Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/10124/2014
IA/10123/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & reasons Promulgated**
On 8 January 2015	**On 10 March 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

SP
AP
(Anonymity directions made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Querton of Counsel
For the respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The appellants, who are mother and daughter, are nationals of Trinidad and Tobago born on 8 February 1980 and 25 May 2008 respectively and have been granted anonymity. They appealed against the decisions of the respondent dated 7 February 2014 to refuse them leave to remain in United Kingdom and grant them discretionary leave based upon the first appellant's private and family life pursuant to s 55 of the Boarders, Citizenship and Immigration Act 2009 and pursuant to Article 8 of the European Convention on Human Rights. Judge AW Khan dismissed both appellants' appeals.

2. Permission to appeal was granted by First-tier Tribunal Judge P.JG.J White on 24 November 2014 stating that it is arguable that the Judge made a material error of law because the Judge's reasoning and conclusions in regard to Article 8 are difficult to follow and the Judge found at paragraph 19 that there was no arguable or realistic claim in respect of an Article 8 claim but subsequently returned to the issue to consider, finally concluding the removal would not be disproportionate interference. The Judge at paragraph 21 of his determination appears to have considered section 55 of the 2009 Act in its own right, rather than within the context of Article 8.

The First-Tier Tribunal Judges Findings

3. The Judge considered that the appellants did not meet the requirements of Appendix FM and paragraph 276 ADE of the Immigration Rules because the appellant has not demonstrated that she has no ties including social, cultural family with the country to which she would have to go if required when she has to leave the United Kingdom.

4. The Judge then went on to consider whether there are compelling circumstances not sufficiently recognised under the Rules in order for him to consider the Article 8 claim. The judge noted that the appellant has been an over stayer in the United Kingdom for over three years. Her immigration status was precarious. The second appellant goes to school and her school reports show she is making progress. There is no reason why the appellant's child who is six years of age cannot return to Trinidad which is an English-speaking country with her mother.

5. The Judge stated "In reality, there is no arguable or realistic claim that under Article 8 in respect of private life either of the first appellant of the second appellant outside the Rules. As to family life there would be no breach of family life because both the first appellant and the second appellant would be removed to Trinidad as one family unit and family life can continue between mother and daughter as it has done in the United Kingdom. There would be no change in family life albeit it would be exercised in a different country".

6. In respect of section 55 of the 2009 Act the Judge was satisfied that the best interests of the second appellant lie in continue to live with her mother and her removal to Trinidad would not prejudice this. He considered the case of **ZH (Tanzania)** and took the second appellant's interest as a primary consideration and said it was not unreasonable to expect the child to leave the United Kingdom with her mother. He stated that this is not the case where the second appellant has spent many years living in the United Kingdom and has established strong connections here. The second appellant was born on 25 May 2008 and at such a young age cannot be said to have really integrated into the life in the UK. He accepted that while the

appellant is well settled in her school and is making good progress, the disruption in education by removal to Trinidad would not be sufficient to outweigh the public interest in removal.

7. The Judge took into account the new primary legislation of 28 July 2014 section 19 of the Immigration Act 2014 part five section 117 A BNC which states that the Tribunal is required to carry out a balancing exercise as to whether a person circumstances engage Article 81 to decide whether the proposed interferences proportionate and all the circumstances. Particular regard was paid to section 117B that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The appellants' immigration status was precarious since June 2010 because the first appellant did not leave the United Kingdom upon the expiry of a visit visa. Her daughter at that time was only two years of age and any private life established in the knowledge that the first appellant had no right to remain in the United Kingdom and this would have also apply to her daughter as a dependent.

8. The child is not a British citizen and therefore not a qualifying child under section 117B(a). She is also not lived continuously in the United Kingdom for a continuous period of seven years or by virtue of the definition of a qualifying child under the section 117D therefore section 117B(6) does not apply. The appellant's removal to Trinidad and Tobago would not be a disproportionate interference with both appellants' rights under Article 8.

Appellant's Grounds of Appeal

9. The appellants' grounds of appeal state the following. The first ground of appeal is that the Judge failed to apply the correct test in relation to ties to the home country under paragraph 276 ADE (vi) because the Judge did not accept the first appellant's evidence that she had severed all ties with Trinidad and knows no one in that country.

10. The Judge as a starting point did not believe the appellant's evidence in relation to the breakdown of the relationship between herself and her family and this should have been further assessment of the nature of the remaining ties in accordance with **Ogundimu (article 8-new rules) Nigeria [2013] UKUT 60 (IAC)**. When it is stated that the natural and ordinary meaning of the word ties imports with the concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties the claimant to his or her country of origin. If this were not the case then it would appear that a persons the nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the Rule. This would render the application of the Rule, given the context within which it operates, entirely meaningless.

11. There was also factors that the Judge should have considered as to whether the appellant had ties to her country of origin. There was no consideration by the Judge of the extent of the family and friends that the first appellant has in Trinidad and the nature and quality of the relationships that the first appellant has with those friends and family. At paragraph 15 of the determination, the Judge simply makes finding that evidence in relation to losing contact and support of her family further to her marriage and the birth of a daughter is disbelieved but fails to go on to consider the quality of those relationships.

12. The second ground of appeal states that the Judge failed to consider the claim substantively under Article 8 of the European Convention on Human Rights. The Judge first stated that there was no arguable or realistic claim under Article 8 in respect of family life for the appellant or her daughter. He said this even before he considered the five states test under **Razgar**. The Court of Appeal has stated in **MM and others this is the Secretary of State for the home Department [2014] EWCA Civ 985** that additional preliminary consideration of whether there is an arguable case prior to proceeding to determine an Article 8 claim was unlawful. Therefore the Judge might not give full consideration under Article 8 fell into material error.

13. In the Supreme Court in the case of **Patel and others v Secretary of State for the Home Department [2013] UK SC 72** recalled that the most authoritative guidance on Article 8 was given in the case of **Huang [2007]** and it remains the case that the Rules are the starting point for the consideration of Article 8. The Court of Appeal in **MF (Nigeria)** came to the same conclusion in a different context which was in cases of deportation. There is no requirement for the appellant to show exceptional circumstances if she does not meet the Immigration Rules in order to have her and her daughters claim considered under Article 8 of the European Convention on human rights.

14. The test of exceptionality was explicitly rejected by the House of Lords in **Huang**. The term exceptional circumstances means that the scales are heavily weighted in favour of deportation and something very compelling which could also be exceptional is required to outweigh the public interest in removal. This is a factor that must be considered in the balance and not an exceptionality test. The Court of Appeal in **MF (Nigeria)** stated that the term circumstances those which are “sufficiently compelling”. **Huang** established that the ultimate test under Article 8 is one of reasonableness. Accordingly the terminology of exceptional circumstances used by the respondent and compelling circumstances in the case law of the Upper Tribunal and the High Court must be read consequently with the Supreme Court’s judgement in **Patel** and the Court of Appeal’s judgement in **MF (Nigeria)** as a byword for reasonableness.

15. The appellant's daughter was born and lived in the United Kingdom for six years. She falls just short of the Immigration Rules but this forms the basis for the starting point of an Article 8 claim. Lord Carnworth in **Patel** noted that the balance drawn by the rules may be relevant to the consideration proportionality. The practical or compassionate considerations which underline the rules are also likely to be relevant to those cases fall just outside them and to that extent may add weight to the argument for the grant of leave outside the rules. The Judge's failure to consider the appellants Article 8 rights amounts to an error of law rendering the determination unsustainable.

Submissions of the Parties at the Hearing

16. I heard submissions from both parties as to whether there is an error of law in the determination, the full notes of which are in my Record of Proceedings.

Findings on Error of Law

17. The appellants' main argument is that the First-tier Tribunal Judge Khan failed to consider the appellant's appeal separately under Article 8 of the European Convention on Human Rights. The allegation against the Judge is that he became confused about his consideration of the Immigration Rules and his consideration of Article 8.

18. The question I have to ask is whether this is a material error of law in the circumstances of the appellant's appeal. I have paid anxious scrutiny to the determination of the First-tier Tribunal Judge. The Judge did not take a systematic approach in considering the appellant's appeal both under the Immigration Rules and under Article 8 of the European Convention on Human Rights. Therefore it is not easy to understand the Judge's reasoning in dismissing the appellant's appeal.

19. At paragraph 19 the Judge found that there was no arguable or realistic claim in respect of Article 8 which falls foul of the guidance in **MM**. However he then considered further factors at paragraphs 20, 22 and 24 and concluded at paragraph 25 that the appellant's removal would not be a disproportionate interference.

20. I conclude for the above reasons that the First-tier Judge materially erred in law and I set aside the decision in its entirety and direct that the appeal be remitted to the First- tier Tribunal to be head afresh as findings of fact have to be made.

21. I direct that the appeal be placed before any First-tier Judge for a full hearing with the exception of First-tier Judge Khan.

Signed by,

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A Deputy Judge of the Upper Tribunal
Mrs S Chana

Dated this 5th day of March 2015