Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/03147/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Sent to parties on:**
On 17 November 2015	**On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

A A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: None
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a Pakistani national born on 25 October 1983. She applied for asylum in the United Kingdom. In a decision letter dated 5 February 2015 the Respondent concluded that she was not a refugee, did not qualify for international protection and rejected her claim under Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR"). The Respondent decided to remove the Appellant as an illegal entrant under s10 of the Immigration and Asylum Act 1999.

2. The Appellant appealed this decision and First-tier Judge Devittie dismissed her appeal in a decision promulgated on 19 August 2015 on asylum and humanitarian protection grounds. Permission to appeal against that decision was granted by First-tier Tribunal Judge Andrew on 10 September 2015 on the basis that he was satisfied that there was an arguable error of law that the Judge had not considered Article 8 which was raised in the grounds of appeal. He did not consider that there was an arguable error of law in the decision in relation to the findings on the asylum claim.

The Grounds

3. Whilst the grounds argue that the First-tier Tribunal erred in relation to the findings on the Appellant's asylum claim, the grant of permission to appeal was limited to Article 8 ECHR. I therefore consider that ground only. It is submitted in the grounds of appeal that the First-tier Tribunal did not give proper weight to the Appellant's case, and did not look at all the oral evidence and documentary evidence. It is said that in these circumstances, Article 8 of the ECHR had not been dealt with properly.

The Rule 24 Response

4. According to the Home Office representative's note of the hearing before the First-tier Tribunal, the Appellant's representative made brief submissions on Article 8 as he was "not really making an Article 8 claim". It is noted that the current application does not make a discrete challenge as particularised by the grant of permission but is rather focussed on the impact of the failure of the First-tier Tribunal to consider properly the documentation in relation to the asylum claim and resulting impact (if any) on the residual grounds (if indeed relied upon or in which way, given the failure to particularise). The Respondent submitted that the First-tier Tribunal Judge directed himself appropriately.

The Hearing

5. Neither the Appellant nor her representatives, MR Solicitors, attended the hearing. I instructed my clerk to telephone MR Solicitors who said that they were no longer acting for the Appellant and provided the number of Reliance Solicitors who they stated were the Appellant's new solicitors. My clerk telephoned them and no solicitor was present to take the call. At 3.30pm a representative from Reliance Solicitors rang the Tribunal to say that they were not representing the Appellant in this appeal because MR Solicitors had not released the file as she owed them money. In view of the fact that both the Appellant and her solicitors had notice of the hearing and the Appellant had chosen not to attend I considered that it was fair, having regard to the overriding objective, to proceed with the hearing in her absence.

6. Mr Jarvis submitted that the appeal was limited to the question of Article 8. Counsel at the hearing before the First-tier Tribunal did not advance a

case under Article 8. It was understandable that the Judge would give it little or no consideration. The Appellant had only been here for a short period and her child was not old enough to have access to 276ADE (iv) of the Immigration Rules. The parent route was not open to her and nor was section 117B (6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Mr Jarvis accepted that the 2002 Act required the First-tier Tribunal to deal with Article 8 under s86. The grounds were silent about what points in relation to Article 8 would have been argued. Presumably the Appellant had instructed her Counsel to act in the way he did. The statute required a finding but it was a cosmetic defect. There may have been a factual case before the First-tier Tribunal. Perhaps it was not the same as abandoned ground of appeal but there was no materiality.

7. I concluded that I should re-make the decision if I found that there was a material error of law. I reserved my decision.

Discussion and Findings

8. Permission to appeal was granted on limited grounds only. The Appellant raised Article 8 as a ground of appeal to the First-tier Tribunal at paragraphs 2 (i) and 6 of the grounds. In paragraph 6 of the grounds of appeal the Appellant asserted that she could not return to Pakistan with her child given the past mistreatment and her future fear. The Appellant also relied on Article 8 in her statement of additional grounds under s120 of the 2002 Act.

9. The First-tier Tribunal did not engage with the Appellant's claim under Article 8. There is no reference to the Appellant or her daughter's family or private life in the UK in the body of the decision and it was not determined as a ground of appeal as required by section 86 (2) (a) of the 2002 Act.

10. In **Sakar v SSHD** [2014] EWCA Civ 195 Moore-Bick, LJ at paragraph [13] held that where no evidence or argument was placed before the First-tier Tribunal in support of an Article 8 claim the tribunal was entitled to treat it as having been abandoned.

11. According to the Rule 24 response, the Appellant's representative made brief submissions in relation to Article 8. There was evidence before the First-tier Tribunal in the Appellant's witness statement in relation to her claim to be entitled to remain here by virtue of Article 8. In the circumstances, the First-tier Tribunal was not entitled to treat the claim as having been abandoned. The First-tier Tribunal therefore made an error of law. The Appellant's case was not inarguable and there was evidence to support it. It cannot therefore be said that the outcome would have been the same notwithstanding the error. I therefore find that the decision involved the making of a material error of law.

12. The Appellant did not attend the hearing and there has been no application for further evidence to be submitted. I therefore determine the

appeal on the basis of the findings of fact and evidence before the First-tier Tribunal.

13. The Appellant applied for a Tier 4 (general) student visa on 20 August 2013 and arrived in the UK on 19 September 2013. She claimed to have arrived with her husband and daughter. On 26 March 2014 her visa was curtailed as she did not enrol on her course of study. On 4 September 2014 she claimed asylum.

14. The First-tier Tribunal found that the Appellant's account that she was at risk of persecution from her husband's parents on return to Pakistan was untrue. The First-tier Tribunal also found that her claim that her husband had left her in a state of anger and frustration and had ceased all contact with her after they had arrived in the UK was palpably false. The Judge found that the Appellant's evidence was not to be believed and did not accept that her parents and her spouse's parents were opposed to the marriage.

15. The Appellant relied on Article 8 in her grounds of appeal. In her witness statement at pages 6-7 of the Appellant's bundle she asserts that she has established a private life in the UK with her family (her brother) in the UK and friends. She states that she feels settled, protected and comfortable in the UK with her family and friends and that it would be disproportionate to send her back to Pakistan, knowing that she had settled into the way of life in the UK.

16. The Appellant's skeleton argument before the First-tier Tribunal contended at paragraph 21 that it was not in the best interests of her child to uproot them to Pakistan given the family's factual circumstances.

17. The First-tier Tribunal did not record the submissions made by the representatives at the hearing in the decision. Neither the Appellant nor a representative attended the hearing in the Upper Tribunal despite being properly served with notice of the hearing. I have therefore taken her case to be as set out in her witness statement, skeleton argument and grounds of appeal.

18. The Respondent refused the Appellant's application under the family and private life provisions of the Immigration Rules. She was found not to meet the requirements for leave to remain as a parent as she did not meet the eligibility provisions. She was also found not to meet the requirements for indefinite leave to remain as an adult dependent as she did not meet the eligibility provisions. The Respondent also considered her application under paragraph 276ADE and refused it because she had not met the requirements regarding length of residence.

19. The Respondent considered the best interests of her child under section 55 of the Borders, Citizenship and Immigration Act 2009 and found that the Appellant's daughter would be able to easily adapt to life in Pakistan given her age and that health care and education were available there.

20. The Appellant did not claim in her grounds of appeal or in her skeleton argument that she met the requirements of paragraph 276 ADE of the Immigration Rules. She has not met the length of residence requirements and in order to satisfy paragraph 276ADE (vi) would have to show that there were very significant obstacles to her integration on return to Pakistan. The Appellant's claim that she would be persecuted was not found credible and the First-tier Tribunal found that she was not at risk in Pakistan. Aside from a fear of persecution, she advanced no other reasons which could amount to very significant obstacles to her return. I therefore conclude that she does not meet the requirements of paragraph 276 ADE.

21. A two-stage approach with regard to Article 8 has been approved by the Court of Appeal in a number of cases including **Singh and Khalid** v SSHD [2015] EWCA Civ 72. The decision-maker should adopt a two-stage process. The first question is whether the individual can succeed under the Rules and the second is, if not, can he or she succeed outside the Rules under Art 8. There is no threshold requirement of arguability before a decision maker reaches the second stage. However, the extent of any consideration outside the Rules will depend upon whether all the issues have been adequately addressed under the Rules. In **Singh and Khalid** the Court of Appeal opined at paragraph [64] "there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

22. The Rules do not provide for the consideration of the best interests of the Appellant's daughter. I have therefore considered the evidence before me in relation to those best interests. The Appellant's daughter was born on 2 October 2011 and was therefore just under two years old when the Appellant arrived in the UK and is now 4 years old. She has spent just over two years in the UK. She therefore does not meet the requirements of paragraph 276 ADE (iv) in relation to her private life, as she has not lived continuously in the UK for 7 years at the date of the application. She also is not a "qualifying child" for the purposes of section 117B of the 2002 Act.

23. According to the witness statement Appellant's witness statement at page 6 of her bundle, she lives with her mother. Her best interests are a primary consideration (**ZH (Tanzania)** [2011] UKSC 4). The correct starting point in considering the welfare and best interests of a young child is that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication (**E-A (Article 8 – best interests of child) Nigeria** [2011] UKUT 00315). It is clear from the consistent jurisprudence of the higher courts that the best interests of a child are an integral part of the proportionality assessment under article 8 ECHR and a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent (**ZH (Tanzania)** [2011] UKSC 4, **Zoumbas v Secretary of State for the Home Department** [2013] UKSC 74). Further, the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent (**EV (Philippines) and**

others v Secretary of State for the Home Department [2014] EWCA Civ 874).

24. In **Azimi-Moayed and Others (decisions affecting children; onward appeals)** [2013] UKUT 197 (IAC) the Tribunal summarized the best interests of the child and noted, at paragraph 13 (iv) that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.

25. It is clearly in her best interests to remain with her mother. There is no evidence before me to show that it would be to her detriment to return to Pakistan, the country of her nationality, with her mother. Whilst the Appellant asserts in her witness statement that she lives in the UK with her brother, she did not attend the hearing and I have heard no evidence in relation to any ties the Appellant's daughter may have established here. She is very young and has only lived in the UK for two years. Given her age, her focus is likely to be on her mother. Whilst she may therefore have established a limited private life in the UK, her removal from the UK with her mother would not result in a disproportionate interference with that right. In so concluding, I have had regard to section 117B of the 2002 Act. The maintenance of immigration control is in the public interest. There is no evidence to show that the Appellant and her daughter are financially independent. In view of the fact that she conducted her asylum interview in English I accept that she speaks English. However, the public interest in firm immigration control is not diluted by this consideration (**Forman (ss 117A-C considerations)** [2015] UKUT 00412 (IAC)). The Appellant and her daughter's private life have been established whilst they have been here either precariously or unlawfully. I find that the Respondent's decision is a proportionate one.

Conclusions:

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.

I re-make the decision in the appeal by dismissing it under the Immigration Rules and Article 8 ECHR.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed Date

Deputy Upper Tribunal Judge I A M Murray
Judge of the Upper Tribunal