



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/14277/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 27th November 2018**

**Decision & Reasons
Promulgated
On 8th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MARIA [C]
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr J Rene, Counsel instructed by Thoree & Co Solicitors

DECISION AND REASONS

1. For convenience I shall employ the appellations “Appellant” and “Respondent” as at first instance.
2. The Appellant is a citizen of Bolivia who appealed against the decision of the Respondent dated 25th October 2017 refusing her indefinite leave to remain here based upon her family and private life. Her subsequent appeal to First-tier Tribunal Judge Beg was allowed on Article 8 human rights grounds in a decision promulgated on 17th August 2018.

3. The judge noted the terms of the Respondent's refusal to her claim and set out the evidence given on the Appellant's behalf in the appeal before her namely by the Appellant, her son John and her other son Johan.
4. In her decision and reasons commencing at paragraph 19 the judge applied the civil standard of proof on a balance of probabilities. She said it was common ground that the Appellant did not come to this country until she was 35 years old and she was granted temporary admission only (paragraph 21). She found that the Appellant had overstayed by a very significant period. She took account of the previous determination of Immigration Judge Horvath in accordance with the case of **Devaseelan [2002] UKIAT 00702**. She found that the Appellant's credibility was damaged by the lies she had told immigration officials (paragraph 24) and concluded that she did not meet the requirements of Appendix FM of the Immigration Rules (paragraph 26). She went on to refer to well-known case law and noted (paragraph 32) that the Appellant had a particularly close relationship with her son Johan. She found the evidence of Johan was credible (paragraph 35). Although she said at paragraph 37 that she had not worked in her home country since she left in 2010, it is clear that date should be 2003. She had no home of her own to return to. She said she took into account the facts that had happened since the first judge's determination and found that the Appellant was acutely aware that her family had been fractured by two of her children being granted leave to remain in this country and two of her children being removed to Bolivia. She found that given the strength of her ties to this country, particularly with her two sons, the length of residence and her family background here that any interference now in her Article 8 rights would be disproportionate. She found she had family life within the meaning and purpose of Article 8 with her sons in the United Kingdom and any interference would result in unjustifiably harsh consequences for her.
5. The Secretary of State lodged grounds of application which are wide ranging and start with the proposition that the judge was wrong to find there were emotional ties beyond the norm. As this ground was departed from by Mr Jarvis no more need be said about that. The second ground was in relation to public interest and proportionality it being said that the Appellant was an overstayer who had worked illegally and it was not in the public interest to allow such an abuse of the immigration system. The third ground was that there were no insurmountable obstacles to the Appellant's return to Bolivia and the conclusion was that the Secretary of State's decision was a disproportionate and necessary response and was of paramount importance to the legitimate aim pursued.
6. Permission to appeal was granted by First-tier Tribunal Judge Parkes in a decision dated 9th October 2018 and thus the matter came before me on the above date. Before me Mr Jarvis relied on his grounds - indicating he was not relying on ground 1. Mr Jarvis emphasised that little weight should be given to private life when someone's presence here was precarious or unlawful. This Appellant was someone who had been working illegally. Reliance was placed on paragraphs 41, 43 and 49 of

Rhuppiah v SSHD [2018] UKSC 58. In particular in paragraph 43 the bright line interpretation of the word “precarious” in Section 117B(5) was said to be linguistically and teleologically legitimate and consistent with the way the ECHR expressed itself in other cases. Reference was also made to **ZS (Jamaica) and Another v SSHD [2012] EWCA Civ 1639**.

7. Essentially for the Appellant to succeed in this case she must prove that there was an exceptional element to this case which was lacking here. As such the decision could not be relied on and should be set aside and the decision remade dismissing the appeal.
8. For the Appellant Mr Rene said that this was a well-balanced decision by Judge Beg and she had considered all the necessary factors. The exceptionality of this case was that there was a family unit in this country and the judge had relied heavily on that in paragraphs 36 and 37. She had taken account of the public interest. While the decision was a generous one it could not be said that there was an error in law.
9. I reserved my decision.

Conclusions

10. The judge referred to well-known case law in making her decision referring to **Huang [2007] UKHL 11** and **VW (Uganda) [2009] EWCA Civ 5** where the court held that there must be more than a degree of hardship to amount to a breach of the fundamental right protected by Article 8. Of importance is that she referred to **Agyarko [2015] EWCA Civ 440** where the court held that the Secretary of State had not imposed a test of exceptionality but the word exceptional meant circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application had not been proportionate.
11. It seems to me that the key finding of the judge is set out in paragraph 32. She found that the Appellant’s sons in the United Kingdom were adults and both were at university. She found that the Appellant’s relationship with her adult sons did go beyond normal emotional ties to a relationship of real committed and effective support. The Appellant had always lived with them being their primary carer when they were minors and supported them against the background of fractured relationships with her two children in Bolivia. She accepted the evidence of the Appellant that she had a particularly close relationship with her son Johan.
12. Johan had given evidence that he did not visit Bolivia last year with his father and brother because he could not leave his mother alone. The judge further noted that her two children in Bolivia were effectively estranged from her because they blamed her for their detention and removal to Bolivia (paragraph 34). The judge took account of Section 117B of the Nationality, Immigration and Asylum Act 2002. The judge was, in fact, applying the reasoning set out in **Agyarko** that her removal

would result in unjustifiably harsh consequences for the Appellant such that the refusal of the application would not be proportionate.

13. The judge was quite entitled to find that she had family life within the meaning and purpose of Article 8 with her sons here. She gave sound reasons for finding that these relationships were particularly close. Against that background while it could be said that this was a case where another judge might have moved in the other direction, there was nothing perverse or irrational about the judge's findings which, in my view, were entirely open to her on the evidence before her; she was therefore entitled to allow the appeal under Article 8.
14. As such there is no error of law in the judge's decision which must stand.

Notice of Decision

15. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
16. I do not set aside the decision.
17. No anonymity order is made.

Signed *JG Macdonald*
2018

Date 18th December

Deputy Upper Tribunal Judge J G Macdonald