IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22807/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 June 2015	**On 6 July 2015**

Before

UPPER TRIBUNAL JUDGE RENTON

Between

REGA AHMED KAREEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy, Counsel, instructed by Alsters Kelley Solicitors
For the Respondent: Mr D Clark, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a female citizen of Iraq born on 21 April 1989. The full immigration history of the Appellant is not available to me, but suffice it to say that on 11 December 2011 she was granted leave to remain in the UK until 11 March 2014 as a spouse. On 6 March 2014 the Appellant applied for further leave to remain on the same basis. That application was

refused on 21 May 2014 for the reasons given in the Notice of Decision of that date. The Appellant appealed, and her appeal was heard by Judge of the First-tier Tribunal E M M Smith (the Judge) sitting at Nottingham on 29th January 2015. He decided to dismiss the appeal for the reasons given in his Decision dated 4 February 2015. The Appellant sought leave to appeal that decision, and on 7 April 2015 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. The Judge dismissed the appeal under the Immigration Rules because he was not satisfied that the appellant had met the requirements of paragraph 284(ix) of HC 395. That decision was not impugned in the application for leave to appeal.

4. The Judge then went on to consider the Appellant's Article 8 rights within the scope of the Immigration Rules. He found that the Appellant did not meet the requirements of paragraph 276ADE of HC 395, nor Appendix FM thereof. In the latter case, the Judge considered the provisions of paragraph EX.1. as the Appellant had a spouse who was a British citizen resident in the UK and also two young children born in the UK. However, the Judge found, that there were no insurmountable obstacles to the Appellant continuing family life with her husband outside the UK. Finally, the Judge decided that there were no good arguable grounds to consider the Appellant's Article 8 rights outside of the Immigration Rules.

5. At the hearing, Ms McCarthy argued that the Judge had erred in law in coming to those decisions. She did not rely upon the grounds of application which had been drafted by the Appellant herself when not legally represented. Instead, she argued that the Judge had been wrong to have considered the Appellant's Article 8 rights under Appendix FM because the Appellant's application for leave to remain had been decided under an earlier version of the Immigration Rules. That being the case, the Judge should have carried out a full assessment following the decision in **R (Razgar) v SSHD [2004] UKHL 27** including an assessment of proportionality by carrying out a balancing exercise. The Article 8 assessment outside of the Immigration Rules carried out by the Judge at paragraph 31 of the decision was wholly inadequate. There was no consideration of the best interests of the children, and no proper proportionality assessment.

6. Finally, Ms McCarthy asked me to remit the case to the First-tier Tribunal should I find an error of law in the decision of the Judge. This was because there had been no proper assessment of the Appellant's Article 8 rights, and those rights had to be assessed at the date of hearing. There had been developments in the Appellant's circumstances since the previous hearing in January 2015.

7. In response, Mr Clark at first submitted that the arguments of Ms McCarthy could not be entertained as they departed from the original grounds of application and the reasons given by Upper Tribunal Judge Deans for granting leave to appeal.

8. Mr Clark then agreed that the Appellant's Article 8 rights should not have been considered under Appendix FM of HC 395 for the reason explained by Ms McCarthy. However, that error was not material because the Appellant did not qualify for leave to remain under the provisions of paragraph 284 of HC 395 and therefore it would follow that the public interest would outweigh the circumstances of the Appellant. The Judge had carried out a Section 55 Borders, Citizenship and Immigration Act 2009 assessment at paragraph 31 of the Decision, and following the decision in **MK (section 55 – Tribunal option) Sierra Leone [2015] UKUT 00223 (IAC)**, the duty was upon the Appellant to show a Section 55 breach, and therefore as there had been no evidence of such put before the Tribunal, it could not be an error of law by the Judge not to have dealt with Section 55.

9. I found an error of law in the decision of the Judge which I set aside. That error of law is that it is agreed between the parties that the appellant's Article 8 ECHR rights should not have been considered under Appendix FM of HC 395, but instead by way of a full **Razgar** exercise and assessment. As Ms McCarthy argued, what the Judge wrote at paragraph 31 of the Decision cannot be described as such. There was no assessment of the weight to be attached to the public interest, nor a decision as to whether the interference with the Appellant's Article 8 rights was of such a degree of gravity as to engage them, and more to the point, no balancing exercise to assess the proportionality of the respondent's decision. There are two young children in this family who are British citizens, and there was no consideration by the Judge of their best interests which ought to have been treated as a primary consideration.

10. I consider myself able to make this decision notwithstanding the wording of the grounds of application because in my view the reference by Upper Tribunal Judge Deans in his grant of permission to the decisions in **ZH (Tanzania) [2011] UKSC 4** and **Zoumbas [2013] UKSC 74** opens the door to a consideration of the appellant's Article 8 ECHR rights.

11. Having set aside the decision of the Judge, and on the basis that there has been no proper assessment of the Appellant's Article 8 ECHR rights, I remit this case to the First-tier Tribunal under the provisions of paragraph 7.2(b) of the Practice Statements for the decision to be remade.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision. That decision will be remade in the First-tier Tribunal.

Anonymity

The First-tier Tribunal made no order as regards anonymity and I find no reason to do so.

Signed Date

Upper Tribunal Judge Renton