



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12922/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18th June 2018

Decision & Reasons Promulgated
On 21st June 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

NELIA [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms H [M], Sponsor
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Ms [M] appeals against the decision of First-tier Tribunal Judge Hollingworth promulgated on 22 September 2017, in which her appeal against the decision to refuse her application for entry clearance as a visitor dated 17 March 2016 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Ms [M] as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Zimbabwe who made an application to visit her daughter, Ms [M], the Sponsor, in the United Kingdom.
3. The Respondent refused the application on 17 March 2016 on the basis that the entry clearance officer was not satisfied that the Appellant's circumstances were as stated (because there was a discrepancy in her claimed earnings and a lack of supporting evidence of payment of a pension) nor that she had sufficiently strong social and economic ties to her country of residence. For these reasons, it was not accepted that the Appellant was genuinely seeking entry clearance as a visitor, nor that she intended to leave the United Kingdom at the end of her visit as required by paragraph 4.2(a) of Appendix V to the Immigration Rules.
4. Judge Hollingworth allowed the appeal in a decision promulgated on 22 September 2017 on human rights grounds. He found, in summary, that the Appellant had established family life with the sponsor which the refusal of entry clearance interfered with. Although the interference was in accordance with the law and in pursuit of a legitimate aim, it was a disproportionate interference with the right to respect for private and family life. This conclusion was reached on the basis of the strength of family life, the fact that the Appellant had addressed all of the reasons for refusal under the Immigration Rules and that there would be no adverse economic consequences for the United Kingdom such that the public interest was outweighed in this case.

The appeal

5. The Respondent appeals on three grounds. First, that the First-tier Tribunal did not have jurisdiction to hear the appeal as it was not a refusal of a human rights claim and failed to determine this issue despite it being raised by the Respondent prior to the hearing. Secondly, that the First-tier Tribunal erred in law in finding that family life had been established for the purposes of Article 8 of the facts, in failing to give adequate reasons in the proportionality assessment and finding that the interference was sufficiently serious to breach Article 8. Thirdly, that the First-tier Tribunal failed to give adequate reasons for finding that the Appellant met the requirements of the Immigration Rules.
6. Permission to appeal was granted by Judge Kinnell on 13 March 2018 on all grounds.
7. At the oral hearing, Mr Tarlow submitted that there was no human rights claim in this case, only an assertion to that effect by the Appellant which was insufficient to bring the claim within section 82 of the Nationality, Immigration and Asylum Act 2002 such that the First-tier Tribunal did not have jurisdiction to hear the appeal at all. It was an error of law for Judge Hollingworth not to deal with this point.
8. In any event, it was submitted on behalf of the Respondent that the findings in relation to Article 8 were inadequately reasoned and on the facts, family life, within the meaning of Article 8 could not be established. Reliance was placed on the written grounds of appeal in this regard and generally as to the third ground of appeal as well.

9. The sponsor attended the hearing and explained the history of the Appellant's applications for entry clearance as a visitor and subsequent refusals, including a period of delay following the successful appeal before the First-tier Tribunal. The sponsor reiterated that more evidence had been provided with each new application and significant evidence submitted to the First-tier Tribunal which shows the Appellant's ties to Zimbabwe and sufficient finances for her trip. She gave assurances that the Appellant had no intention of remaining in the United Kingdom and was coming to visit her and her children only and supported the findings of the First-tier Tribunal that the Appellant could meet the requirements of the Immigration Rules. It was also noted that the Appellant had no adverse immigration history or lack of compliance. The sponsor was unable to understand why the Appellant had been denied the opportunity of visiting her family without reasonable justification, nor why on this occasion in particular the application had been refused.

Findings and reasons

10. As to the jurisdiction of the First-tier Tribunal to hear this appeal, the right of appeal is governed by section 82 of the Nationality, Immigration and Asylum Act 2002. A person may appeal, inter-alia, where the Respondent has decided to refuse a human rights claim made by that person, and section 84 of the same specifies that the grounds of appeal are that the decision is unlawful under section 6 of the Human Rights Act 1998. The Respondent does not categorise this application as a human rights claim, nor the refusal of entry clearance as a family visitor as the refusal of a human rights claim either as a general category, nor on the specific facts of this case.
11. The Appellant's application for entry clearance was for entry clearance as a family visitor to see the sponsor and her grandchild (subsequently grandchildren by the date of the hearing before me), to see the family in their own environment and not just when they visit her in Zimbabwe and further that she is the family that the sponsor depends upon.
12. In the refusal of entry clearance, the entry clearance officer concluded "*you stated in your application that you have a right to private and family life. A mere assertion without an indication of how your rights are affected does not amount to a human rights claim. Therefore this decision is not a refusal of a human rights claim and there is no right of appeal against this refusal.*" For an applicant acting in person, the decision is then arguably inconsistent and at best confusing because it sets out expressly that the Appellant is entitled to appeal against the decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and sets out the forms to be used for doing so.
13. Although for the reasons set out below, this is not a claim which could ultimately succeed on human rights grounds with reference to Article 8 of the European Convention on Human Rights, that does not detract from the fact that the application was expressly made to visit a close family member and raised human rights. I find on the facts this was sufficient to make this a human rights claim such that the First-tier Tribunal had jurisdiction to hear the appeal. Although of course Judge Hollingworth should have dealt with the point, which was expressly raised by the Respondent in the

appeal before him, in circumstances where he had jurisdiction to hear the appeal, there is no material error of law in failing to do so.

14. In relation to the second ground of appeal, I find it is an error of law for the First-tier Tribunal to have found family life on the facts to engage Article 8 of the European Convention on Human Rights. The findings on this point were set out in paragraph 17 and 18 as follows:

“17. I find that family life exists between the Sponsor and the Appellant. I find that extremely strong emotional bonds been developed between the Sponsor and the Appellant which exceed the normal emotional ties between adults. I find that the reasons for the establishment of these bonds are rooted in the Sponsor’s upbringing within the context of a very strong family unit and the Sponsor’s siblings are all in Zimbabwe. The Sponsor is the Appellant’s only child within the United Kingdom.

18. I find that the bonds to which I refer have been reflected in the emotional needs of the Sponsor at the time of her Caesarean operation to which she has referred given the evidence which I have set out above in this context. The strength of the bonds to which I refer is also reflected in the financial support provided by the Appellant’s children to her, which reflect the continuing relationship between the Sponsor and the Appellant and the continuing relationships within the family. The regularity and frequency of contact between the Sponsor the Appellant and visit made to Zimbabwe reflect the continuing mutual desire on the part of the Sponsor and the Appellant to maintain the bonds to which I refer.”

15. There is no record in the decision, in the section relating to evidence or otherwise, relating to the Sponsor’s upbringing, nor in fact anything other than a reference to very frequent contact, (with the Appellant and sponsor speaking normally every other day and no more than three or four days pass without speaking, they also message each other on a daily basis) and the particular circumstances following the birth of the sponsor’s first child to explain the findings made above. There is no assessment consistent with binding authority on the establishment of family life in these circumstances, where the sponsor is an adult who has been living in the United Kingdom for ten years and who has formed her own family unit here.
16. Lord Justice Sales, in Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511, confirmed existing authority on the ambit of “family life” for the purposes of Article 8 and examined this in the context of an application for entry clearance. He held that Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 remained good law and that in order for family life to be found within the meaning of Article 8, the must be something more than normal emotional ties. The relationship between a person and their adult child would not without more established family life for these purposes. Further, there was no positive obligation on the Respondent to grant someone leave to develop or extend family ties, particularly in the context of relatively short visits which would not involve a significant contribution to the time people involved spent together.
17. Although for the reasons set out by Judge Hollingworth, it is clear that he found a close family relationship between the Appellant and the sponsor, on the facts it falls far short

of the requirement for something more than normal emotional ties. In particular, frequent contact, a close relationship and additional support after childbirth is not unusual nor uncommon, nor does it show more than normal emotional ties between a mother and an adult child. The finding that it was sufficient to engage in Article 8 is therefore an error of law.

18. In any event, even if family life was established for the purposes of Article 8 on the facts of this case, it is a further error of law to have found that the interference in the refusal of entry clearance would have consequences of sufficient gravity to engage Article 8. No reasons at all were given by Judge Hollingworth as to why he found this was the case, particularly in the context of a relatively short visit which would not significantly add to the time the Appellant and sponsor spent together, for the reasons set out by Lord Justice Sales in paragraph 30 of Kopoi. For these reasons it also follows that there was inadequate reasoning ultimately in the proportionality assessment under Article 8 of the European Convention on Human Rights.
19. The Respondent's appeal must therefore be allowed on the second ground, that there was a material error of law in the First-tier Tribunal's assessment under Article 8 of the European Convention on Human Rights, which could not have been engaged on the facts of this case. As such it is necessary to set aside the decision and for the reasons already given, a decision must be substituted to dismiss the appeal on human rights grounds.
20. The final ground of appeal was not expanded upon orally by Mr Tarlow, who relied on the following written grounds of appeal only. These were that the First-tier Tribunal's reasoning for finding that the Appellant meets the requirements of the Immigration Rules, including that she is in receipt of a pension and has a farm in Zimbabwe which were considered ties to ensure her return at the end of the visit. However, this is contrary to the finding that help is available to run the farm in the Appellant's absence and there was no finding that the Appellant would be unable to draw her pension in the United Kingdom.
21. This ground of appeal refers only to one small part of the reasons given for finding that the Appellant would meet the requirements of the Immigration Rules and fails to engage with the breadth of reasons given. The Appellant was found to have two properties in Zimbabwe which she owns outright and she undertakes, with assistance, a number of farming activities to generate income. By reference to those and her earnings generally it was found that the Appellant is self-sufficient in Zimbabwe, regardless of whether in addition she was in receipt of a pension. Further, that the Appellant would be financially supported throughout her visit by the sponsor.
22. Judge Hollingworth went on to find:

"28. ... I am satisfied that the Appellant has ample social and economic ties to Zimbabwe. The economic ties have been made out. The Sponsor has given evidence as to the social ties of the Appellant including her role in the church and the friendships which she has made. I find this entirely unsurprising given the period of time spent by the Appellant in Zimbabwe, and occupation in her role in the church. ..."

23. I find no error of law nor inconsistency in the reasons given for the finding that the Appellant would meet the requirements of the Immigration Rules and that all of the doubts raised by the Respondent in respect of the elements of the rules have been resolved. Those findings are clear, cogent and supported by the evidence that was before the First-tier Tribunal. Although the Respondent's appeal is allowed on the second ground in relation to Article 8 of the European Convention on Human Rights, such that the decision under appeal must be set aside and replaced with a decision dismissing the appeal for the reasons already given, I make it expressly clear that the findings in relation to satisfaction of the Immigration Rules are not impugned in any way.
24. It does not appear from the file that the decision under challenge was reviewed by an Entry Clearance Manager following the notice of appeal, which is unfortunate as it may have resolved the doubts raised under the Immigration Rules in the initial decision. It is not clear whether that could now be done in light of the above and in any event, I have no power to direct such consideration be given.
25. In the alternative, it is of course a matter for the Appellant as to whether any further application for entry clearance as a visitor is made. However, if it is, I would expect an entry clearance officer to have regard to and attach weight to the findings of Judge Hollingworth in relation to the Appellant's satisfaction of the requirements of the Immigration Rules under Appendix V on this application (submitted on or around 29 February 2016) which led to the decision under appeal dated 17 March 2016.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake the decision. The appeal is dismissed on human rights grounds.

No anonymity direction is made.



Signed

Date

18th June 2018

Upper Tribunal Judge Jackson