Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37682/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 11 July 2014	**On 06 August 2013**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GLADYS INORI POWIS

Respondent

Representation:

For the Appellant: Mr G Jack
For the Respondent: Mr Caskie, instructed by McGuire Solicitors.

DETERMINATION AND REASONS

1. The Secretary of State had been granted permission to appeal the decision of First-tier Tribunal Judge Scobbie who, for reasons given in a determination dated 23 January 2014, dismissed the appeal under the

Immigration (European Economic Area) Regulations 2006 but allowed it on human rights grounds against a decision dated 3 September 2013 refusing to issue a derivative residence card to the respondent (the claimant).

2. The claimant is a national of Nigeria born 6 July 1983 and is married to a UK citizen. When she applied for the derivative residence card the couple had one child. They now have two children. The Secretary of State was not satisfied that there was sufficient evidence to show that the first child would be unable to remain in this country if the claimant were required to leave.

3. At the hearing the judge heard evidence from the claimant, her husband and her father-in-law, as well as submissions. It was accepted on the claimant's behalf that she could not meet the requirements for a derivative residence card and instead based her case on Article 8 grounds.

4. The judge noted in his decision that the submissions on behalf of the respondent were in terms that there were no removal directions and it was not possible for the claimant to argue a breach of Article 8 as she was not being removed.

5. The judge did not decide the point at the hearing but on reflection with reference to *Patel and Others v SSHD* [2013]UKSC 72 and *AS (Afghanistan)* [2013] EWCA Civ 1469 considered that the claimant was nonetheless entitled to argue Article 8 as she had done so in her notice of appeal. The judge then proceeded to consider the issues she was required to under Article 8. She noted the British nationality of the claimant's husband and their two sons and that if the claimant were removed it would not be reasonable to expect her to take the two children with her, nor would it be reasonable for her husband to accompany her. Having regard to the circumstances of the husband's employment, which would require him to leave home to go to sea for reasonably lengthy periods, the judge concluded there were no other relatives who could be called upon to look after the children. This included consideration of the circumstances of the claimant's mother and father-in-law who live in England. With these matters in mind the judge concluded that it would not be in the best interests of the children for their father to be removed and for the parents to be split up and concluded that reveal of the claimant would be disproportionate.

6. The Secretary of State argues:

   (i) The judge had materially misdirected himself in law by finding that he had jurisdiction to make findings on the Article 8 grounds when the Secretary of State had not made a decision regarding the claimant's removal.

   (ii) The judge had failed to give any or adequate consideration to the merits of the claimant's circumstances under the Immigration Rules

but instead made his assessment on Article 8 by reference to case law that predated the change in the Rules.

(iii) The judge had failed to consider whether there were any insurmountable obstacles to family life contusing outside the United Kingdom.

(iv) The judge did not have sufficient information to carry out an analysis of the best interests of the children.

(v) The judge had failed to identify any exceptional circumstances in the case that would render the claimant's removal unjustifiably harsh.

7. Prior to commencement of the hearing I invited the representatives to address me on the impact of the decision in *Haleemudeen v SSHD* [2014] EWCA Civ 558 in particular [40] from the judgment of Beatson LJ. After submissions I reserved my determination. I take each in turn as summarised in [6] supra

Jurisdiction to make findings on Article 8

8. As observed by the judge, the claimant's leave to remain expired in 2011 and her application for a residence card was made on 22 February 2012.

9. The entitlement by the appellant to appeal is provided for in reg. 26 of the Immigration (European Economic Area) Regulations 2006. Regulation 26(3A) provides:

> "3A If a person claims to be a person with a derivative right of entry or residence he may not appeal under these Regulations unless he possesses a valid national identity card issued by an EEA state or a passport , and either-
>
> (a) an EEA family permit; or
>
> (b) proof that –
>
> (i) where the person claims to have a derivative right of entry or residence as a result of reg. 15A(2), he is a direct relative or guardian of an EEA national who is under the age of 18;
>
> (ii) where the person claims to have a derivative right of entry or residence as a result of reg. 15A(3), he is the child of an EEA national;
>
> (iii) where the person claims to have a derivative right of entry or residence as a result of reg. 15A(4), he is a direct relative or guardian of the child of an EEA national;

(iv) where the person claims to have a derivative right of entry or residence as a result of reg. 15A(5), he is under the age of 18 and is a dependant of a person satisfying the criteria in (i) or (iii);

(v) where the person claims to have a derivative right of entry or residence as a result of reg. 15A(4A) he is a direct relative or guardian of a British citizen."

10. Regulation 15A(4A) provides in respect a person is entitled to a derivative right to reside in the UK as long as he satisfies certain criteria which relevant to this appeal:

> "(4A) he satisfies the criteria in this paragraph if –
>
> (a) he is the primary carer of a British citizen ("the relevant British citizen");
>
> (b) the relevant British citizen is residing in the United Kingdom; and
>
> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if he were required to leave."

11. The Secretary of State's position briefly stated is that the appellant had failed to demonstrate that the first child, Thomas Powis, would be unable to remain in the United Kingdom or the European Union if she were required to leave in the light of the failure to provide sufficient evidence why the child's father was not in a position to provide that care.

12. Having dealt with the matter of EEA rights, the Refusal Letter then turns to Article 8 and the Immigration Rules. In essence the letter explains that the Immigration Rules now include provisions for applicants wishing to remain based on private or family life. If the claimant wished the Home Office to consider an application she would need to make a separate "charged application" using the appropriate specified application form for the five year partner route, for the five year parent or ten year partner or parent route or for the ten year private life route.

13. The refusal letter continues:

> "Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the United Kingdom would breach Article 8 of the ECHR. Additionally, it is pointed out that a decision not to issue a derivative residence card does not require you to leave the United Kingdom if you can otherwise demonstrate that you have a right to reside under the Regulations."

14. After explaining that the Secretary of State had discharged its duty of care with reference to its obligations under s.55 of the 2009 Act, the letter continues as follows:

> "It is pointed out that the decision not to issue a derivative right of residence card does not require you to leave the United Kingdom if you can otherwise demonstrate that you have a right to reside under the Regulations."

15. After recording the documentation that the claimant had provided, the letter concludes, so far as it is relevant to this appeal, in these terms:

> "As you appear to have no alternative basis of stay in the United Kingdom you should now make arrangements to leave. If you fail to do so voluntarily your departure may be enforced. In that event we would first contact you again and you would have a separate opportunity to make representations against the proposed removal."

16. Otherwise the letter was taken up with details of an agency that may assist the appellant and other routine matters in connection with prospective removal.

17. An EEA decision is defined in the 2006 Regulations as

> "EEA decision means a decision under these Regulations that concerns
>
> (a) a person's entitlement to be admitted to the United Kingdom;
>
> (b) a person's entitlement to be issued with or have renewed, or not to have revoked a residence certificate, residence card, derivative residence card, documents certifying permanent residence or permanent residence card;
>
> (c) a person's removal from the United Kingdom; or
>
> (d) the cancellation, pursuant to reg. 20A, or a person's right to reside in the United Kingdom."

18. Schedule 1 to the Immigration (European Economic Area) Regulations 2006 provides:

> "1. The following provisions of, or made under the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under s.82(1) of that Act:
>
> Section 84(1) except paragraphs (a) and (f); Sections 85 to 87;
>
> Section 85 and any Regulations made under that Section; and

Section 106 and any Rules made under that Section."

19. Section 82 of the Nationality, Immigration and Asylum Act 2002 provides that a person may appeal to the Tribunal where an immigration decision of a kind that is detailed in Section 82(2) is made.

20. Section 84 is in these terms:

> "1. An appeal under s.82(1) against an immigration decision must be brought on one or more of the following grounds –
>
> (a) if the decision is not in accordance with the Immigration Rules;
>
> (b) if the decision is unlawful by virtue of Article 20A of the Race Relations (Northern Ireland) Order 1976 (discrimination by public authorities);
>
> (c) if the decision is unlawful under s.6 of the Human Rights Act 1998 (c.42) public authority not to act contrary to the Human Rights Convention as being incompatible with the appellant's Convention rights;
>
> (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
>
> (e) that the decision is otherwise not in accordance with the laws;
>
> (f) that the person taking the decision should have exercised differently a discretion conferred by the Immigration Rules;
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

21. The grounds of appeal by the claimant are in terms that:

> "[the claimant] is primary carer of British citizen child
>
> [her] spouse is merchant seaman, to refuse application is beach of rights under 2006 Regulations
>
> Further, to remove [the claimant] would breach her and family members rights under Article 8 of the ECHR."

No further particulars were provided.

22. At the hearing as recorded at [17] of the determination the Presenting Officer argued that the key feature of the case was that there were no removal directions. It was not possible for the claimant to argue in breach of Article 8 as she was not being removed. For her to be granted leave under Article 8 would be a "higher value" than what she had applied for.

23. The judge noted that there had been no one-stop notice and that the respondent had clearly not considered Article 8. Furthermore she observed at [22] that it was difficult for her to take a view with regard to Appendix FM:

> "I simply do not know from the information before me whether the appellant complies with Appendix FM. However case law would suggest that in any event I am entitled to consider an additional Article 8 argument that there is a good arguable case. I consider there is a good arguable case here and proceeded with the five pronged *Razgar* considerations."

24. It is unarguable that the claimant was entitled to rely on the grounds available to her under Section 84 in the light of the above provisions I have set out. The submissions I heard on the application of the principles in *JM v SSHD* [2006] EWCA Civ 1402 have no direct relevance. It seems to me that the real issue in this case is not whether the judge had jurisdiction to consider Article 8 as clearly she had, but whether she was correct in her approach to Article 8 and this brings into play the remaining grounds relied on.

Was there error in the article 8 assessment?

25. In essence Mr Jack argued that the judge had erred in taking a freewheeling exercise on Article 8 without first considering the circumstances under the Rules referring to [40] of *Haleemudeen* which I quote:

> "I however consider that the FTT Judge did consider in his approach to Article 8. This is because he did not consider Mr Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate as more particularised in the new Rules than had previously been ..."

26. In his submissions Mr Caskie referred to the application having been made prior to the change in the Rules in July 2012. He argued without producing the decision that on remittal of *Haleemudeen* to the Upper Tribunal it had been conceded by the Secretary of State that where applications had been made prior to July 2012 it was the law before that date which had to be applied.

27. I do not consider there is any merit in this submission for the simple reason that although the application had been made in February 2012 it had not included an Article 8 application and it was only when the claimant had appealed in September 2012 that there was an indication of reliance on Article 8 grounds.

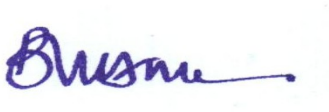
28. Mr Caskie also submitted that the decision in *Haleemudeen* was not binding in Scotland but highly persuasive. Its force was reduced because the issue in *Edgehill* had not been argued. He submitted in the alternative that the claimant would succeed under the (current) Immigration Rules. As to why no application had been made to the Secretary of State, he explained that this was only possible once any appeal had been disposed of. Unfortunately Mr Caskie was unable to explain the basis on which he considered the claimant would be able to meet the requirements of the Rules, a task that the judge likewise did not undertake.

29. In my view it was incumbent upon the judge to start his consideration of article 8 with Appendix FM and paragraph 276ADE (if applicable) before deciding whether there should be a separate Article 8 enquiry. Accordingly the second ground is made out. That error was material and sufficient to require the decision to be set aside and remade.

30. As to that remaking, Mr Jack and Mr Caskie accepted that the First-tier Tribunal was the appropriate forum for that exercise. That task should be on the basis of the acknowledged facts that the claimant is married to a British national and that she and her husband have two sons, both of whom are British nationals. The task for the First-tier Tribunal Judge will be to determine whether on the evidence the claimant is able to meet the criteria of the Immigration Rules and if not, to decide whether an Article 8 case is made out. This will include consideration of the recent Court of Appeal authorities on this including *R (on the application) of MM and Others v SSHD* [2014] EWCA Civ 985.

31. In summary therefore the appeal by the Secretary of State in the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside. The case is remitted to the First-tier Tribunal for its reconsideration.

Signed Date 5 August 2014



Upper Tribunal Judge Dawson