Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22349/2014

THE IMMIGRATION ACTS

Determined at Field House without a hearing On 3 December 2015	**Decision an Reasons Promulgated On 14 December 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

OLUWALOLA ABOSEDE AGBAJE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The respondent appealed with permission against the determination of the First-tier Tribunal Judge Callender-Smith, promulgated on 21 October 2014 in which he allowed the appellant's appeal against the decision of the respondent on human rights grounds. For the reasons given in my decision of 17 March 2015, a copy of which is attached at Annex A, I was satisfied that the decision did involve the making of an error of law.

2. Owing to the appellant's subsequent claim for asylum (now withdrawn) and a pending application for her daughter to be registered as a British Citizen (now granted), it has not been possible to proceed to remake the case.

3. The appellant's daughter has now acquired British Citizenship. That is a significant change in circumstances, and accordingly on 4 November 2015, I made the following directions:

    1. It appears that the appellant's asylum application has been withdrawn as her daughter has now been registered as a British Citizen.

    2. Given the acceptance in the refusal letter of 2 May 2014 that the suitability requirements under Appendix FM have been met, and given the appellant's child falls within EX.1 as she is now a British Citizen (albeit she was not at the date of decision which was the basis of refusal under the Immigration Rules), it is my preliminary view that the sole issue in any appeal under the Immigration Rules would appear to be whether it is reasonable to expect the child to leave the United Kingdom. Given the preserved findings of the First-tier Tribunal with regard to the relationship between the daughter and the father who is not in a relationship with the appellant, but with a woman with whom he lives and who have children together, and in the light of the respondent's policy as set out in "Appendix FM 1.0 Family Life (as a partner or parent) and Private Life: 10 year routes August 2015" at section 11.2.3, as well as the length of time the appellant's daughter has spent in the United Kingdom, it is my preliminary view that all the requirement of paragraph EX.1 are met, and that the appeal should be allowed under the Immigration Rules.

    3. In the circumstances, I intend to remake the decision on that basis, allowing the appeal, without a further hearing unless the parties object to that course of action within 5 working days of the issue of these directions.

4. There has been no response to these directions. Accordingly, I am satisfied that neither party objects to the matter being determined without a hearing and has nothing further to say.

5. While I accept that there was no cross-appeal by the appellant against the decision to refuse the application under the Immigration Rules, any consideration of article 8 outside the rules, the basis on which the appeal remains to be remade, would inevitably have to lead to a consideration of whether, as at the date of hearing, the provisions of the Immigration Rules are met. Further, the particular rules in question have been adopted to give effect to article 8, and accordingly, it would be artificial and contrary to the interests of justice not to exercise the power under section 12 of the Tribunals, Courts and Enforcement Act 2007 and the Tribunal Procedure (Upper Tribunal) Rules 2008 to remake the decision as a whole, including remaking the decision in respect of the Immigration Rules. I also vary the direction made for the remaking of this appeal, so far as is necessary to permit this.

6. For the reasons set out above, I am satisfied that the appellant meets the requirements of the Immigration Rules and I allow her appeal on that basis. It follows also that her removal would be disproportionate and in breach of article 8 of the Human Rights Convention.

Summary of conclusions

1. The determination of the First-tier Tribunal did involve the making of an error and I set it aside.
2. I remake the decision by allowing the appeal under the Immigration Rules.

Signed Date: 3 December 2015

Upper Tribunal Judge Rintoul

ANNEX A – ERROR OF LAW DECISION

IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22349/2014

THE IMMIGRATION ACTS

Heard at Field House
On 20 January 2015

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

OLUWALOLOLA ABOSEDE AGBAJE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: in person
For the Respondent: Mr Walker, Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Callender-Smith promulgated on 21 October 2014 in which he allowed the appeal of Miss Agbaje (to whom I refer as the claimant) against the decision by the respondent made on 2 May 2014 to refuse her leave to remain in the United Kingdom.

2. The claimant arrived in the United Kingdom on 19 February 2006 and was granted leave to enter as a student until 26 January 2009. An application for a variation of her leave to allow her to remain as a Tier 1 (General) Migrant was refused and on 5 August 2009 she was granted further leave to remain in the United Kingdom as a student until 31 October 2009. The appeal against that decision was allowed and to the limited extent that the matter was remitted to the Secretary of State to consider. Again her duties pursuant to Section 55 of the UK Borders Act 2009. On 23 August 2011 after a further consideration the application was refused again. A fresh appeal against the followed and again the appeal was allowed to the limited extent that the matter was remitted to the Secretary of State to make a lawful decision to consider Section 55.

3. The respondent refused the application for the reasons set out in the refusal letter of 2 May 2014 in which it is said:-

   (i) Section 55 of the 2009 Act has been replaced by paragraph EX1 of the Immigration Rules, that paragraph reflecting the duty first by Section 55;

   (ii) that she was not the parent of a British citizen or of a child settled in the United Kingdom or a child who had lived in the United Kingdom continuously for seven years immediately preceding the date of application thus she did not have a family life in the United Kingdom under Article 8 which were the requirements set out in Appendix FM;

   (iii) that any interference with her child's relationship with her father would be minimal as she only has a visit from him twice a year and that he could visit her in Nigeria and could remain in contact with her through modern means of communication;

   (iv) that she did not meet the requirements of paragraph 276ADE of the Immigration Rules; that she had not submitted any evidence to support her argument that removal would give rise to a disproportionate interference with Article 8.

4. After arriving in the United Kingdom the appellant met Mr Emmanuel Kolebaga, who is the father of her daughter born 29 September 2007. She was subjected to domestic violence during her relationship and she later learned that he was married and has children. He has been providing for the daughter financially through the parent to the Child Support Agency and maintains regular if unannounced contact with her.

5. It is the claimant's case that the above has now acquired British citizenship but has refused to support or permit the daughter to have the necessary documents to allow her to acquire British citizenship.

6. On appeal, Judge Callender-Smith had evidence from the appellant as well as submissions from her and Mr D Morley, a Home Office Presenting Officer. Judge Callender-Smith found that:-

(i) the appellant did not meet the requirements of the Immigration Rules, in particular EX.1 [33] as her daughter was neither a British citizen nor had she lived in the United Kingdom continuously for at least seven years preceding the date of application;

(ii) the child could acquire British citizenship if her father cooperated in the process [33], the respondent already having available to her information in relation to the father's citizenship [35];

(iii) this is a situation where he could properly consider Article 8 outside the Immigration Rules [36];

(iv) the child had spent the entire seven years in the United Kingdom and it was accepted that she has an existing relationship with her father [41], the father visiting about once a week and that the daughter becomes distressed when she does not see him [42]; that the respondent had never challenged the assertion that the child's father was a British citizen [49]; that the father is not prepared to allow his daughter to avail herself for her rights to citizenship because of his obstructive and spiteful attitude towards the appellant [51], and it would not be in the best interests of the child simply to accept that and that her potential British citizenship was a right which could not be ignored [54]; and, given the age of the child, her latent British nationality and the effect of removing her to a country where she might be at risk of FGM, that this interference would not be in accordance with the law [58];

(v) and that in any event any interference would not be proportionate [60].

7. The respondent sought permission to appeal the ground that the judge:-

(i) had failed to follow the approach as set out in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640** in failing to identify what compelling circumstances that there were to warrant a grant of leave outside the Immigration Rules justifying an Article 8 analysis as outlined to **Razgar**;

(ii) erred in his analysis that the appellant's daughter's apparent entitlement to British citizenship, straying into matters possibly arising in the future; that the judge analysed the situation of her daughter without any consideration that she has no independent right to stay in the country contrary to **EV (Philippines) v SSHD [2014] EWCA Civ 874**;

(iii) failed to have regard to **Azimi-Moayed [2013] UKUT 197** when regarding the daughter's age is a relevant factor in assessing proportionality;

(iv) failed to give adequate reasons for his findings in respect of FGM or to take into account the relevant risks and given that this was included as part of the balancing exercise, starting with the issue of the daughter's contact with her father entitled to British citizenship

was not in themselves wholly determinative of the outcome of the appeal.

8. On 5 December 2014 First-tier Tribunal Judge Grimmett granted permission on all grounds.

9. When the matter came before me, Mr Walker was able to explain, having made enquiries, that the claimant's daughter's father had obtained permanent residence pursuant to the EEA Regulations in 2008 and in 2012 had become naturalised as a British citizen. It is therefore apparent that the daughter is not entitled to British citizenship from birth although if a proper application is made pursuant to Section 1(3) of the British Nationality Act 1981 she may be entitled to British Citizenship.

10. In considering the grounds of appeal I note that there is no challenge to the findings of fact with regard to the existence of family life between the appellant's daughter and her father who is accepted to be a British citizen. There is no challenge to Judge Callender-Smith's findings that there is contact on a weekly basis contrary to what was asserted by the respondent. The submission that the judge failed properly to apply **Gulshan** is without merit.

11. Similarly there is no merit in the challenge in the grounds at A3 that the judge's approach to this case was in error. He was entitled to do found that the appellant's child had a family life with her father who, it is accepted, is a British citizen. That is entirely contrary to the situation in **EV (Philippines)** where none of the family was a British citizen or had the right to remain in the United Kingdom. It is not disputed that here, the father is married to someone other than the appellant's mother or that he has children here from that marriage. As was noted in **EV (Philippines)** the cases are inevitably fact specific.

12. Further, the assertion in the grounds at A4 that the judge failed to have regard to **Azimi-Moayed** it is misconceived. Whilst that decision may be authority for the proposition that the seven year period from age 4 is likely to be more significant to a child in the first seven years of life that does not mean that the first seven years are not significant.

13. It is not properly arguable that the judge erred in taking into account the fact that the appellant's daughter is, as a matter of fact, prima facie entitled to British citizenship if an application is made although it is difficult to discern how much weight was put on this.

14. It is evident in considering proportionality that the judge took into account the possibility of the appellant's daughter being subjected to FGM. His analysis of that risk is not adequate as it fails to engage with the background evidence relating to FGM in Nigeria which clearly exists; the extent to which internal flight would be possible; and, the extent to which there would be a sufficiency of protection.

15. On that basis, I am satisfied that the judge's decision involved the making of an error of law and for that reason must be set aside.

16. The extent to which that decision requires any further fact-finding is limited. I therefore direct that any reconsideration by limited to the question of the possible FGM and a further balancing exercise to be undertaken.

Directions

1. The matter is to be relisted for hearing for fresh findings of fact to be reached with respect to the risk to the claimant's daughter of her being subjected to FGM. A fresh consideration will then need to be given as to whether, in the light of these findings, and the preserved findings, it would be proportionate to remove the claimant and her daughter.
2. Any new material on which it is sought to rely must be served on the Upper Tribunal at least 14 days before the hearing.

Signed Date: 17 March 2015

Upper Tribunal Judge Rintoul