IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04866/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th November 2014	**On 19th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS F P A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr T Ogunnubi, instructed by TM Legal Services

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State for the Home Department but nonetheless hereafter I shall refer to the parties as they were described before the First-tier Tribunal, that is Miss F P A as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Nigeria born on 10th October 1994 and she appealed against the respondent's decision of 1st July 2014 to refuse to

vary leave to enter or remain in the United Kingdom and to remove her from the United Kingdom.

3. The appellant's claim for asylum and international protection was rejected by First-tier Tribunal Judge Coleman but Judge Coleman allowed the appeal in respect of Article 8.

4. The application for permission to appeal made by the respondent submitted that the judge had misdirected herself in respect of the finding that Appendix FM did not apply to the appellant's case as the application was made prior to 9th July 2012. The Secretary of State relied on the Court of Appeal's decision in **Haleemudeen [2014] EWCA Civ 558** paragraphs 25 and 41. In effect **Haleemudeen** found that further to **Odelola v Secretary of State for the Home Department [2009] UKHL 25** the material date was the date of the decision. Further, paragraph 41 of **Haleemudeen** identified that the First-tier Tribunal Judge in that case had not either expressly or implicitly referred to paragraph 276ADE of the Rules or to Appendix FM and that none of the new more particularised features of the policy were identified or even referred to in general terms.

5. It was submitted that the judge should have followed the decision in **Haleemudeen** rather than **Edgehill & Anor [2014] EWCA Civ 402** and it was submitted that this case was limited in scope to long residence cases where an appellant had acquired fourteen years' residence. As paragraphs 2 and 33 of **Edgehill** stated:

> *"The principal issue in these appeals is whether the Upper Tribunal correctly applied the transitional provisions set out in the Statement of Changes in Immigration Rules promulgated on 13th June 2012. Those changes in the Immigration Rules came into effect on 9th July 2012."*

This acknowledged that "the decision only becomes unlawful if the decision-maker relies upon Rule 276ADE(iii) as a consideration materially affecting the decision."

6. It was also submitted in the application for permission to appeal that the judge had not followed **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** whereby only if there may be arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on and consider whether there were compelling circumstances not sufficiently recognised under them.

7. Ms Isherwood submitted that the point was that in view of the administrative decisions the conclusion in **Edgehill** would be the same. The transitional provisions suggest that with any application the new Rules would be considered and the judge did not do that. The Rules must be gone through in order that a complete assessment of the proportionality should be undertaken. **MM (Lebanon)** did not just look at the compelling circumstances but also considered the Immigration Rules. There was no

consideration in the Secretary of State's decision or case law setting out the compelling circumstances.

8. The appellant's representative submitted that the decision of Judge Coleman was thorough and decisive. At paragraph 9 of the determination the judge did consider the Immigration Rules and there was no need to go further.

9. There were two Court of Appeal decisions which were contradictory and the reliable and clear authority was that of **Huang**.

10. Mr Ogunnubi relied on his skeleton argument.

11. The Immigration Rules which came into force on 9th July 2012 sought to codify within the Rules the question of whether Article 8 under the European Convention on Human Rights would be breached by a person's removal from the UK.

12. Not only is **Edgehill & Anor** a Court of Appeal decision which predates **Haleemudeen** but as cited the Rules as at the date of decision apply in the absence of any statements to the contrary (**Odelola**). It would appear that there are two decisions in conflict. However the rules as at the date of the decision is applicable unless there are transitional provisions to the contrary. I am assisted not only by the view that the prior decision should take precedence but also **Singh, R v Secretary of State for the Home Department [2014] EWHC 2330** at paragraph 12 adopted the approach most favourable to the appellant but stated that the appellant could not succeed if the decision inevitably would have been the same even if the Secretary of State had paid no attention to the criteria in the Rules. That is not the position in this case.

13. I find that the judge did indeed make some reference to the Immigration Rules at paragraph 9 of the determination but she considers that they did not apply. In view of the decision in **Singh** it is not clear that the decision in **Edgehill** should be confined to considerations of fourteen years' long residence. It was clear that this appellant made an application prior to 9th July 2012 which is acknowledged in the reasons for refusal letter. I make a further point. It is clear that the judge noted that the Secretary of State had refused the matter under the new Immigration Rules, those post-9th July 2012 and that it was accepted that the appellant could not succeed under the Immigration Rules either pre or post-July 2012.

14. Although the judge did not refer to the Immigration Rules themselves and Ms Isherwood states that this is an error the judge made a series of findings as to the acceptance of the appellant's credibility, her young age and the fact that she had no opportunity to make earlier disclosures in relation to a prompt application for asylum (24).

15. The judge identified the exceptional features of this case although she did not identify them as such and stated at (30):

> *"I should note that she was still a minor when she applied for further leave. Had the application been dealt with swiftly she would have had some further leave. There was an unacceptable and unreasonable delay of some years and that had a profound effect on her. It was not true that her relationship with her father was one of an adult child with a parent. The evidence clearly showed an interdependence."*

16. Clearly the judge found that there was a family life which she took into account and that there were closer ties which indicated "a relationship with a high degree of interdependence which goes beyond ties of normal kinship". This was not a matter that the respondent had taken into account and bearing in mind the judge's overall considerations that the appellant had been sexually abused in Nigeria I find that even if she should have applied the Immigration Rules she was aware that the appellant had not fulfilled them and she set out reasons as to why there was an arguably good ground outside the Immigration Rules themselves on the basis of the "classic" Article 8.

17. I make a further point that **MM (Lebanon) v SSHD** **[2014] EWCA Civ 985** refers to the need to consider the Immigration Rules specifically in relation to the public interest and this is now a matter which is statutorily set out at Section 117B of the Immigration and Asylum Act 2002 but this the judge identified at paragraph 36. She identified that there was a public interest to maintain effective immigration control and she noted that the father is not Nigerian and had no right to live in Nigeria. He was from Sierra Leone and was a recognised refugee so he could not return to his country safely. The judge took into account that the appellant had a very bad upbringing and in particular since 2008 was living with an abusive stepfather and had been abandoned by her mother and in essence she had been seriously ill-treated.

18. Bearing in mind my findings in relation to the conflicting cases of **Edgehill** and **Haleemudeen** the judge made a full assessment under Article 8 and I find that this was a course open to her in the circumstances. **Huang v SSHD [2007] UKHL 11** is still authoritative in the following terms:

> 'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.

Huang was applied by the judge.

19. I therefore find that there is no error of law and the decision shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 17th December 2014

Deputy Upper Tribunal Judge Rimington