Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/04259/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 June 2019	**On 26 June 2019**

Before

RT HON LORD BOYD OF DUNCANSBY

Sitting as a Judge of the Upper Tribunal

UPPER TRIBUNAL JUDGE FINCH

Between

JACQUI ETTA LEONORA MOSS

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Paul Richardson of counsel, instructed by SG Law

For the Respondent: Mr. T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Jamaica. She entered the United Kingdom on 21 December 2001, as a visitor, accompanied by her daughter. They did not return to Jamaica when their visas expired and the Appellant made an unsuccessful application for leave to remain as a

student, which was refused on 14 November 2002. She married an Irish national on 11 May 2004 but he died on 27 May 2004.

2. Since January 2005 the Appellant has been in a relationship with her current partner, who is a British national and they married on 6 December 2008. She applied for leave to remain as his partner on 17 October 2014. This application was refused on 9 January 2015 and she re-applied on 29 September 2015.

3. This application was refused on 2 February 2016. She appealed and her appeal was dismissed by First-tier Tribunal Judge Pacey in a decision promulgated on 14 September 2017. She applied for permission to appeal but she was refused permission by First-tier Tribunal Judge Landes on 27 March 2018 and Upper Tribunal Judge Grubb on 3 September 2018.

4. There was no right of appeal against this decision for the purposes of section 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007. Therefore, she lodged a claim for judicial review of the decision with the Administrative Court. Mrs Justice Lang granted permission on 23 January 2019 on the basis that the First-tier Tribunal Judge had arguably erred in law when she failed to consider the family relationship between the Appellant and her adult daughter. Master Gidden quashed the decision by Upper Tribunal Judge Grubb to refuse permission to appeal to the Upper Tribunal on 6 March 2019. The Vice President of the Upper Tribunal then granted permission on 30 April 2019. The Respondent filed a Rule 24 Reply on 24 May 2019.

ERROR OF LAW HEARING

5. A skeleton argument had been filed and served by the Appellant on 10 June 2019 and the Respondent had filed and served his skeleton argument on 19 June 2019. Neither party had complied with the directions made by Upper Tribunal Judge O'Connor on 16 May 2019 but no point was taken on this issue and the Tribunal was content to take these skeleton arguments into account. In his oral submissions Counsel for the Appellant relied on grounds 1,2 and 3 of the Appellant's grounds of appeal.

ERROR OF LAW DECISION

6. Paragraph 17 of First-tier Tribunal Judge Pacey's decision indicated that the appeal before her proceeded on the basis that refusing the Appellant leave had amounted to a disproportionate breach of Article 8 of the European Convention on Human Rights outside the Immigration Rules.

7. She acknowledged in paragraph 30 of her decision that she was bound to take into account the guidance provided in section 117B of the Nationality, Immigration and Asylum Act 2002. In paragraph 31 of her decision First-tier Tribunal Judge Pacey also reminded herself that little weight should be given to a private life or relationship with a qualifying partner when the Appellant was here unlawfully and that little weight should be given to a private life established at a time when her leave here was precarious. In paragraph 20 she also referred to the Appellant's poor immigration history.

8. In paragraph 19 of her decision, First-tier Tribunal Judge Pacey also referred to the case of *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 and the need to determine the question of proportionality by undertaking a balancing exercise between the public interest and that of the Appellant. But then she had failed to take into

account evidence relating to the Appellant's relationship with her daughter which should have been weighed into that balance.

9. In particular, she failed to take into account the close relationship which the Appellant had with her adult daughter, despite noting at paragraph 7 of her decision that her daughter and her son-in-law were living with her. The Appellant's daughter had stated in a letter contained in the Appellant's Bundle that she was still living with her mother, as she could not afford to move out and live on her own. She also described her mother as her right hand and said that, whenever she needed her mother, she was there. In her witness statement, she also stated that she and the Appellant were emotionally dependent on each other for support and had not been apart since moving to the UK. The chronology also indicates that the Appellant's daughter was only ten years old when she entered the United Kingdom with her mother.

10. The Home Office Presenting Officer submitted that this did not amount to a material error of law as the Appellant had not established that there was a dependency over and above the normal emotional ties between members of a family.

11. However, in paragraph 14 of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley LJ cited with approval the European Commission's observation in *S v United Kingdom* (1884) 40 DR 196 which was that:

> "Generally, the protection of family life under Article 8 involved cohabiting dependents, such as parents and their dependents, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties".

12. In *Ghising (family life – adults – Gurkha policy)* [2012] UKUT 160, the Upper Tribunal also found that:

> "A review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive".

13. In paragraph 68 the Upper Tribunal also said that on the facts before them: "We have found that the Appellant depends upon his parents for financial, practical and emotional support and guidance. They depend on him as their only child still living at home".

14. It is our view that First-tier Tribunal Judge Pacey failed to carry out the necessary fact-finding exercise and it may be that it would have been open to her, once she had done so, to accord sufficient weight to the Appellant's relationship with her daughter, so as to find in the Appellant's favour in the necessary balancing exercise. This was particularly the case in the context of the length of time that the Appellant has lived in the United Kingdom, the length of her marriage to a British citizen and the fact that she had established a deeply rooted private life here.

15. As a consequence, we find that it was an error of law for First-tier Tribunal Judge Pacey not to consider the impact of separating the Appellant from her adult daughter.

16. In the Appellant's third ground of appeal, it was accepted that at the date of the hearing it seemed that the Appellant could not show that she met the financial requirements contained in Appendix FM to the Immigration Rules, This was a concession that was in keeping with the fact that, at paragraph 14 of her decision, First-tier Tribunal Judge Pacey recorded that the Appellant's representative submitted that she could not apply for entry clearance under Appendix FM, as she could not meet the financial threshold.

17. Counsel for the Appellant did not rely on this third ground as it was originally formulated, which was that the First-tier Tribunal Judge should have taken into account the fact that, as the Appellant's husband had passed "the Knowledge" in March 2017, he could expect to be earning significantly more as a Black Cab driver in the future. This would have been a hopeless argument as there was insufficient evidence before the First-tier Tribunal to confirm that this was the case. Therefore, she could not apply *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 with any certainty.

18. In addition, the First-tier Tribunal Judge did not have sufficient evidence to apply the Upper Tribunal's guidance in *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR* [2015] UKUT 00189 (IAC) where the Upper Tribunal found:

> "Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

19. At the hearing, the Appellant's evidence went no further than stating that if she was deported to Jamaica her husband would not be able to afford to support two households.

20. At the hearing, Counsel for the Appellant noted that there was evidence before First-tier Tribunal Judge Pacey to suggest the Appellant could have met the financial requirements at that time. It is the case that his income and expenditure account for the year ending 31 July 2016 states that her husband had a net income that year of £13,870. There was also a letter, dated 21 December 2015, which stated that at that date he had an occupational pension of £10.455.96.

21. However, this was not the basis of the case put before First-tier Tribunal Judge Pacey, as is clear from the decision and the record of proceedings. Therefore, this cannot amount to an error of law in First-tier Tribunal Judge Pacey's decision.

22. As a consequence, we find that First-tier Tribunal Judge Pacey did make an error of law in her decision by failing to consider and reach a decision in relation to any family life which the Appellant may enjoy with her adult daughter.

Decision

(1) The Appellant's appeal is allowed.

(2) The decision of First-tier Tribunal Judge Pacey is set aside.

(3) The appeal is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Pacey or First-tier Tribunal Judge Landes.

Nadine Finch

Signed Date 20 June 2019

Upper Tribunal Judge Finch