Upper Tribunal
(Immigration and Asylum Chambers Appeal Number: HU/08859/2018

THE IMMIGRATION ACTS

Heard at: Manchester
On: 1st February 2019

Decision Promulgated
On: 14th February 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Gloria [C]
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Ms Rutherford, Counsel instructed by Cartwright King Solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Mrs Gloria [C] is a national of Jamaica who is now 82 years old. She first landed in the United Kingdom in 1956, just six years after the SS Empire Windrush docked at Tilbury: she lived and worked here for many years before returning to Jamaica, and in the years since she has repeatedly returned to visit the United Kingdom, where at least six of her children still live. It was on such a visit in January 2015 that her daughters became concerned about her welfare. They had her assessed by a doctor and by February of that year Mrs [C] had been formally diagnosed with vascular dementia. An application was made on her behalf that she may be granted

leave to remain on human rights grounds. It was the Respondent's decision to refuse such leave[1], and the First-tier Tribunal's agreement with that decision[2], that is the subject of the appeal before me.

The First-tier Tribunal Decision

2. The case before the First-tier Tribunal was that the decision to refuse leave breached the United Kingdom's obligations under the European Convention on Human Rights: reliance was placed on Articles 3 & 8. It was submitted that Mrs [C] is suffering from advanced dementia, as well as several physical ailments including diabetes and heart disease. In the United Kingdom she was supported and cared for by her daughters, and it was submitted that this love and assistance could not be replicated in Jamaica. Although Mrs [C] has adult sons living in Jamaica, they had not hitherto shown themselves competent to look after her; there was some suggestion that the sons had been neglectful or even financially abusive. Given her ties to this country and the nature of her illness, her removal was submitted to be a disproportionate interference with her Article 8(1) rights. It was further submitted that her removal would be a breach of Article 3 because she would find herself living in inhuman and degrading circumstances.

3. For the Respondent it was pointed out that healthcare is available in Jamaica. There is treatment available for all of the physical ailments that Mrs [C] suffers from, and a google search revealed there to be 44 registered care homes for the elderly. There was no evidence to suggest that Mrs [C] could not be adequately accommodated in such a setting, and supported if necessary by her sons. Nor was there any reason given as to why any or all of Mrs [C]'s British daughters could not continue to support their mother financially, and emotionally through visits or 'skype' type calls. The Respondent did not accept that the medical consequences of removal would violate Article 3, or that the decision to refuse leave was disproportionate.

4. In order to address these matters in dispute the First-tier Tribunal had the benefit of hearing live evidence from four of Mrs [C]'s British daughters, [C], [R^D], [P] and [S^1]. It was not considered appropriate, in light of the latest medical assessments, that the Appellant herself be called to give evidence. The Tribunal was also supplied with limited, albeit unchallenged evidence, relating to Mrs [C]'s health and social needs. This consisted of correspondence from the family GP and other doctors, and a detailed report by Occupational Therapist Ms [S] dating from July 2018.

5. The Tribunal's findings were as follows:

[1] On the 28th March 2018

[2] Decision of First-tier Tribunal Judge JWH Law dated 1st October 2018

i) This appeal is not concerned with someone who is "close to death" and as such the Article 3 caselaw relied upon by Counsel for Mrs [C], including N v United Kingdom 26565/05, D v United Kingdom (1997) 24 ECHR and Paposhvilli v Belgium 41738/10 was not relevant;

ii) There is a *Kugathas* dependency between Mrs [C] and her daughters and as such it is accepted that she enjoys an Article 8 'family life' in the United Kingdom;

iii) After a "period of more than three years in this country" the Tribunal accepts that Mrs [C] also enjoys an Article 8 private life here;

iv) Article 8 is engaged by the decision;

v) The decision to refuse leave is nevertheless proportionate for the following reasons:

   a) The evidence about why Mrs [C] came here in 2015 is unsatisfactory;

   b) The evidence that Mrs [C] may have been neglected or financially exploited by one or both of her sons in Jamaica is unsatisfactory;

   c) There is a contradiction in the evidence of the Occupational Therapist who on the one hand opines that "removal would cause significant shortening of life" and on the other that without the assistance of her daughters Mrs [C] would suffer a "steady deterioration" in health. Nor was the OT qualified to make the comment that the care currently received by Mrs [C] "could not be replicated" in a care setting;

   d) Mrs [C]'s condition has worsened in several respects since her arrival in the United Kingdom but her needs are not unusual for someone of her age;

   e) The drugs she requires are available in Jamaica and it has not been shown that all of the 44 care homes identified by the Respondent would be unsuitable;

   f) The submission that a care home could not replicate the love of a daughter must be read in line with the evidence that Mrs [C]'s condition has deteriorated to the point that she no longer recognises her daughters;

   g) The family could continue to support Mrs [C] financially if she were to return to Jamaica;

   h) The family could maintain contact by telephone and the Tribunal was not therefore satisfied that the risk of social isolation would be any higher for Mrs [C] than for other widows her age;

   i) Whilst the decision under appeal would impact upon the lives of Mrs [C]'s daughters "that is the inevitable consequence for those left behind when some family members decide to move to another country";

j) The maintenance of immigration control is in the public interest and it had not been shown that Mrs [C] could meet the relevant immigration rules. She has the option of returning to Jamaica in order to apply under the appropriate rule if she wishes to do so;

k) There was a further public interest in refusing leave because of the "increasingly high cost of social care" (it being the accepted evidence that Mrs [C] was receiving treatment on the NHS, was attending a day centre four days per week, and that her daughters were receiving carers allowance);

l) Her private life was established whilst her immigration status was 'precarious'.

The Appeal

6. The grounds take issue with several of the individual findings, but their central thrust is that the Tribunal erred in failing to direct itself, upon consideration of Article 8, to consider the meaning of "very significant obstacles to integration". The rule is concerned with private life and in this case the nature of the appellant's illness was such that removal would result in a nullification of that right, since Mrs [C] would not have the means to build meaningful human relationships in Jamaica. The Judge has failed to grapple with the consequences of her advancing illness. The Article 3 grounds before the First-tier Tribunal were not pursued before me.

7. For the Respondent Mr Bates resisted the appeal on all grounds. He maintained that the Appellant failed to meet the requirements of the rules relating to adult dependent relatives. She had not shown that care in a Jamaican care home would be inadequate, or that she could not speak to her daughters by telephone, with the assistance of a member of care home staff if necessary. Mrs [C] had two sons in Jamaica and the suggestion that they were estranged had not been proven.

Discussion and Findings

8. The most obvious error in the First-tier Tribunal's determination, and one which infects the entire proportionality assessment, is that the Tribunal appears to have entirely overlooked the fact that Mrs Gloria [C] is not simply a visitor who has overstayed. She is an individual who can quite properly be said to be part of the 'Windrush generation'.

9. The determination does allude to this factual background. At paragraph 9 [C]'s evidence that her brothers are regarded as "foreigners" in Jamaica is recorded, and at paragraph 38 the determination notes that Mrs [C] only returned to live in Jamaica after the death of her husband in 2002. It is however apparently forgotten by the time that the Tribunal conducts its

proportionality balancing exercise, since the determination here contains errors that are otherwise inexplicable:

i) At paragraph 36 the Tribunal accepts that after three years in the United Kingdom it could be said that Mrs [C] has a private life here. At paragraph 46 little weight is attached to that scant three years of private life established after she arrived as a visitor. The Tribunal here fails to take material evidence into account, viz that from 1956 this country was Mrs [C]'s home. The bundle before the First-tier Tribunal contained a copy of the passport that Mrs [C] used when she arrived in the United Kingdom. It was issued by the Governor of Jamaica on the 7th September 1956 and was an old-style black British passport. It indicates that Mrs [C] (nee Carter) is a 'British subject: citizen of the United Kingdom and Colonies'. This was her status when she entered, travelled and remained in this country, when she lived and worked in Derby and gave birth to at least 7 of her 9 children[3].

ii) At paragraph 45 the Tribunal considers the impact of separation on the family, but apparently discounts any distress that might result as follows: "that is the inevitable consequence for those left behind when some family members decide to move to another country". I can only read that sentence, in the context of the paragraph (and determination) overall, to mean that the family split has been caused by Mrs [C]'s daughters moving to the United Kingdom. That is a material error of fact. All of four daughters who appeared before the First-tier Tribunal were born in this country, and have been British since birth. They have not therefore "decided to move to another country". If anything the family's current predicament has been caused by Mrs [C] deciding to move to "another country" ie Jamaica, in 2002.

iii) At paragraphs 40 and 45 the Tribunal refers to the cost to the NHS of providing medication etc to Mrs [C], and to the provision by social services of a care package (an allowance paid to [R^D] as her mother's carer). This is a matter directly weighed in the balance against Mrs [C]. No regard is had here to the evidence in the bundle indicating that Mrs [C] was a long-term United Kingdom tax-payer who made national insurance contributions, and has in fact been in receipt of a DWP pension since retirement.

10. These errors of fact and law were plainly fundamental to the consideration of Article 8 'outside the rules' and for these errors alone I would set aside that part of the decision.

[3] The papers before me are not in order but I have been able to identify birth certificates showing that [C], [R^D], [S^1], [S^2], [P] were all born in Derby. From the dates it would seem that Mrs [C]'s late sons [M] and [R^S] were also born here.

11. The failure to recognise Mrs [C]'s long immigration history was also, as I explain below, potentially relevant to the decision under the Immigration Rules.

12. The relevant rule in this case was unquestionably paragraph 276ADE(1). This much is recognised by the First-tier Tribunal at its paragraphs 2 and 19 but I note as an aside that it important to underline that fact, since the determination, and indeed the parties in their submissions before me, appeared to stray towards consideration of the provisions relating to adult dependent relatives contained in Appendix FM. Those provisions are not relevant to a consideration of 276ADE(1). The Secretary of State, when drafting those rules, expressly excluded in-country applications under the adult dependent relative route, which is only open to those applying out-of-country for entry clearance to the United Kingdom. Thus the relevant rule, the only rule under which Mrs [C] could apply, was 276ADE(1). That reads:

> '276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.
>
> 276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

13. Before me the respective submissions made on behalf of Mrs [C] and the Secretary of State dealt exclusively with the Tribunal's treatment of sub-paragraph (vi), and that is a matter which I address below. Before I do I

mark the unfortunate failure on the part of all concerned to consider whether Mrs [C] may in fact qualify for indefinite leave to remain on the basis of sub-paragraph (iii) of that rule.

14. It does not appear to be in issue that Mrs [C] arrived in this country in September 1956: that is the date of entry marked in her British subject passport. Nor has either party challenged the evidence recorded by the First-tier Tribunal (and repeated before me) that this remained her home until she retired to Jamaica in 2002. By my calculation that is a period of continuous residence of well over 20 years. There being no requirement in the rule that the period of continuous residence must immediately precede the application, it would seem that Mrs [C] has a *prima facie* case for indefinite leave to be granted without further ado. As this was not a matter raised before me, or the First-tier Tribunal, I say no more about it.

15. Returning to the grounds as argued in respect of paragraph 276ADE(1)(vi) I note that the First-tier Tribunal properly directs itself to judicial guidance on how that rule should be interpreted. It cites, for instance, the Court of Appeal judgement in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 to the effect that the test of "very significant obstacles" requires the decision-maker to evaluate whether the individual would be able:

> "… to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

16. This jurisprudence is wholly consistent with how the Secretary of State interprets the rule. In his policy guidance *Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes* January 2019[4], the Respondent instructs caseworkers that the starting point should be the presumption that integration will be possible. It is for the applicant to introduce evidence to demonstrate that it is not. A number of factors can be considered, for instance linguistic, familial, cultural and social ties to the destination country, but the focus should, in the Respondent's view, be on the extent to which it is possible for the applicant to enjoy an Article 8 private life if removed from the United Kingdom:

> 'A very significant obstacle to integration means something which would **prevent or seriously inhibit the applicant from integrating into the country of return**. The decision maker is looking for more than obstacles. They are looking to see whether there are "very significant" obstacles, which is a high threshold. **Very significant obstacles will exist where the applicant demonstrates that they would be unable to establish a private life in the country of return, or where establishing a private life in the country of return would entail very serious hardship for the applicant**.'

[4] The passage I cite here is identical to that in earlier versions of this guidance, i.e. that available at the date of the First-tier Tribunal decision

(emphasis added)

17. The Court of Appeal judgment in Kamara, and the Secretary of State's policy guidance, are both in turn consonant with the jurisprudence of the European Court of Human Rights, which has consistently held that the term 'private life' encompasses "the physical and moral integrity of the person"[5] and that this must include, fundamentally, the right to establish and develop relationships with other human beings: see for instance McFeeley v United Kingdom[6] , Pretty v United Kingdom[7] or the opinion of Judge Martens in Beldjoudi v France[8].

18. That then, is the focus of the test in 276ADE(1)(vi). The decision maker must be assessing whether removal (or the refusal to grant leave) will result in a nullification, or at least a flagrant interference with, the individual's ability to enjoy such relationships.

19. In this case it was said on Mrs [C]'s behalf that the nature of her illness was such that her removal from the United Kingdom would deprive her of any meaningful human contact and comfort so as to be a disproportionate interference with her human rights: it would result in the nullification of, or flagrant interference with, her Article 8(1) private life. On appeal it is Ms Rutherford's case that the First-tier Tribunal wholly failed to grapple with that matter.

20. That is a submission with which I must agree. At paragraph 42 the Tribunal finds that Mrs [C]'s needs are "not unusual for a person of her age". That is not relevant. There was no requirement upon Mrs [C] to demonstrate that her situation was unique or exceptional. At paragraph 44 the Tribunal records itself to be unsatisfied that Mrs [C]'s sons would harm her. That was a factor of some relevance, but the Tribunal stops short of finding that these two sons (one of whom is said to work long hours and have little time for his mother, the other of whom was said to have taken money from her and have a 'temper') would or could replicate the *Kugathas* relationships that Mrs [C] enjoys with [C] and [R^D]. In the same paragraph the Tribunal finds that the family could and would pay for Mrs [C] to live in a care home in Jamaica. Whilst that was plainly a finding open to it on the evidence, it was not determinative of the question posed and outlined above: would Mrs [C] enjoy any meaningful human interaction in such a setting? Although her daughters expressed doubts about the quality of care that Mrs [C] might receive in a home in Jamaica, this case was not about whether someone could take her to the toilet or make sure she took her medication. This case was about whether, in the short years remaining to her, Mrs [C] might retain a modicum of comfort and human dignity in the face of a relentlessly cruel disease which stripped away her ability to "integrate".

[5] See for instance X and Y v The Netherlands (A91 para 29)
[6] No 8317/78, 20 DR 44 at 91
[7] (2002) 35 EHRR 1
[8] App 234-A (1992)

21. That this was so is reflected only in the Tribunal's remaining reasoning on the point: "I have to take into account that her mental health has now deteriorated to the point where she either doesn't recognise her daughters or thinks they are still young and addresses them as such, or forgets who they are". This evidence was taken from the report of the OT, and from the statements of [C] and [R^{D}]. It is accurate, but what it fails to reflect is the totality of that evidence, that when Mrs [C] suffers from the worst effects of her illness it is the presence of her *daughters* which gives her comfort and reassurance, regardless of whether she is able to recall their names or ages. In her statement [C] describes her mother's condition as follows:

> "She can become upset and easily distressed at times and requires reassurances from myself that its ok. My mother also suffers from hallucinations where she believes she can see her dead husband, two dead sons, dead parents and aunt. She will also say she sees people, babies, animals – things that are not there. This again causes my mother to become really upset and she will then start to cry sometimes in the middle of the night and early hours of the morning.
>
> My mother since losing her memory has also become quite anxious. If I am out of sight for short periods she often becomes upset and cries…"

In her report the OT Ms [S] concurs:

> "Whilst she has problems in recalling names, facts and events, she is able to recognise her family and her demeanour when in the presence of her daughters was seen to be calm, relaxed and seemingly trusting"

22. I am satisfied that it was, in light of that evidence, irrational for the Tribunal to focus simply on Mrs [C]'s difficulties with memory in order to defeat her claim under the rule. The focus should rather have been on the consequences of that loss of memory, the distress that this caused, and the extent to which it would impede her ability to receive reassurance from others outside of the home that she currently shares with [C] in the United Kingdom.

23. The test under 276ADE(1)(vi) is a stringent one. In R (Ullah) v Special Adjudicator [2004] UKHL 26 the House of Lords stressed that in cases where a migrant seeks to rely on ECHR rights other than family life to resist removal he or she must demonstrate a "flagrant, gross or fundamental breach of that article such as to amount to a denial or nullification of the rights" concerned. I am quite satisfied, on the evidence before me, that removal to Jamaica, and away from the home of [C], would result in such a dramatic loss of private life for Mrs [C]. Her ability to form meaningful relationships with other people is diminished to the point of nullification. For that reason there plainly would be "very significant obstacles to integration" in Jamaica.

24. I therefore set the decision of the First-tier Tribunal aside and remake it by allowing the appeal, with reference to paragraph 276ADE(1)(vi) of the Rules, on human rights grounds.

25. It follows that I need not deal in any detail with the decision 'outwith the rules' save to say that for the reasons set out above I would also set that part of the First-tier Tribunal decision aside. The fact that the Appellant has a long association with this country, and a private life established here when she was, as a matter of law, entitled to be here as a British subject, was plainly relevant. Even taking account of the mandatory public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 I am quite satisfied that this is a case where the refusal to grant leave would be disproportionate. To refuse leave would be to deny Mrs [C] dignity in the closing years of her life.

Decisions

26. The decision of the First-tier Tribunal contains material errors of law and it is set aside.

27. I remake the decision in the appeal as follows:

> "the appeal is allowed on human rights grounds".

28. There is no direction for anonymity.

Upper Tribunal Judge Bruce
8th January 2019