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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02193/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 17 November 2015	**On 20 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE ENTRY CLEARANCE OFFICER, KINGSTON

Appellant

and

RADESHA ARNELA ROACH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel

DECISION AND REASONS

1. The respondent to this appeal is a citizen of Jamaica born on 4 December 1990. The appellant is the ECO, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Stokes, allowing the respondent's appeal against a decision of the ECO made on 11 December 2013 outside the rules on Article 8 grounds. The

appellant conceded she could not meet the requirements of Appendix FM of the rules.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Ms Roach from now on as "the appellant" and the ECO as "the respondent".

3. The appellant applied for entry clearance on 1 October 2013, aged 22, in order to join her mother, Ms Sharon Rose Dixon-Smith ("the sponsor"), who is a British citizen. It appears the appellant was hoping that her application would be considered by reference to paragraph 317 of the Immigration Rules. However, the respondent applied the new adult dependent relative rules and refused the application because the appellant admitted she had no medical conditions and she was able to care for herself. The grounds of appeal explained the appellant and the sponsor are close and the sponsor supports the appellant. The appellant's brother, Fabian, was murdered on 6 November 2012 and the appellant was fearful of the repercussions for her own safety.

4. As said, at the hearing, counsel for the appellant accepted the rules in Appendix FM were not met. The judge then wrote as follows: "*The issue in this appeal is whether or not the Respondent should have exercised discretion to grant the Appellant leave to remain outside the Rules under Article 8 ECHR"* [23]. The judge went on to find the appellant lived with the sponsor until the latter left Jamaica in 2002. There was evidence of regular visits and financial support from the sponsor. Family life continued. Fabian's death had taken an emotional toll on both of them. Thus Article 8 was engaged. Moving on to consider proportionality, she found it was not reasonable for the sponsor to move to Jamaica. She had resided in the UK for 13 years and been married for 10 of them. She had a daughter living with her in the UK in the final stages of her secondary education. All three family members were British. The sponsor had three jobs. Relocating to Jamaica would have an adverse effect on their wellbeing.

5. The judge then balanced the matters in favour of refusal against those in favour of the appellant. In terms of the former, there was strong public interest in maintaining effective immigration controls (see section 117B(1) of the 2002 Act). The appellant could not meet the eligibility requirements of the rules as an adult dependent relative. There was nothing to show the appellant could not lead a normal life in Jamaica as a result of threats being made against her. However, in her favour the judge noted the enormous emotional toll on both her and the sponsor caused by Fabian's death. The appellant speaks English and has a degree. She would be supported by the sponsor and her step-father. She would be able to integrate (see sections 117B(2) and (3)). The appellant has no immediate family in Jamaica and relies on friends for accommodation. The judge concluded the refusal of entry clearance was not proportionate.

6. The respondent applied for permission to appeal on the basis that the judge had made a misdirection in law. The appellant failed to meet the

requirements of the rules by a wide margin and this should have formed a weighty factor in the judge's assessment of proportionality. The judge erred by failing to direct herself that in general the rules codified the categories of persons for whom the UK placed weight on the importance of family reunion. Finally, the judge erred by giving undue weight to evidence of the murder rate in Jamaica given the appellant had not received any threats.

7. The First-tier Tribunal granted permission to appeal. It was unclear whether the judge had identified compelling circumstances supporting a claim for leave outside the rules (*SSHD v SS (Congo)* [2015] EWCA Civ 387).

Error of law

8. I heard submissions on whether the judge made a material error of law.

9. Mr Tufan said the correct rules had been applied and the appellant did not meet them. The judge erred in paragraph 23 in directing herself because she had not applied the test explained in *Singh & Khalid v SSHD* [2015] EWCA Civ 74. She also erred in making the proportionality balancing exercise because she failed realise the threshold is higher in entry clearance cases following *SS (Congo)*.

10. Mr Richardson said the test under *SS (Congo)* was whether there were compelling circumstances justifying the exercise of discretion outside the rules. As the judge allowed the appeal, it could not be argued she had not identified compelling circumstances. The respondent had not argued her decision was perverse. He recognised the rules were more than a starting-point, in line with *Haleemudeen v SSHD* [2014] EWCA Civ 558, but pointed out the judge had taken every possible adverse matter into account when coming to her decision. The respondent's grounds were mere disagreement with the outcome. It could not be argued the judge had not had the correct test in mind because she cited *R (on the application of Esther Ebun Oludoyi & Ors) v SSHD (Article 8 – MM (Lebanon) and Nagre) IJR* [2014] UKUT 00539 (IAC). Even if the judge had not applied the correct approach, as explained in *SS (Congo)*, her error could not possibly be material because she found there were compelling circumstances.

11. I indicated that I needed to reserve my decision on whether Judge Stoke's decision should be set aside. As no additional findings of fact would be required, the representatives agreed to make submissions in case I decided to set aside the decision.

12. In my judgment the decision of Judge Stokes is vitiated by error of law and must be set aside. My reasons are as follows.

13. In *SS (Congo)* the Court of Appeal resolved a number of uncertainties regarding the correct approach to assessing Article 8 following the introduction of rules in July 2012 designed to give effect to the UK's

obligations under Article 8. The judge heard this appeal before the Court of Appeal had given judgment. However, the court was revealing what had always been the law and it is therefore appropriate to apply the case when determining whether the First-tier Tribunal erred in law.

14. Giving the judgment of the court, Richards LJ explained as follows:

> "17. If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in *MM (Lebanon)* in the Court of Appeal, at [135], the proportionality balancing exercise "will be more at large". If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8. An issue arises on this appeal as to whether the Secretary of State has made a conscientious effort to use the new Immigration Rules to strike the fair balance which Article 8 requires and whether there is a substantial gap, or not, between the content of the FTE Rules and the requirements of Article 8.
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> 32. However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As Beatson LJ observed in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558; [2014] Imm AR 6, at [40], the new Rules in Appendix FM:
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> > "… 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 have 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 is more particularised in the new Rules than it had previously been."
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> Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (para. [47]).

> 33. In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in *Nagre* at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., *Haleemudeen* at [44], per Beatson LJ.
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> 40. In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.
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> 41. This formulation is aligned to that proposed in *Nagre* at [29] in relation to the general position in respect of the new Rules for LTR, which was adopted in this court in *Haleemudeen* at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of application of Article 8 in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or "very compelling circumstances" test applicable in the special contexts explained in *MF (Nigeria)* (precariousness of family relationship and deportation of foreigners convicted of serious crimes).”

15. In this case, it is not possible to discern from her decision that the judge had in mind the need for the appellant to identify compelling circumstances justifying a grant of leave to enter outside the rules given the fact the rules contained in Appendix FM were designed to give effect to the UK’s obligations to admit family members in order to continue family life. Nor does her decision show that she recognized that the rules in a LTE case maintain, in general terms, a reasonable relationship with the requirements of Article 8. The only way in which the judge’s paragraph 23 can fairly be read is that she moved straight from finding Appendix FM was not satisfied to a freestanding Article 8 assessment notwithstanding her reference in paragraph 17 to *Oludoyi*, which applied the *Nagre* test, approved in *Singh & Khalid* and *Haleemudeen*. It is possible the judge took

from the passage cited from *Oludoyi* that there was no threshold test, as suggested in *Gulshan*, but she overlooked that there remained a need to give reasons for making a two-stage assessment and to identify at that point compelling reasons justifying a second stage.

16. Mr Richardson's argument was that it was implicit from the judge's ultimate decision allowing the appeal on proportionality grounds that she found there were compelling circumstances is not a complete answer because absent from the judge's decision is any recognition that the rules were more than a starting-point and that the judge needed to show in her decision that she recognized that she had to give *"appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM."*

17. Furthermore, when going on to the second stage, the judge was required to approach the proportionality balancing exercise "through the lens" of the rules, as explained by the Court of Appeal in the context of deportation appeals: see, for example, *AQ (Nigeria) & Ors v SSHD* [2015] EWCA Civ 250, paragraphs 37 and 74. It is not possible to see that the judge recognized that this matter played a role in the proportionality balancing exercise.

18. I set aside the decision of Judge Stokes.

Re-making the decision

19. I shall now summarise the parties' submissions to me on how the appeal should be disposed of. Mr Richardson took me to paragraph 39 of *SS (Congo)*, which he described as a "template" for his submissions. He argued the case showed an appellant could succeed on Article 8 grounds if they were outside the UK. There was an obligation to give weight to the way in which the Secretary of State struck the balance through the rules but there was nonetheless a positive obligation on the UK to respect family life. The appellant's circumstances had changed fundamentally when her brother was killed. She had cooperated with the police in their enquiries and feared the consequences of doing so. Her emotional difficulties supported a finding of family life. The compelling circumstance was the killing of her brother. The appellant was 24 years of age but was not completely independent. In terms of the public interest which the Secretary of State was seeking to protect, the appellant would not be a drain on public funds, as found by Judge Stokes. In the circumstances, there was more likely to be a positive obligation to respect family life. The fact the appellant has a minor half-sibling in the UK tipped the balance in her favour. It could not be suggested that the child, who was British, should leave the UK. The application of the section 117B factors did not give the appellant any positives but neither did they give rise to any negatives.

20. Mr Tufan relied on his previous submissions that there were no compelling circumstances justifying a grant of leave outside the rules on Article 8

grounds. He questioned whether there was family life given the appellant is an adult. The sponsor had left Jamaica in 2002 so the separation had been voluntary. The decision was proportionate. Mr Richardson did not wish to reply.

21. I reserved my decision.

22. The burden of proof is on the appellant and the standard of proof is the ordinary civil standard of a balance of probabilities. I may consider only the circumstances appertaining at the time of the decision to refuse, as interpreted in *DR (ECO: Post-decision evidence) Morocco* [2005] UKIAT 00038 Starred.

23. There is no need to disturb the findings of fact made by Judge Stokes and I gratefully adopt them. These can be found in paragraphs 24, 28 and 29 of her decision and I do not need to set them out again.

24. Unfortunately for this appellant, the rules now severely restrict the circumstances in which an adult dependent relative can be admitted to the UK. The only persons who will succeed under Appendix FM are those who can show, among other things, that as a result of age, illness or disability they require long-term personal care to perform everyday tasks (see section E-ECDR of Appendix FM[1]). It is therefore the Secretary of State's view that the public interest lies in restricting this particular route for family reunion. That must be a weighty consideration.

25. The appellant was 24 years of age at the date of decision. It is common ground that the murder of the appellant's older brother on 6 November 2012, aged 25, would have caused the appellant shock and emotional distress. However, the appellant is a healthy adult. She waited almost a year before applying for entry clearance and she was able to lead a normal life in Jamaica. She was not living with Fabian when he was killed and she did not move home until several months after his death. The appellant is well-qualified and there was no reason given why she could not find employment. The sponsor was able to visit Jamaica without any problems. The appellant has been separated from the sponsor since 2002 when the latter decided to move to the UK.

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[1] "E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-

(a) it is not available and there is no person in that country who can reasonably provide it; or

(b) it is not affordable."

26. In paragraphs 35 to 40 of its judgment in *SS (Congo)*, the Court of Appeal explained the different considerations which apply in a LTE case compared to a LTR case. The requirements on the State are usually less stringent in the LTE context and the rules will generally maintain a reasonable relationship with the requirements of Article 8. The court did not look specifically at the situation of an adult child. However, the current case lies at the outer margins of what might be deemed extant family life for the purposes of Article 8 due to the age of the appellant at the date of decision and the fact the lengthy separation from her mother was brought about through the latter's choice to leave Jamaica without her children. In my judgment this is not a case in which, despite the tragic death of Fabian, it is correct to say there are compelling circumstances which are not sufficiently recognized under the rules to require the grant of leave on Article 8 grounds. I therefore substitute a decision dismissing the appeal.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision allowing the appeal is set aside. The following decision is substituted:

The appeal is dismissed on human rights grounds.

Signed **Date 18 November 2015**

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal