the Appellant has with [J], is exceptional in my view because of the absence of her father and the inability of the Appellant's daughter to carry out all of her duties to her as her mother because of her medical condition" (paragraph 25).

12. The appeal was allowed.

Grounds of Application

13. The grounds of application state that the judge was wrong to have concluded that under paragraph 276ADE there would be "very significant obstacles" to the Appellant integrating in Jamaica. The reasons that the judge gave was that the Appellant had little contact with her family in Jamaica, and that she would find it hard to settle, and hard to get work. Such a conclusion did not satisfy the high threshold of "very significant obstacles". The Appellant lived for 43 years of her life in Jamaica. She came to the UK as a visitor and then she overstayed. Her residence in the UK has been predominantly a matter of her personal choice. There is no reason why she could not fit into her home country without a problem. She had failed to show that she was incapable of working in Jamaica or unable to find accommodation there.

14. Second, the judge incorrectly applied the test in **Kugathas** because the judge failed to show how the high threshold of elements of dependency beyond the normal emotional ties had been met.

15. Third, the Appellant's daughter herself can rely upon other childcare services or friends to look after her children. The Appellant herself had no legal basis to remain in the UK and was merely acting as an unpaid carer for her grandchildren. There were no compelling reasons why the Appellant could not return to Jamaica. Section 55 of the BCIA did not take matters further.

16. On 9th August 2018, permission to appeal was granted by the Tribunal. First, it was said that the judge erroneously concluded arguably, that there were "very significant obstacles" to the Appellant's integration into Jamaican society, in the context of the private life Rules requirements, where she held the nationality and lived in Jamaica for 43 years, working as a domestic worker and having four siblings there. Second, this arguably erroneous assessment was then taken forward and infected the proportionality assessment that the judge then carried out under Article 8, because although it was the case that the judge has expressly stated that he would discount the precarious period of the Appellant's stay, where, after the six month period of lawful entry as a visitor, she had unlawfully then gone on to remain in the UK since December 2003, such a statement was incoherent in the context of the conclusion reached, by the judge, that removal of the Appellant would be disproportionate to her Article 8 interests.

Submissions

17. At the hearing before me on 27th September 2018, Ms Pal, appearing as Senior Home Office Presenting Officer on behalf of the Respondent, submitted that the judge in his Article 8 consideration failed to weigh in the proportionality consideration, in that the Appellant had come to the UK as a visitor, put in an asylum claim which he had then abandoned, and remained in the UK unlawfully, after the asylum claim was refused in June 2013. At the hearing in March 2014 she had decided not to pursue her asylum appeal. Importantly, in the judge's assessment (at paragraphs 22 to 26) of how the provisions under Article 8 of the ECHR fell to be applied, there is no mention of proportionality, as a consideration, the factors in also the Section 117 requirement, to bear in mind that immigration control is in the public interest.

18. For her part, Ms Kouma submitted that to the decision of Judge Abebrese, amount to nothing more than a disagreement with his findings. She carefully addressed this Tribunal on the judge's assessment of the facts before him. The judge looked at the position of each of the children of the Appellant's daughter, in the lives of which the Appellant played such an important role, and this is clear from paragraph 15 of the determination, very early on, as the judge begins to look at the situation before him. There is the child, [J], who is "extremely close to her grandmother" because her father has left her and gone to Jamaica, and the Appellant has "been vital in her upbringing because of her daughter's medical condition". There is also the Appellant's other daughter, living in the same household, [T], who also because of her medical condition does not leave the house for several days, and here also her condition is mitigated by the presence of the Appellant in the house (paragraph 15).

19. Thereafter, the judge considers whether, in these circumstances, there is a relationship between the Appellant and her daughter which is over and above the normal family ties, as stated in **Kugathas**, which one would normally find, and against the background set out, the judge is clear, that

this does go beyond normal family ties. On any view, this conclusion was one which was open to the judge, given the role that the Appellant played in the life of her own daughter, by looking after her grandchildren, together with other children, namely the three that are born of a different father, and who live elsewhere, where the Appellant also plays a role by taking these children to school when she can. The findings reached by the judge are borne out by the evidence. It is unsurprising, therefore, that the judge does end with the conclusion that, with respect to the Appellant "to remove her from this would have a devastating and everlasting impact on all concerned" (paragraph 21).

20. However, she submitted that it does not end there. After setting out the applicable legal provisions, which do refer to Section 117B expressly in terms of the law as it is (see paragraph 24) the judge does go on to engage in the balancing exercise at the end of the provisions that she has set out, before concluding (at paragraph 25) that "the decision of the Respondent is not proportionate because the Appellant has formed strong ties in this country with her daughter and children and that her presence in this country is crucial because of the medical condition of her daughter …" (paragraph 25).

21. In reply, Ms Pal returned to say that the assessment at paragraph 24 is actually not clear. The judge states that, "I have not taken into account any period in this country where her immigration status was precarious", but then makes a finding that belies that statement.

Error of Law

22. I am satisfied, that notwithstanding Ms Kouma's well-structured and careful submissions before me, that the decision of the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(1)(ii) of TCEA 2007). My reasons are as follows.

23. First, in what is an otherwise comprehensive and sensitive determination by the judge, it is not clear that the concept of "integration" was properly evaluated, in the context of the requirement that there needs to be "very significant obstacles" to the Appellant's integration back in Jamaica, so as to satisfy the requirements of paragraphs 276ADE.

24. In **Kamara [2016] EWCA Civ 813**, it was explained that the concept of "integration" is one which is "a broad one" because, "it is not confined to the mere ability to find a job or sustain life while living in the other country." Instead, the term "integration" is one which "calls for a broad evaluative judgment to be made as to whether the individual would be enough of an insider in terms of understanding how life in the society, in that other country is carried on and a capacity to participate in it, so as to have reasonable opportunity to be accepted there" (paragraph 14). The Appellant in this case is an "insider" as far as Jamaican life and society is concerned. She holds Jamaican nationality, had lived there for 43 years,

and worked as a domestic worker, with her family life of four siblings, when she was there. The assessment that there were "very significant obstacles" was accordingly not made out by the judge.

25. Second, this assessment was then fed into the Article 8 assessment, which required a consideration of how the balance of considerations fell to be applied. It is a significant feature of this appeal that the Appellant's daughter herself did not give evidence. Yet the judge found that, "I found the evidence of the Appellant and her daughter to be consistent and credible" (paragraph 20). She was not cross-examined. On the other hand, I do not accept at all, that the judge was wrong in concluding that the relationship between the Appellant and her daughter exceeded the normal family ties, as stated in **Kugathas**, because since her arrival in the UK, the Appellant has been living with her daughter, and performing a undoubtedly valuable family role in the household, which has been recognised expressly in the medical reports, which the judge properly takes into account.

26. The judge may very well have been correct in the conclusion that given this arrangement that the Appellant now has with her daughter the grandchildren that "to remove her from this would have a devastating and everlasting impact on all concerned" (paragraph 21). Certainly, the judge gives adequate reasons for coming to this conclusion. However, that still does not get over the fact that the finding in relation to there being "very significant obstacles" under paragraph 276ADE was flawed, in the light of the judgment in **Kamara**, and this was a finding which was then carried forward into the Article 8 ECHR assessment that the judge undertook.

Notice of Decision

27. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be reheard pursuant to practice statement 7.2(b) because the nature or extent of judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

28. No anonymity direction is made. The appeal of the Secretary of State is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 20th October 2018