



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

Appeal Numbers: PA/06749/2017
PA/06750/2017

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 5 November 2018**

**Decision & Reasons
Promulgated
On 21 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

v

**C M
T M**

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Tan, Home Office Presenting Officer
For the Respondents: Mr Misra, Crown solicitors

DECISION AND REASONS

1. The Respondents, to whom I shall refer as the Claimants, are nationals of Zimbabwe born respectively on 24 August 1997 and 17 March 2001. They applied for entry clearance as visitors on 27 March 2012 and their applications were refused but allowed on appeal. The Claimants then arrived in the United Kingdom as visitors in April 2013.

2. They subsequently applied for leave to remain as dependants of their mother who is a naturalised British citizen but these applications were refused and they were served with documents as overstayers on 24 November 2015. The Claimants claimed asylum on 28 April 2016 and their applications were refused on 10 July 2017. They appealed against that decision and their appeals came before Judge of the First-tier Tribunal Gurung-Thapa for hearing on 8 November 2017.
3. In a decision and reasons promulgated on 5 December 2017 the judge dismissed the asylum appeals but allowed the appeals with regard to Article 8 human rights outside the Immigration Rules.
4. Permission to appeal was sought, in time, by the Secretary of State on the basis that the judge had erred materially in law in allowing the appeals without having had regard to the public interest factors outlined in Section 117B of the NIAA 2002. It was asserted that given the judge's credibility findings in respect of the Claimants' asylum claim and inconsistencies between their mother's account and evidence in her own asylum appeal, there were no exceptional circumstances to justify a grant of leave outside the Rules and that the case did not show that there were family ties above and beyond normal family ties between the Claimants and their younger siblings and mother.
5. Permission to appeal was granted by First-tier Tribunal Judge O'Garro in a decision dated 5 January 2018 on the basis that there was merit in the grounds of appeal and it was arguable that the judge had made an error of law in her assessment of Article 8 and in particular her consideration of the public interest.

Hearing

6. At the hearing before the Upper Tribunal, I raised at the outset with Mr Tan that the grounds of appeal essentially appeared to be misconceived in that it was clear from [79] through to [84] of her decision that the judge had in fact made reference to Section 117B of the NIAA 2002 and related case law and had taken into consideration the statutory public interest considerations, which Mr Tan accepted.
7. Mr Tan sought instead to show that the judge had erred in her application of those principles to the facts of the case in light of the fact that the asylum claims had been rejected along with the credibility of those claims and that the Claimants had, in essence, circumvented immigration control by applying for visit visas with no intention to return and had overstayed rather than apply for entry clearance in the proper manner and that this was material to consideration of the public interest. However, these were not matters raised in the grounds of appeal and thus his submissions fell outwith the remit of the grant of permission.
8. In his submissions, Mr Misra agreed with the point raised by the Upper Tribunal in that there was clear and direct reference to the public interest

considerations at [79] to [85] and the judge had made reference to the substance of those considerations, including the fact that the Claimants speak English and she addressed the issue of financial independence.

9. Mr Misra submitted the judge went into quite some depth, considered each point individually in turn and the relevant case law in relation to the subsistence of family life. The judge had heard oral evidence and the unique circumstances in play, from which she was entitled to find it would not be proportionate in this particular family set up for the Claimants to be removed and that this would be contrary to Article 8 family life.
10. The judge heard evidence as to the role of the Claimants with regard to their younger siblings particularly the oldest Claimant who, despite having moved out due to a lack of space, remained living less than one kilometre away and effectively took almost a father figure role in relation to caring for the younger siblings. This is due to the fact that his mother and the three younger siblings, all of whom are British, require him to assist as she is a single mother and he is responsible for ensuring the chores are done and their homework. It was clear that the British citizen siblings look up to him and there was no distinction between sibling and half-sibling. He submitted it was open to the judge to reach the findings and conclusions she did but it was an exceptional case and there were more than normal emotional ties between the Claimants, their mother and younger siblings.
11. I announced my decision at the hearing. I now provide my reasons.

Findings

12. I find no material error of law in the decision of First-tier Tribunal Judge Gurung-Thapa and that the grounds of appeal are misconceived. It is clear, even from a superficial reading of the judge's decision, that she did indeed take full account of the public interest considerations beginning at [79] where she states

“As part of an Article 8 assessment I have to consider the statutory provisions found in Part 5A of the Nationality, Immigration and Asylum Act 2002.

80. In considering the public interest question Section 117A(2) states that the Tribunal must in particular have regard (a) in all cases to the considerations listed in Section 117B. ... Sub-Section 3 provides that ‘the public interest question’ means a question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

81. I have had regard to Section 117B which outlines a number of factors that the Tribunal must consider when assessing whether an interference with a person’s right to respect for private and family life is justified and proportionate. The maintenance of an effective system of immigration control is in the public interest.”

13. The judge then at [82] referred to the decision in AM (s.117B) Malawi [2015] UKUT 0260 (IAC) and the issue of the precarious immigration status of the Claimants and at [83] to the decision in Forman [2015] UKUT 00412 (IAC). The Judge went on to make the following findings:

“84. It is in the public interest that a person who seeks to remain here is financially independent. The first Appellant is supported through NASS. The second Appellant is supported by his mother. The Appellants speak English but this is a neutral factor that does not weigh in favour of them remaining in the UK. I accept that the Appellant’s private life was formed whilst their immigration status was precarious. However I find that the appeals turn on their family life with their mother and siblings.

85. ... while the first Appellant may be living on his own I accept he is playing a principal role in the lives of his younger siblings and I take note of the fact he moved from his mother’s current address in November 2016. Prior to the move he had also resided at the family home.

86. The reasons I come to the conclusion that it is in the second Appellant’s best interest to remain with his mother are because he has re-established a close bond with his mother and has established a close bond with his half-siblings and accept that they make no distinction that they are half-siblings the second Appellant is still 16 years old.”

14. The Judge then concluded that it would be disproportionate for the Claimants to be removed from the United Kingdom in light of the fact that they have formed family life bonds with their younger siblings and their mother and bearing in mind the second appellant was a minor at all material times.
15. Whilst it may be that the reasons provided by the judge and her assessment of the public interest considerations are not perfect, this was not a point taken in the grounds of appeal, which instead asserted bluntly that the Judge has entirely failed to look at the public interest considerations at all, which is palpably not the case.
16. The only other possible point that can be gleaned from the grounds of appeal is that the judge failed to consider whether there were exceptional circumstances justifying consideration of Article 8 at all, in light of her wholesale rejection of the Claimants’ asylum appeal. However that aspect of the grounds of appeal fails to take into consideration the fact that when considering Article 8 outside the Rules the judge at [64] expressly found that there were compelling circumstances justifying such consideration given the best interests of the minor child i.e. the second Appellant were involved.

17. In these circumstances I find no material error of law in the decision of First-tier Tribunal Judge Gurung-Thapa, with the effect that her decision is upheld.

Notice of Decision

The appeal by the Secretary of State is dismissed. The decision of the First tier Tribunal allowing the Claimants' appeal on human rights (Article 8) grounds is upheld.

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.

Signed Rebecca Chapman

Date 14 November 2018

Deputy Upper Tribunal Judge Chapman