Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38068/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 26 August 2014	**On 2 October 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

CLEOPATRA RICHENDA ROSE MANNING

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Sarwar, Counsel instructed by Bassi Solicitors
For the Respondent: Mr M Hussain, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Jamaica citizen, born on 8 March 1967.

2. She entered the United Kingdom as a visitor on 26 June 1997 with leave. Further leave was granted on a number of occasions until 31 October 1999. Thereafter, further leave to remain was refused on 5 December 2000. The appellant applied for further leave to remain on 19 February 2003 but this was refused on 21 November 2008. On 14 September 2011

the appellant was granted discretionary leave to remain until 14 March 2012.

3. On 23 February 2012 the appellant submitted an application for further leave to remain outside the Immigration Rules on the basis that she had been in the United Kingdom for over fourteen years. The respondent rejected that application for the reasons as set out in the refusal letter dated 6 September 2013.

4. In particular, it was said that the appellant failed to meet the requirements of paragraph 276B of the Immigration Rules because she had not completed a period of ten years' lawful residence. Indeed, she had been sentenced to eighteen months' imprisonment on 8 February 2008. It is said that she did not meet the requirements of paragraph 276B(i)(a) or (b). Neither did she meet the requirements of paragraph 276B(ii) because it would be undesirable to allow her to remain in the United Kingdom on the basis of her criminal conviction. The grant of discretionary leave had been on the basis of the best interests of her daughter, Sashania. Her circumstances were such however that that daughter was now an adult.

5. The respondent also considered the application under the current Immigration Rules, and particularly under Appendix FM – Section – LTR.1.4 and paragraph 276ADE. The appellant failed to meet such Rules because she had not lived in the United Kingdom continuously for the requisite period nor indeed was her presence in the UK conducive to the public good because of her conviction.

6. The respondent considered Article 8 of the ECHR but did not find there to be any compassionate or compelling circumstance such as to allow her to remain in the United Kingdom.

7. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Khan on 9 April 2014. In a detailed judgment the Judge considered first of all whether the appellant met the requirements of the old Immigration Rules and concluded that she did not. It was found that she did not meet the new Immigration Rules nor were there any circumstances that were exceptional or compelling as to grant the appeal on the basis of her human rights.

8. The appellant sought to appeal against that decision and submitted detailed grounds of appeal. Permission to appeal was granted with certain caveats to that grant.

9. Thus the matter comes before me in pursuance of that permission.

10. It was the contention made on behalf of the appellant by Mr Sam Sarwar, who represents her, that because her application was submitted before the coming into effect of the new Rules, her application should have been considered in the light of the then Immigration Rules, and in particular in

the light of paragraph 276B of HC395. The decision in **Edgehill [2014] EWCA Civ 402** is cited as authority for that proposition.

11. Although it is accepted by Mr Sarwar that the appellant does not in fact meet the requirements of the old Immigration Rules she fails to meet the requirements only by a very small margin and accordingly that factor should have weighed heavily with the First-tier Tribunal Judge, particularly in the assessment as to Article 8 of the ECHR. It is also submitted that the Judge was wrong to consider that the period of imprisonment broke the continuity of residence with the expectation that the period of residence be re-started from the release from imprisonment.

12. The appellant was imprisoned from 8 February 2008 to 26 November 2008. Although she had been sentenced to a long imprisonment she in fact served in the order of nine months' imprisonment. Thus it is argued that the appellant had almost completed a period of lawful residence from her entry in June 1997 until the imposition of the sentence in February 2008.

13. I am not persuaded that that is a correct interpretation of the matter. As I have indicated, the appellant had lawful leave from 26 June 1997 until 5 December 2000 allowing for the 3C leave and thereafter there was a break of some two years or more when the applicant resided as an overstayer. It was only in September 2011 that the appellant was granted discretionary leave to remain.

14. Clearly therefore the appellant fell far short of having ten years' lawful residence.

15. As to the period of fourteen years' residence the sentence of imprisonment did not break the continuity but neither did it count towards that period. Therefore the proper course is to exclude that from the fourteen year period.

16. As Mr Sarwar indicated, taking the concept of the fourteen year period at the time the application was made on 23 February 2012 and less the period of time spent in custody, the appellant would have been only one month short of that particular period. It is to be noted however that leave was refused in December 2000 and 2008.

17. In any event Mr Hussain, who represents the respondent, submitted that because of the serious nature of the offending as highlighted by the Judge in the determination, the appellant would undoubtedly have fallen to be refused on the grounds that her presence was not conducive to the public good. Indeed the refusal letter makes it clear that the Secretary of State was satisfied that it would be undesirable for the appellant to remain in the United Kingdom on the basis that her personal history would not meet the requirements of paragraph 276B(ii).

18. It was clear from the determination that the Judge spent a considerable amount of time in the determination looking at the issue as to whether or not the appellant met with the requirements of the old Immigration Rules which clearly she did not.

19. Consideration was given as to whether or not the appellant met the current Immigration Rules and the finding was that she did not. It was not suggested before me in argument that she did.

20. What is argued on behalf of the appellant as part of the grounds of appeal, is that the Judge failed to give sufficient weight in the assessment of Article 8 to the health of the appellant and more particularly the inter-dependence between herself and her daughters, Sashania in particular. It is submitted that the Judge was wrong to find that there was no evidence of family life between the appellant and her daughter. Accordingly the determination was defective in that regard.

21. Mr Hussain invites me to find that that was not a criticism that was properly held against the Judge. The Judge considered the medical history of the appellant, particularly in paragraphs 22 and 23 of the determination and looked at the decision in **Kugathas**, in paragraph 24. It was the finding that the appellant had sought to exaggerate the difficulties she would face in Jamaica and indeed he did not find that the appellant was credible in her account of having no connections or ties with Jamaica. The Judge looked at the relationship between the appellant and her two daughters.

22. The grounds seek to criticise the Judge's comment that he found the appellant's account to be grossly exaggerated as a comment without reason. It is clear, however, from reading the determination as a whole that the finding as to exaggeration in evidence comes in the context of the appellant claiming that she would be on the scrapheap in Jamaica and that disabled people would be ridiculed. The Judge found that to be an exaggeration in all the circumstances.

23. There was no suggestion that the Judge failed to note the relevant aspects of the ill-health of the appellant.

24. It is argued that the Judge failed to give sufficient weight to the family life that exists as between the appellant and her daughter. Because of her ill-health she has become very dependent upon her daughter for support by building between them a special degree of dependency. It is contended that the Judge failed to deal with that matter. It is clear however that the issue of dependency was carefully considered by the Judge, particularly at paragraph 24. The Judge noted in particular that there was no up-to-date medical evidence to say that the appellant's medical condition had deteriorated. The Judge did not find there to be a special degree of dependency having been established.

25. I find, having regard to the determination as a whole, that those findings were properly open to be made and were well-reasoned. The Judge has paid careful note not only to the medical conditions of the appellant but, as is clear from paragraph 21, her private life as well. The issue of the grant of discretionary leave was also dealt with by the Judge in paragraph 26.

26. The Judge noted therefore that the appellant could not meet the relevant requirements of the Immigration Rules and no exceptional or compelling circumstances existed outside the Rules so as to allow an appeal on that basis.

27. It is contended that once again the appellant was entitled to rely upon the case of **Edgehill** and expect the Judge to determine the issue of Article 8 under the law that existed prior to 2012 i.e. apply the simple five stage **Razgar** test.

28. As the grounds granting permission make clear there is a tension between the decision of **Edgehill [2014] EWCA Civ 402** and that of **Haleemudeen [2014] EWCA Civ 558**. That seemed to indicate that Article 8 had to be determined as at the date of hearing in the light of the understanding of Article 8 that was current at that time.

29. It seems to me that it would be wholly artificial to seek to freeze the Article 8 rights as confined to those set out prior to the change in the Immigration Rules. The element of family and private life is an ongoing process. It is understandable therefore that it falls generally to be determined as at the date of hearing when all relevant factors can be weighed in the balance. One such factor of course being the weight that should be given to the control of immigration and the desirability to remove an overstayer was someone who has committed an offence in the United Kingdom. This is clearly not a deportation case but nevertheless the Secretary of State in the refusal letter sets out why it is that the further leave to remain in the United Kingdom is not to be granted.

30. Clearly the health of the appellant is a significant topic as is also the fact that she has been in the United Kingdom for a lengthy period of time. The Judge in a detailed determination considered both matters. The Judge did not consider that the case of **Ogundimu [2013] UKUT 00060 (IAC)** had an application in this case upon the factual findings that were made.

31. Having considered with care the grounds of appeal that had been submitted and the oral arguments by Mr Sarwar upon them, I do not find that the determination discloses any material error of law. The Judge has properly noted matters that can be held to the credit of the appellant and those that are not.

32. In all the circumstances therefore the appellant's appeal before the Upper Tribunal is dismissed. The decision of Judge Khan is upheld, namely that

the appeal is dismissed under the Immigration Rules (both old and new) and also dismissed in respect of human rights.

Signed Date

Upper Tribunal Judge King TD