Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-006688 & UI-2022-006689
First-tier No's: HU/52564/2021; IA/09632/2021
HU/52565/2021; IA/09633/2021

THE IMMIGRATION ACTS

Decision & Reasons
Promulgated
On 24 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

NBZ – 1st Appellant
NEZ – 2nd Appellant
(Anonymity order made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Counsel
For the Respondent: Ms S Mackenzie, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 11 June 2024

The Appellants

1. The appellants are both citizens of South Africa. The 1st appellant, who I shall refer to as the appellant and whose date of birth is 10 September 1990, is the mother of the 2nd appellant ("NEZ") whose date of birth is 2 June 2017. They appealed against decisions of the respondent dated 27 May 2021 to refuse their applications for leave to remain outside the Immigration Rules pursuant to Article 8 (right to respect for private and family life) of the European Human Rights Convention. Their appeals were allowed at first instance by Judge of the First-tier Tribunal Iqbal on 3 May 2022. The respondent appeals with leave against the First-tier decision. Although this matter comes before me as an appeal by the respondent for the sake of clarity I shall continue to refer to the parties as they were known at first instance.

2. **Anonymity.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant has been granted anonymity, and is to be referred to in these proceedings by the initials NBZ. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant.

   Failure to comply with this order could amount to a contempt of court.

3. The appellants entered the United Kingdom on 21 July 2019 on visit visas granted from 2 July 2019 to 2nd January 2020. Both appellants had been granted visit visas in the past. An application for leave to remain dated 22 November 2019 was refused with an out of country right of appeal (which in the event was not exercised). On 17 July 2020 the appellants made another application for leave outside the rules the refusal of which forms the basis of this appeal.

The Appellant's Case

4. The appellants' case is that there would be very significant obstacles to their integration on return to South Africa pursuant to paragraph 276 (1)ADE (vi) of the Immigration Rules. The appellant suffers from depression. She was left in the care of her grandmother at the age of 11, when her mother came to work in the UK. Her father and two younger siblings followed the year after. The Appellant's grandmother with whom the appellant had formed a stable relationship, passed away in 2016 and the Appellant has never got over her death and still suffers from depression. NEZ was born in 2017 soon after the grandmother's death in 2016. The appellant felt vulnerable as a single mother in South Africa with no family to support her. The Appellant is currently receiving the support she needs from her family for her depression in the UK. If forced to return to South Africa without any support, the appellant would be at risk of self-harm and South Africa is not safe for females living alone.

The Decision at First Instance

5. The judge analysed the psychiatric evidence relating to the appellant's depression in some detail. She concluded that if the Appellant were to continue on the current medication regime she could on return to South Africa be in a position to undertake effective employment whilst NEZ was at school if she so wished. The appellant had been supported by her mother but that was simply a matter of choice. The appellant had previously been employed and there was nothing to demonstrate that she would be unable to find non-commission based employment. There was evidence of alarming levels of gender based violence and femicide. However, the Appellant's fear was generalised and she had been able to live in South Africa since the death of the grandmother, work and after the birth of NEZ travel to the UK and return to South Africa without any difficulty.

6. There was nothing to stop the appellant from accessing medical treatment on return if necessary and her mental health would remain stable. As the Appellant was now being treated for depression and her health had improved, there would not be very significant obstacles to the Appellant's integration on return. This was a finely balanced case but what tipped the balance in favour of the Appellant were the Appellant's vulnerabilities and mental health condition at the present time against what the judge referred to as "the dual best interests of [NEZ]". The circumstances were sufficient to demonstrate that the refusal caused unjustifiably harsh consequences and was disproportionate. The appeal was allowed.

The Onward Appeal

7. The respondent appealed this decision noting that the First-tier Tribunal had found: (i) the appellants could not satisfy Appendix FM of the Immigration Rules and (ii) there were no very significant obstacles to reintegration. There were no exceptional or compelling circumstances in the case. The First-tier granted permission to appeal finding it arguable "against the backdrop of the findings made, that the Judge erred by failing to properly undertake the Article 8 ECHR proportionality exercise in light of the case law in this area, when determining whether there were any exceptional or compelling circumstances outside of the Immigration Rules."

8. The appellants responded under Rule 24 to the grant of permission arguing that "the grounds set out by the Home Office failed to identify any specific legal or procedural errors that would warrant overturning the original decision … The Judge's decision to allow the appeal outside the Immigration Rules on Article 8 ECHR grounds was made after a comprehensive and balanced consideration of all pertinent factors"

The Hearing Before Me

9. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

10. For the respondent it was submitted that the judge had to first satisfy herself whether the immigration rules had been met. The judge had considered the issue of whether there were very significant obstacles to reintegration, under paragraph 276 ADE but had failed to consider other aspects under the rules such as the eligibility criteria. The judge failed to say whether the respondent had considered such matters properly in the refusal letter. The respondent's grounds of onward appeal stressed that NEZ could not meet the qualifying period in that she had not been in the United Kingdom for at least seven years. The judge had not struck a fair balance between the legitimate aim of immigration control and personal factors put forward by the appellants. The judge had set out in 19 paragraphs between [34] and [53] aspects of the appellants' case but had not applied a balancing exercise to those aspects.

11. The judge had dealt with the issue of exceptional circumstances somewhat unusually. She had found no family life beyond normal emotional ties between the appellant and her family in the United Kingdom at [55] but had held at [56] there was an interference. How could she find an interference with something that she had found not to exist? The support the appellant would receive in South Africa had not been considered at all by the judge. That should have been applied to the balancing exercise. If a material error of law was found the decision at first instance should be set aside and the appeal should be remitted back to the First-tier with no findings preserved.

12. In reply counsel relied on his skeleton argument which set out a chronology and background to the appeal. The respondent's grounds, it argued, had failed to identify any error of law. Relying on the Upper Tribunal authority of **Nixon [2014] UKUT 368** the Upper Tribunal could "be expected to deal brusquely and robustly with any application for permission that did not specify clearly and coherently with appropriate particulars the error of law said to contaminate the decision under challenge." There were strict parameters for granting permission on a point not pleaded where the applicant in question was the Secretary of State. Permission to appeal should only be granted on a ground not advanced if it would breach the United Kingdom's international treaty obligations. See the authority of **AZ [2018] UKUT 245**.

13. There was nothing within the determination which demonstrated that the judge had failed to properly undertake an article 8 proportionality assessment in light of the case law. The respondent or indeed the Upper Tribunal might regard the judge's determination as generous and conclude that a different judge including the Upper Tribunal may have reached a different conclusion but that was not enough to disturb the

determination. The judge had undertaken a proper assessment of the proportionality exercise and had had regard to the competing interests in the appeal.

14. The judge was entitled to look at the added stability that NEZ received from her extended family in the United Kingdom. The judge had appreciated that this was a finely balanced case. The appellants failure to qualify under the rules was the point at which to begin not end consideration of the claim under article 8, see **Huang [2007] UKHL 11**. If the tribunal found the judge did materially err in law the appeal should be remitted for a de novo hearing. NEZ was born in 2017 and had been in the United Kingdom since 2019 a further two years since the hearing of the appeal at first instance. This was a long time in the child's life.

15. In oral submissions counsel reiterated the point made in the skeleton that another judge might find the decision in this case generous but it was one open to the First- tier judge. It was not a requirement for the judge to go into each and every point which had been considered by the respondent in the refusal letter. The appellant had never sought to persuade the judge that the eligibility criteria could be met.

16. As to the apparent contradiction between [55] and [56] in the determination, highlighted by the respondent, see paragraph 11 above, the judge was not suggesting that there had been interference with the appellant's family life with her extended family in the united kingdom but with her private life. The judge had not made a one sided assessment, at [57] she recognised both sides needed to be taken into account. She had not made any material error of law. In conclusion for the respondent it was submitted that although the judge had noted the issue of proportionality she had not gone on to conduct a balancing exercise.

Discussion and Findings

17. It was accepted by the judge that the appellants could not meet the immigration rules even if the judge did not set out in detail each and every rule that the appellants fell foul of, for example that NEZ had not been in the United Kingdom for at least seven years. The most relevant finding made by the judge under the immigration rules was that the appellants could not show there were very significant obstacles to their reintegration into South Africa. At that point the judge was of necessity dealing with this appeal under Article 8 outside the rules.

18. Case law demonstrated that there had to be very compelling circumstances for appellants to succeed under Article 8 in those circumstances. That another judge might have concluded given for example the shortness of time both appellants had been in the United Kingdom there were no such compelling circumstances is irrelevant. The issue is whether this judge who had the benefit of hearing live evidence by CVP has sufficiently explained why she found very compelling circumstances in this case.

19. The respondent's grounds of onward appeal are brief. They note certain findings made by the judge which told against the appellants such as the appellant's ability to access medical treatment in South Africa for her psychiatric problems. The judge found the appellant would be able to find employment in South Africa while NEZ could attend school. The important point is whether a losing party can understand why they have lost. The implication behind the respondent's grounds of onward appeal is that given the various adverse findings in the case it was not possible to understand why the judge nevertheless found that the balance was tipped in favour of the appellants. The grant of PTA referred to the lack of a proper balancing exercise which if undertaken would have allowed the parties to see what factors were given weight and which were not or given less weight.

20. The judge's reasons for finding the balance tipped in favour of the appellants is contained at 64 and is somewhat brief. She says what tips the balance in favour of the Appellant in this case, are the "first Appellant's vulnerabilities and mental health condition at the present time against the dual best interests of the second Appellant." It is difficult to determine from this what are indeed the factors which tipped the balance given that the judge had said the appellant can access medical treatment as required in South Africa. Further, it is not clear what the judge meant by "the dual best interests of [NEZ]". The judge had found that NEZ's best interests were to remain with the appellant but that would happen anyway if both were returned at the same time to South Africa.

21. At [62] the judge quotes from the medical report of Dr Ul-Haq "the risk to [NEZ] will also be significantly increased if [the appellant] is left to care for her daughter on her own in her current state of mind and in a country where she will have no support". Whether the judge agreed with that comment is not clear given what the judge had also said about the ability to access medical care and support. As a result I find that it cannot be seen how the judge has arrived at the conclusion that there are compelling circumstances in this case such as to lead to this appeal being allowed outside the rules. There are very significant factors which the judge herself has set out in some detail which argue against the appellants' case but it is less clear what there is to the appellants' case which outweighs those adverse factors.

22. I find therefore there is a material error of law such that the determination falls to be set aside. In the event of such a finding both parties agreed that the appeal should be remitted back to the First-tier to be determined again. In those circumstances no findings should be preserved. It would be of assistance to the tribunal if the appellant were to make an updated witness statement dealing in particular with NEZ's circumstances given the point made in the appellant's skeleton argument that that a substantial period of time in NEZ's life has elapsed since these proceedings began.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set the decision aside. The appellants' appeals against the respondent's decision to refuse leave will be remitted back to the First-tier to be heard de novo with no findings preserved.

Signed this 11th day of June 2024

.....
Judge Woodcraft
Deputy Upper Tribunal Judge