Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19443/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 9th August 2019	**On 11th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

YAIMUDOW [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reza (Solicitor)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge A L B Nixon, promulgated on 1st May 2019, following a hearing at Birmingham on 4th April 2019. In the determination, the judge allowed the appeal of the Appellant, whereupon the

Respondent Secretary of State made an application for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Gambia, is 59 years of age, and is a female. She was born on 21st June 1959. She appealed against the decision of the Respondent refusing her application for leave to remain on the basis of her Article 8 rights.

The Judge's Findings

3. The judge observed that the Appellant, who had no family remaining in Gambia, could not show that there were very significant obstacles to her integration into that country, if she was returned there. Therefore, the Appellant could not succeed under paragraph 276ADE of Appendix FM. However, the judge went on to consider the position outside the Immigration Rules and observed that the Appellant had lost two children in tragic circumstances, and only had one child now, who has ILR in the UK and upon whom she is dependent. She also has an elderly mother in the UK, who is extremely ill and is to a great extent reliant on the assistance of the Appellant. At the same time, the Appellant had been in the UK for over sixteen years. Although she had lived in Gambia until she was 43, and did retain knowledge of the life and language in that country, removing her to Gambia would now breach her Article 8 rights.

4. The appeal was allowed.

Grounds of Application

5. The grounds of application state that the judge failed to identify exceptional circumstances and appeared to conflate private life with family life making no decision upon relationships of dependency. The judge also overemphasised the Appellant's role within the Gambian community in referring to **UE (Nigeria) [2010] EWCA Civ 975**. In so doing, the judge failed to incorporate the failure of the Appellant to meet the relevant Immigration Rules, as a weighty factor in the proportionality assessment.

6. On 21st May 2019 permission to appeal was granted, with the observation that paragraph 19 of the determination appeared to suggest that the only public interest factor was the Appellant's unlawful residence.

Submissions

7. At the hearing before me, on 9th August 2019, Mr Reza, appearing on behalf of the Appellant, handed up a Rule 24 response, which he said was missing from the papers and he would wish to rely upon.

8. As this was the appeal of the Respondent Secretary of State, Mr McVeety relied upon the grounds of application. He submitted that the judge had flouted the established jurisprudence of Article 8 cases. For example, the judge had given credit to the

Appellant (at paragraph 19) for the fact that she spoke English, even though the established case law held that this was a neutral factor. The judge had also stated that there were no public interest factors demanding her removal. This overlooked the fact that Section 117B expressly led to the contrary conclusion. Ultimately, if there was no evidence to allow the appeal under the Rules, it was difficult to see how the appeal could be allowed outside the Immigration Rules.

9. For his part, Mr Reza submitted that there was evidence to be considered under the Rules, which the judge did consider, but went on to reject; and it was this evidence that the judge was ultimately able to take into account in allowing the appeal outside the Rules. There was nothing incongruous about that. The evidence here in question was the illness of the Appellant's mother (see the Appellant's bundle at page 67). There were also witness statements from the Appellant's son and sister. There were also supporting letters and other documentary evidence about the Appellant's role in the Gambian society. The judge had plainly concluded that the Appellant could not succeed under the Immigration Rules.

10. However, he had then gone on to consider "exceptional circumstances", and these included the Appellant's long residence, her personal tragedy of losing two children, her dependency on her only surviving child, and her care for her elderly mother. The judge was entitled to take all of this into account in coming to the conclusion that the Appellant could succeed outside the Immigration Rules. The reference to the case of **UE (Nigeria)** was not illegitimate. The judge was entitled to apply the jurisprudence in this case. Equally, the judge was entitled to take into account a series of positive factors.

11. Although the judge did not refer to the case of **Rhuppiah [2018] UKSC 58**, what the Supreme Court said in that case was relevant. This was that,

> "Although a court or Tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question ...".

This is what the judge had done. There was no error.

12. In reply, Mr McVeety submitted that the decision was not open to the judge given that he had already concluded that the very high threshold of "very significant obstacles" had not been met by the Appellant under the Immigration Rules.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

14. The judge has plainly adopted the correct approach to the assessment of the evidence before her. She begins by consideration of the Immigration Rules (at paragraph 16)

and concludes that the Appellant cannot succeed on the basis that there are very significant obstacles to her integration into the country. Thereafter, the judge considers the position outside the Rules, and does make it clear that she has to carry out "the necessary balancing act" and to "bear in mind the provisions of Section 117B and keep in mind that this private life was established while she was here unlawfully and therefore should attract little weight" (paragraph 19). There is nothing in this approach that suggests that the judge has over-extended herself. It is not the case that the judge has actually attached any particular weight to the fact that the Appellant is fluent in English because she simply states that "I note that she speaks fluent English, has at no time claimed benefits and is of good character" (paragraph 19). There is no suggestion here that she has treated this particular finding in a way that is not anything more than just neutral.

15. In the same way, it is not the case that the judge has said that there are no public interest factors. What she has said is that "other than the fact that she overstayed her lawful leave, I find there are no public interest factors demanding her removal". This is because "looking at the case in the round, I do not find that this outweighs the positive factors I have set out" (paragraph 19). The positive factors in question are that the Appellant has established strong friendships in the UK, has played an active role in the community, has been described by the president of the Gambian Community in Birmingham as "one of the pillars of our society", and has played a special role in advising women and youths in difficulty and has won awards for her part. She has appeared on BBC television promoting Gambian food. (Paragraph 19).

16. These factors, the judge considers alongside the Appellant's personal circumstances where "she has suffered the loss of her two children in tragic circumstances, leaving her with only one child, who has ILR in the UK" and has a "elderly mother, who is also in the UK, is extremely ill, and is to a great extent reliant on the assistance of the Appellant" (paragraph 17). It was for this reason, that the judge concludes that, "I find that it would be disproportionate to the need for effective immigration control to making the decision" (paragraph 19). It is difficult to see why that decision was not open to the judge on the evidence that the judge evaluated in the particular circumstances of this case.

Notice of Decision

17. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

18. No anonymity direction is made.

19. This appeal of the Secretary of State is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 10th September 2019