Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00816/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Microsoft Teams On 10 June 2021	**Decision & Reasons Promulgated On 24 June 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

YASSIN [J]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Broachwalla instructed by Burton & Burton Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of the Gambia who was born on 14 February 1992.

2. The appellant arrived in the United Kingdom in August 2007, aged 15 years old. She accompanied her mother and was granted leave from 8 August 2007 until 8 February 2008. Thereafter, she overstayed. Her mother returned to the Gambia leaving the appellant in the UK.

3. On 9 September 2014, the appellant claimed asylum on the basis that on return to the Gambia she would be at risk of a forced marriage and Female Genital Mutilation (FGM). On 12 February 2015, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

4. The appellant appealed to the First-tier Tribunal. In a decision sent on 11 December 2015, Judge McDade dismissed the appellant's appeal on all grounds. He rejected her account which was that she would be at risk of FGM on return to Gambia. In addition, the judge dismissed the appellant's appeal under the ECHR, including under Art 8. Permission to appeal was refused by the First-tier Tribunal on 19 January 2016 and by the Upper Tribunal on 31 March 2017. The appellant became appeal rights exhausted on 31 March 2017.

5. On 4 November 2019, the appellant lodged further submissions. The basis of those submissions was that she was a carer for her sister, Ramou, in the UK who had indefinite leave to remain. On 6 January 2020, the Secretary of State refused the appellant's human rights claim under para 276 ADE(1) of the Immigration Rules (HC 395 as amended) and also outside the Rules under Art 8 of the ECHR.

6. The appellant appealed to the First-tier Tribunal. In a decision dated 13 November 2020, Judge Parkes dismissed the appellant's appeal under both para 276ADE(1)(vi) and under Art 8 outside the Rules.

7. The appellant sought permission to appeal to the Upper Tribunal. Initially, the First-tier Tribunal (Judge O'Garro) refused permission to appeal on 21 December 2020. However, on 18 February 2021, the Upper Tribunal (UTJ Sheridan) granted the appellant permission to appeal.

8. On 2 March 2021, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

The Grounds of Appeal

9. The appellant's grounds of appeal, drafted by Mr Broachwalla, raise three points.

10. Ground 1 contends that the judge failed properly to carry out the proportionality assessment under Art 8 of the ECHR. First, the judge failed properly to apply ss.117B(2), (3) and (4) of the Nationality, Immigration and Asylum Act 2002 (as amended). Secondly, the judge failed to take into account the impact upon the appellant's private life in the UK, rather than her family life with her sister, Ramou, for whom she was a carer.

11. Ground 2 contends that the judge failed properly to assess whether there were "very significant obstacles" to the appellant's integration on return to Gambia under para 276ADE(1)(vi), in particular by failing to have regard to the fact that she arrived in the UK as a child and her circumstances on return.

12. Ground 3 contends that the judge failed to give adequate reasons why the appellant and her sister (if she travelled with the appellant to the Gambia) would have family support on return.

The Submissions

13. In his oral submissions, Mr Broachwalla accepted that ss.117B(2) and (3) had no positive impact upon the appellant's claim as the fact that she was financially independent and spoke English were both neutral factors.

14. Mr Broachwalla, however, submitted that the judge had failed to grapple with the appellant's private life claim, focusing instead upon the impact upon her sister for whom she claimed to be a carer. He submitted that even though the focus of the appellant's case before Judge Parkes was the impact upon the appellant's sister if the appellant returned to the Gambia, the judge nevertheless was required to consider the impact upon the appellant's private life more generally, including that she had come to the UK as a child and had lived here since the age of 15. The judge had also focused on the fact that the appellant had overstayed, even though she had been a child at the time.

15. As regards the appellant's situation on return to the Gambia, Mr Broachwalla submitted that the judge had failed to engage fully with the evidence concerning the appellant's situation if she returned to the Gambia, including that she had no relationship with her father who lived there. Mr Broachwalla submitted that the judge had focused, instead, on the fact that the appellant's sister could accompany the appellant to the Gambia.

16. On behalf of the respondent, Mr Tan submitted that the focus of the appellant's application for leave and case before the judge was the impact upon her sister for whom the appellant said she was a carer. He submitted that there were no details of relationships with other family members or, indeed, more generally of her private life in the UK which could have led the judge to allow the appellant's appeal under Art 8 if he had had regard to her "private life". He submitted that Judge McDade's decision in 2015 was a "starting point" on all relevant matters and, taking into account the way in which the case was presented to the judge and the evidence relied upon, it was properly open to Judge Parkes to dismiss the appellant's appeal under Art 8 of the ECHR.

Discussion

17. Mr Broachwalla relied upon the summary of the approach to Art 8 claims set out in the Court of Appeal's decision in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 (Green and Simler LJJ). At [25]–[32], the Court of Appeal set out six "general points about the proportionality test". It is helpful to set that out as a background to the submissions. The substance of those points is at [27]–[32] as follows:

> "27. First, the IR and section 117B must be construed to ensure consistency with Article 8. This accords with ordinary principles of legality whereby Parliament is assumed to

intend to make legislation which is lawful (see for example *R v SSHD ex p. Simms* 2 AC 115 at page 131; and *Bennion on Statutory Interpretation* (7th Edition) at page 718 – there is "*a high threshold for rebutting this presumption*"). Were it otherwise then domestic legislation could become inconsistent with the HRA 1998 and the ECHR and be at risk of a declaration of incompatibility.

28. Second, national authorities have a margin of appreciation when setting the weighting to be applied to various factors in the proportionality assessment: *Agyarko* (ibid) paragraph [46]. That margin of appreciation is not unlimited but is nonetheless real and important (ibid). Immigration control is an intensely political matter and "*within limits*" it can accommodate different approaches adopted by different national authorities. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Section 117B. To ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: *Rhuppiah* (ibid) paragraphs [36] and [49].

29. Third, the test for an assessment outside the IR is whether a "*fair balance*" is struck between competing public and private interests. This is a proportionality test: *Agyarko* (ibid) paragraphs [41] and [60]; see also *Ali* paragraphs [32], [47] - [49]. In order to ensure that references in the IR and in policy to a case having to be "*exceptional*" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be "*some highly unusual*" *or* "*unique*" factor or feature: *Agyarko* (ibid) paragraphs [56] and [60].

30. Fourth, the proportionality test is to be applied on the "*circumstances of the individual case*": *Agyarko* (ibid) paragraphs [47] and [60]. The facts must be evaluated in a "*real world*" sense: *EV (Philippines) v SSHD* [2014] EWCA Civ 874 at paragraph [58] ("*EV Philippines*").

31. Fifth, there is a requirement for proper evidence. Mere assertion by an applicant as to his/her personal circumstances and as to the evidence will not however necessarily be accepted as adequate: In *Mudibo v SSHD* [2017] EWCA Civ 1949 at paragraph [31] the applicant did not give oral evidence during the appeal hearing and relied upon assertions unsupported by documentary evidence which were neither self-evident nor necessarily logical in the context of other evidence. The FTT and the Court of Appeal rejected the evidence as mere "*assertion*".

32. Sixth, the list of relevant factors to be considered in a proportionality assessment is "*not closed*". There is in principle no limit to the factors which might, in a given case, be relevant to an evaluation under Article 8, which is a fact sensitive exercise. This obvious point was recognised by the Supreme Court in *Ali* (ibid) at paragraphs [115ff]] and by the Court of Appeal in *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109 ("*TZ*") at paragraph [29]. Nonetheless, there is in practice a relatively well trodden list of factors which tend to arise in the cases. We address those of relevance to this appeal below. But others exist, identified in Strasbourg and domestic case law, such as the personal conduct of an applicant or family member in relation to immigration control eg. breach of immigration rules or criminal law, or public order considerations; the extent of social and economic ties to the UK; and the existence of prolonged delay in removing the applicant during which time the individual develops strong family and social ties: See generally *Ali* paragraph [28] citing with approval *Jeunesse v The Netherlands* (2014) 60 EHRR 17 ("*Jeunesse*")"

18. Mr Broachwalla submitted that Judge Parkes had failed in paras 19–20 of his determination, properly to assess proportionality, and carry out the balancing exercise inherent in it, in accordance with GM (Sri Lanka). At paras 19–20, Judge Parkes said this:

> "19. In assessing where the balance lies the private and family life of the appellant and her sister are relevant. As noted above care is provided by their other sister and is available from various state agencies. Ramou has travelled to Gambia with the appellant's assistance where they still have family. The appellant no doubt provides care and is company for Ramou and may well do more than a paid carer would.
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> 20. Against that is the fact that the arrangements now relied on were not raised at the hearing before Judge McDade and came into being after the asylum had been rejected and both knew what the appellant's status was. Before that the appellant had remained in the UK without leave and her situation had always been at best precarious and latterly illegal. There are alternatives to the care provided by the appellant and in the circumstances I find that the balance does not fall in favour of the appellant. As matters stand I find that the appellant's removal would not be disproportionate having regard to Article 8 in the situation she has created".

19. Although the grounds contend that the judge failed to consider s.117B of the 2002 Act, Mr Broachwalla resiled from that contention in his oral submissions. He was right to do so. First, the judge refers to s.117B in para 4 of his determination as relevant to the balancing exercise in assessing whether the appellant's circumstances are outweighed by the public interest. Secondly, Mr Broachwalla accepted that the fact that the appellant could speak English and that she was financially independent did not provide any positive support to her claim. That, in my judgment, is the proper position and understanding of the law as set out by the Supreme Court in Rhuppiah v SSHD [2018] UKSC 58 at [57].

20. Likewise, as regards the appellant's "family life" with her sister, Ramou in the UK, s.117B(4) has no application. Even though her family life was formed essentially whilst the appellant was "unlawfully" in the UK, s.117B(4) only applies such that "little weight" should be given to that family life, where it relates to "a relationship formed with a qualifying partner". That does not apply to the appellant's family life and relationship with her sister. Of course, family life formed, at a time when both parties realise that the existence of family life would be "precarious", is relevant in assessing what weight should be given to family life and whether there would be "unjustifiably harsh consequences" (see Jeunesse v Netherlands (2015) 60 EHRR 17 and R(Agyarko and another) v SSHD [2017] UKSC 11 at [49]-[53]; [54]-[55] and [60]).

21. That said, it is far from clear to me that the judge did apply a "little weight" approach to the impact upon the appellant's family life with her sister under s.117B(5). What the judge said, at para 17, related to Jeunesse and was, in my judgment, entirely consistent with it. There he said:

> "Both (the appellant and her sister) are obliged to comply with and respect the Rules that apply to them as Jeunesse makes clear and a situation created when a person is in an

> ECHR contracting state without leave attracts less protection. States are not obliged to accept the circumstances created unlawfully, and in the knowledge that they are in breach of the relevant laws, as a fait accompli".

22. In my judgment, that was not, on its face, a misdirection as to the proper approach.

23. However, in addition under ground 1 Mr Broachwalla submits, relying upon para 7 of his grounds, that the judge failed to consider the appellant's "private life" claim, particularly in regard to the fact that she had come to the UK as a 15 year old child in 2007 and, although she had overstayed, she had done so at a time when she was a child.

24. It is clear on reading Judge Parkes' decision that, apart from the consideration of the impact upon the appellant's private life in Gambia under para 276ADE(1)(vi), the judge did not deal with the impact upon her private life in the UK formed since 2007 when she first arrived in the UK as a child. That is, perhaps, understandable given the way in which the case was presented to the judge. The appellant relied, before the judge, principally upon the impact on her relationship with her sister as her sister's carer. There nevertheless, remained an aspect of the appellant's claim which was about her own private life in the UK. She had been in the UK for some thirteen years since she was 15 years old. Mr Tan is undoubtedly correct to submit that there was, at best, limited evidence concerning the appellant's private life and the impact upon it if she were to leave the UK. The judge, however, did not consider the appellant's private life, in this regard, at all. The point was an obvious one. Even though it was not a focus of the appellant's claim, given those circumstances, it was in my judgment incumbent upon the judge to consider the extent to which, if any, the appellant's private life in the UK would be affected by her removal and whether or not that, as part of the overall assessment of her circumstances, would result in a disproportionate interference with her Art 8 rights.

25. Although Mr Tan did not explicitly put it in these terms, the issue is raised as to whether that failure was material. There is, in my view, some merit in Mr Tan's submission that the appellant's claim based upon her "private life" was not particularly strong on the material before the judge. However, in order for his failure to consider it not to be material, I must be satisfied that her claim under Art 8 would certainly or inevitably fail if the judge had considered her private life formed since a 15 year old in the UK over the intervening fourteen years.

26. Of course, the appellant's private life claim under Art 8 of the ECHR is, in part, connected to her reliance upon para 276ADE(1)(vi) which the judge did deal with in paras 22 and 23 of his determination. There he said this:

> "22. So far as the appellant's ability to return and reintegrate to Gambia is concerned I note that there is still the appellant's parents living there and clearly there is contact between the family in the UK and in Gambia. Relations are close enough for Ramou to have travelled there and living conditions must have been deemed to be sufficient for her having regard to her needs. The suggestion the appellant would have no support there and cannot reintegrate is not sustainable.

> 23. That the appellant would prefer to remain in the UK is obvious but does not show that if returned to Gambia she would face any significant obstacles or that the situation could be said to be unduly harsh. On the evidence there are no compelling circumstances that would justify a grant of leave outside the Immigration Rules".

27. That passage is challenged in Grounds 2 and 3. There is merit in Mr Broachwalla's submission that the judge has failed to grapple with the appellant's witness statement, in particular para 21 of that statement, where she points out that she has no siblings in the Gambia and that her relationship with her father has broken down and that she last spoke to him around six years previously. In stating that the appellant has family in the Gambia and that there is contact between the family in the UK and in the Gambia, the judge has not resolved whether or not the appellant has family (in particular a parent) with whom she has a relationship and from whom she could obtain support as part of her reintegration on return. The judge, instead, focuses on the fact that the appellant's sister Ramou had travelled there and focuses upon her sister's ability to live in the Gambia rather than that of the appellant. As is clear from the evidence, the appellant's sister went for a three week holiday which would not equate to the appellant's situation if she were being required to return on a permanent basis to live in the Gambia.

28. Mr Broachwalla recognised that there were, to some extent, overlap in the grounds in relation to the issue of the appellant's circumstances on return to the Gambia. But, even those findings, do not deal with the impact of removal on the appellant's private life *in the UK* which is the focus of Ground 1.

29. In my judgment, the judge erred in law both in assessing the issue of "very significant obstacles" to integration in para 276ADE(1)(vi) and the appellant's private life claim outside the Rules under Art 8.

30. I am unable to conclude that any such claim would inevitably and certainly fail even though the claims might not be the strongest. It is also worth noting that the appellant's private life claim was only perfunctorily dealt with by Judge McDade at para 8 of his decision in December 2015. This is not, therefore, simply a case where an individual's private life claim was rejected on appeal and now, a few years later, is again relied upon essentially on the basis that the individual has been in the UK a few years longer. The appellant's private life claim has never really been judicially examined in any detail.

31. For these reasons, therefore, I am satisfied that the judge materially erred in law in dismissing the appellant's appeal under Art 8 of the ECHR.

Decision

32. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

33. In my judgment, none of Judge Parkes' findings should be preserved and the appeal should be heard *de novo* at a fresh hearing by a different judge. Accordingly, I remit the appeal to the First-tier Tribunal to be heard *de novo*, with no findings preserved, by a judge other than Judge Parkes.

Signed

Andrew Grubb

Judge of the Upper Tribunal
15 June 2021