IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

JR/4160/2013

Field House,
Breams Buildings
London
EC4A 1WR

9 January 2015

BEFORE

UPPER TRIBUNAL JUDGE RINTOUL

Between

HORTENCE MILETA GAYLE

Applicant

and

Secretary of State for the Home Department

Respondent

- - - - - - - -

Mr P Saini, Counsel, instructed by Greenland Lawyers, appeared on behalf of the Applicant.

Mr C Thomann, Counsel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

- - - - - - - - - - - - - -

JUDGMENT

- - - - - - - - - - - - - -

JUDGE RINTOUL:

1. This is an application for judicial review brought with the permission of Upper Tribunal Judge Freeman on 20 May 2014.

2. On 1 July 2013 the respondent refused the applicant leave to remain in the United Kingdom on the basis that:

    a. she did not meet the requirements of Appendix FM or paragraph 276 ADE of the Immigration Rules; and,

    b. her circumstances were not exceptional enough to warrant a grant of leave outside the rules.

Background to the Claim

3. The applicant is a citizen of Jamaica born on 8 July 1946. She entered the United Kingdom on 17 September 2000 and has remained here since without leave. Her son and grandchildren live in the United Kingdom; another son who had been resident here was unfortunately murdered in 2008. It is said that she plays a large role in looking after the two children left behind as well as in the lives of her other four grandchildren.

4. On 11 May 2012 the applicant applied for leave to remain in the United Kingdom using form FLR(O) stating in a covering letter that she relied on Article 8 of the Human Rights Convention as she enjoys family life in the United Kingdom, having established a right to private life here.

5. Both parties accept that the Immigration Rules were substantially amended on 9 July 2012 between the date of application and the date of decision.

6. The grounds of claim in this case were reformulated pursuant to the order of Judge Freeman on 20 May 2014 and are, in summary, as follows:-

i. That the decision of 1 July 2013 was unlawful in that the respondent had failed to apply paragraph 317 of the Immigration Rules which would result in a successful application, following the decision in the Court of Appeal in **Edgehill v SSHD [2014] EWCA Civ 402**;

ii. That the respondent erred in her consideration of Article 8, in particular failing to consider that the applicant had established a family life with her grandchildren, the jurisprudence of the European Court of Human Rights indicating that this can engage Article 8.

7. The respondent's grounds of resistance take issue with the challenge regarding paragraph 317, observing that the claimant had not applied for leave to remain as a dependent relative, had not used the correct form and further, had the application been considered for an application for leave to remain as a dependent relative, it would have been refused as she had not provided the correct information as to her financial means required by paragraph 317(iii), (iv) and (iva). It is also stated that the applicant was incorrect to assert that she would have benefited from the more complete or favourable consideration of an Article 8 claim had that been decided under the pre-12 July 2012 Immigration Rules, that assertion being contrary to the authorities.

8. The respondent states also that she carried out a full and proper Article 8 analysis, considering all the material facts within the Rules and after concluding that the requirements of the Immigration Rules were not met, considered whether any exceptional circumstances justified a grant of leave outside the Rules. In particular, the Secretary of State determined that as the grandchildren would be brought up by their mother and parents in any event, their welfare was not an issue and thus it was not necessary to consider Section 55 of the

Borders, Citizenship and Immigration Act 2009 and that there was no medical evidence to support the applicant's claim that there were health issues to be taken into account. The Secretary of State also submits that the Article 8 claim was weak and that refusal on the facts was clearly appropriate.

9. I deal with the grounds in turn.

Paragraph 317

10. While I note Mr Saini's submissions that the application made did raise issues pertinent to paragraph 317 it cannot properly be argued that the Secretary of State is under a duty to examine a case to see whether, if it is refused, then there is perhaps some other category which the application could have been made. This applies even more so where, as here, as the detailed grounds of resistance note at [29] the published policy indicated that if somebody is already in the United Kingdom and settled here as a British citizen or settled person's elderly/other dependent relative you should complete application form SET(F). This also gave the relevant application fee.

11. I note Mr Saini's submissions that the ground of permission by Judge Freeman was of some width, but it is important to note that he stated in granting permission:

> "10. It is by no means surprising in my view that this application was dealt with in the way in which it was by the Home Office having been expressly made under Article 8 with none of the supporting financial or housing evidence which might have been expected on a dependency of the application under the Rules. ...
>
> 12. In my judgement it is arguable that the material in the application under consideration by the Home Office raised material which ought to have been considered

under paragraph 317 when the decision was made. I do not put that at all strongly and in view of the terms of the covering letter in particular I might not have granted permission on that point which is just arguable …"

12. I do not consider that this is in any way an endorsement of the applicant's argument; it is merely an observation that it is arguable.

13. Having reviewed the material as a whole I consider that the Secretary of State was not under a duty to treat this as an application pursuant to paragraph 317. The effect of paragraph 9 of the Immigration and Nationality (Fees) Order 2013 is that an application for leave must be accompanied by a fee, if required under the Fee Regulations, and is not validly made unless this is done. For an application under paragraph 317 to have been valid, it would have to be accompanied by the correct fee which, as is clear from the application form, was the fee applicable for form FLR(O), £561, whereas the application for SET(F) is considerably more, £1,850, as stated in the grounds of resistance.

14. Turning to the second ground, Mr Saini submitted that while the Secretary of State had in this case gone on to consider Article 8 outside the Rules, she had erred in not considering at all the interests of the children even though it was clear that this is a primary concern. He submitted that of the shared residence of the children and absent a finding regarding whether the applicant was "a primary carer" as opposed to "the primary carer", she had erred in her approach to the evidence. He submitted that the Secretary of State's approach to what constitutes family life was, in light of the jurisprudence, unnecessarily restricted and it was not open to the respondent to dismiss the family life shared between the parent and the

grandchildren in the manner in which she did so. Further, following the decision in **Zoumbas v SSHD [2013] UKSC 74** he submitted that the best interests of the grandchildren would have informed part of the proportionality assessment which ought to have been considered properly and that in failing to do so, the decision was not lawful.

15. Mr Thomann submitted that the Secretary of State's approach to the issue of Article 8 was rational and was one which was open to her. This was not a case in which she had, wrongly, simply said that the circumstances did not warrant further consideration. On the contrary, she had set out in some detail the matters she had taken into account. He submitted also that the Secretary of State was entitled to conclude that as the grandchildren would be raised by their mothers as parents in any event, the effect on them was not significant as to warrant consideration of the kind requested and that the contribution of grandparents to a children's life needed to be exceptional, if it is to be treated on a par with that of primary care givers.

16. Mr Thomann submitted also, having had regard to the decision of the European Court of Human Rights in **GHB (Application number 42455/98)** that the relationship between grandparents and grandchildren by its very nature generally calls for a lesser degree of protection than that between natural parents and their children.

17. In reply Mr Saini submitted that there had in reality in this case been no proper proportionality assessment, a failure properly to take into account the grandchildren's interests being a significant omission, and that there had been sufficient material before the Secretary of State in the application to show that there was a joint responsibility for the grandchildren. He submitted that **GHB** could be

distinguished on its facts given that there had been a significant breakdown in communication between the grandchildren and the grandparents, unlike here.

18. It is not disputed between the parties that family life can exist between grandparents and grandchildren. That proposition is accepted in **GHB**, relying on the decision in **Marckx v Belgium** [1979] ECHR 2. I accept that it calls for a lesser degree of protection generally than the relationship between natural parents and their children.

19. As Mr Saini submitted, the covering letter submitted with the application states that the applicant had been jointly responsible for the upbringing of her murdered son's children; that it was in the interests of the grandchildren to continue to have a life with their grandmother and that this should be a primary consideration given that she has been a constant and stable influence in their lives since they were born, and that they would be affected if they she were removed. [Page 26]

20. It is again stated that she was involved in their welfare and upbringing [page 27] and, in the light of **Zambrano** [2011] EUECJ C-34/09 that she is the primary carer of her grandchildren in the absence of their parents [28].

21. The decision reads as follows:-

> "You have stated that you have joint responsibility for the upbringing of your son's two children following the death of your son. Whilst I sympathise with you and your family regarding these unfortunate circumstances, ultimate responsibility for the care of the grandchildren rests with their mother who will be able to raise the children in your absence. Your other grandchildren also have parents who are responsible for their care. As the children will remain in the UK with their parents if you are removed, it is not

relevant to consider your application under the provisions in Section 55 of the Borders, Citizenship and Immigration Act 2009 which relates to the welfare of childrne."

22. There is no indication that the respondent has considered whether the relationship with the grandchildren and the applicant could amount to family life. There is also no apparent indication of any consideration as to whether there may have been joint responsibility; there are no findings on that issue. Having directed herself that the relationship between the applicant and her son and grandchildren did not constitute family life within Appendix FM, the respondent did not then consider whether, as is accepted, it could constitute family life for the purposes of article 8.

23. The fact that one of the joint carers may be able to look after a child if the other is removed from the United Kingdom does not in itself mean that the duty to promote the welfare and best interests of the children need not be considered. Certainly, that could not properly be argued if one parent is to be removed. Where, as here, it is a grandparent that is to be removed, albeit one who has had some responsibility for the children, there may well be a detrimental effect on them. Even if it is in the child's best interests that a grandparent remain in the United Kingdom, it does not necessarily follow that removal would be disproportionate. What the Secretary of State has done is to rule out the possibility of family life existing and to restrict her interpretation as to the provisions of Section 55 as relating solely to the position as between children and their parents.

24. I am therefore satisfied that the Secretary of State has acted irrationally in considering her exercise of discretion outside the Immigration Rules in that she has failed properly to take account as to whether there is family life between the

applicant and her grandchildren, or to have regard to their welfare, having impermissibly directed herself as to the scope of Section 55 of the 2009 Act.

25. Further, it is not disputed between the parties and the learning on this is clear, that when considering Article 8 outside the Immigration Rules, the exercise to be undertaken is a balancing exercise, an assessment of proportionality but one where, clearly, the public interest in maintaining immigration control is attached significant weight. Mr Thomann submitted in his skeleton argument that the Secretary of State did weigh the factors [39(iv)].

26. Neither party has provided a full copy of the policy/ instructions to caseworkers as to how to approach a consideration of article 8 outside the rules which was in place at the date of decision. Whilst Mr Thomann's skeleton argument at [18] does refer to the long residence and private life policy, that policy does not appear to apply to cases here where there may be an effect on an individual other that the applicant in question. It is not, therefore, of any real assistance.

27. Even assuming that the phrase "it is not accepted your circumstances are exceptional enough" is capable of indicating that the Secretary of State undertook a proportionality exercise, for the reasons set out above, that exercise was flawed in that it failed to have regard to the best interests of the applicant's grandchildren or to consider whether there may be a family life between her and them.

28. I am not satisfied that that the error was immaterial, nor that there could rationally only be one outcome in this case. For these reasons, I quash the decision of the Secretary of State of 1 July 2013.

~~~~0~~~~
~~~~