



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/29159/2012

THE IMMIGRATION ACTS

**Heard at Newport
On 20 March 2013**

**Determination
Promulgated
On 16 July 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

CHRISTINA KARASAMBUDZI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Takavada of Matieni & Co Immigration Services
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of Zimbabwe who was born on 24 December 1973. She first entered the UK as a student on 24 January 2005 and, following a number of extensions to her leave, she was granted leave to remain until 30 April 2012. On 26 April 2012, the appellant applied for further leave to remain on the basis of her relationship with a Zimbabwe citizen, Edias Mushayanyama (who was born on 9 November 1964) and

who had been granted indefinite leave to remain on 5 December 2008 on the basis of family reunion with his wife. His wife had subsequently died on 26 December 2010. On 28 November 2012, the Secretary of State refused the appellant's application to extend her leave and also made a decision to remove her by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 5 April 2013, Judge Archer dismissed the appellant's appeal. He was not satisfied that the appellant met the requirements of para 295D of the Immigration Rules (HC 395 as amended) that the appellant was entitled to further leave to remain as an unmarried partner. Although it was not contested that the parties' relationship was genuine and that the appellant met the English language requirements of the Rules, he was not satisfied that the parties had been living in a relationship akin to marriage for two years or more as required by para 295D(vi). The Judge also accepted that the appellant could not succeed under para 276ADE of the Rules based upon her private life in the UK. Further, she could not succeed under Appendix FM of the Rules on the basis that there were no "insurmountable obstacles" to the appellant and her partner continuing family life in Zimbabwe. In the result, the Judge dismissed the appeal under the Immigration Rules.
3. On 25 April 2013, the First-tier Tribunal (Judge Parkes) granted the appellant permission to appeal on the basis that the Judge had arguably erred in law in failing to consider the appellant's claim under Article 8 of the ECHR. Thus, the appeal came before me.

The Submissions

4. Mr Takavada relied on the grant of permission. He confirmed that Article 8 had been relied on in the grounds of appeal to the First-tier Tribunal and in his submission before the Judge. He submitted that the Judge had erred in law in failing to consider Article 8.
5. On behalf of the respondent, Mr Hibbs accepted that the Judge had made an error in not dealing with Article 8. However, he submitted that it was not material since the Judge was not required to consider the appellant's claim under Article 8 as he had dismissed the appeal under the new "Article 8 Rules" which fully dealt with the appellant's claim under Article 8. He relied upon the decision of the Inner House of the Court of Session in Scotland in MS v SSHD [2013] CSIH 52 at [26] where the Court of Session, had agreed with the view expressed by Sales J in R (Nagre) v SSHD [2013] EWHC 720 (Admin) at [30]. Mr Hibbs submitted, on the facts of this appeal, no panel properly directing itself could have reached the conclusion that Article 8 would be breached.

Discussion

6. It is accepted by both parties that the Judge did err in law in failing to consider Article 8 of the ECHR. His reason for not considering Article 8 is set out in paragraph 1 (the second and repeated numbering “1”) that because no removal directions had been issued, the appellant’s human rights were not engaged. That reasoning is clearly wrong as the Court of Appeal pointed out in JM v SSHD (2006) EWCA Civ 1402. An appellant is entitled to rely upon Article 8 in an appeal against a refusal to vary (by way of extension) his or her existing leave and, when such a ground is raised, the First-tier Tribunal is required by virtue of s.86(2) of the Nationality, Immigration and Asylum Act 2002 to determine that “ground of appeal”, namely whether, at the date of the hearing, the appellant’s removal, in consequence of that decision would breach Article 8 of the ECHR. There is no doubt, therefore, that the Judge fell into error by not considering the appellant’s claim, raised before him, under Article 8.
7. Was that error material? Mr Hibbs’ submission is that it is not because, having determined that the appellant could not meet the requirements of the Rules, there was in effect nothing left to decide under Article 8. Mr Hibbs relied upon the Administrative Court’s judgement in Nagre and its approval by the Inner House of the Court of Session in MS. At para [26], the Court of Session set out [30] of Nagre and commented as follows:

“[26] In *R (Nagre) v Home Secretary, supra*, Sales indicated his general agreement with that statement of the law, but added (at paragraph 30)

“The only slight modification I would make, for the purposes of clarity, is to say that is, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it clear that consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the rules.”

We agree entirely with that qualification. It seems to us that the new rules are likely to deal adequately with the great majority of cases where the article 8 right to private or family life is put in issue. In that event, there is no need to go on to consider article 8 separately, using the type of analysis set out in *R (Razgar) v Home Secretary, supra*.

8. At para [27], the Court of Session noted that:

“[27] In some cases, however, the new Rules may not adequately cover an applicant’s Article 8 right to private or family life.”

9. At [28], the Court went on to state:

“[28] It can be expected that the new Rules will cover most cases where an applicant seeks to rely on his or her Convention right to private and family life. If an official or Tribunal or Court is asked to

consider leave outside the Rules, an applicant must put forward a reason for doing so. Such a reason will usually consist of circumstances ‘in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate’ (in the words of paragraph 3.2.7(d) of the Home Secretary’s Guidance. We are of the opinion in considering whether such circumstances has been demonstrated by an applicant, the criterion that should be used is that of a ‘good arguable case’, as suggested by Sales J in the passage quoted above. The decision maker should examine the circumstances put forward by the application and determine whether they disclose a good arguable case that the Rules would produce an unfair or disproportionate result such that the applicant’s Article 8 rights would be infringed. It is only if that test is satisfied that there is any need to go on to consider the application of Article 8 in detail. Furthermore, as Sales J indicates, those writing decision letters should demonstrate that they have indeed addressed this test.”

10. That approach is reflected in, the Upper Tribunal’s jurisprudence culminating in the decision in Green (Article 8 – New Rules) [2013] UKUT 00254 (IAC).
11. In my judgement, this appeal does not fall within the “caveat” recognised in Nagre and MS to the approach set out in MF (Article 8 – New Rules) [2012] UKUT 00393 (IAC) and Izuazu (Article 8 – New Rules) [2013] UKUT 45 (IAC) that a Judge should adopt a two stage approach: first determining whether a claimant meets the requirements of the Rules and, secondly if the claimant does not, move on to consider the claim under Article 8 generally.
12. I accept that this was not a case like Green where the Immigration Rules did not reflect the established principles for applying Article 8. There, the appellant was subject to a deportation order as a result of a crime he had committed as a juvenile. That factor was recognised by the Strasbourg Court as a particularly relevant factor in assessing proportionality (see Maslov v Austria [2008] ECHR 546). That factor was, however, not reflected in the relevant immigration rule, namely para 398. As a consequence, it was necessary to consider that appellant’s claim under Article 8 despite the fact that he could not succeed under the Immigration Rules.
13. It may well be that this appeal cannot be said to fall within that category of case. It does, however, fall outside the “caveat” and require a consideration of Art 8. The appellant relies upon her family and/or private life with her partner and the effect upon him including his relationship with his 25 year old daughter who is at university in the UK if he returned to Zimbabwe. The sponsor is a MDC activist, being the MDC Secretary for the South West Region. In principle for the purposes of this appeal, I am content to accept that if the Judge had fully considered the appellant’s claim under the relevant Immigration Rules, namely para 276ADE and Appendix FM then it might well have not been necessary for the Judge to go on and consider Article 8 separately. That, however, ignores the fact that in this appeal the Judge only gave a relatively cursory treatment to

the application of the Rules. It is not clear from the judgement what precisely was the extent of the witnesses' evidence given orally at the hearing. The appellant and her partner undoubtedly gave evidence despite the Judge's comment at paragraph 3 (the second numbered "3" paragraph) that he heard no evidence because the appellant did not attend the hearing. At para 12, he found both witnesses to be credible. In applying para 276ADE the crucial issue was whether or not the appellant "had no ties (including social, cultural or family)" with Zimbabwe. In relation to para 276ADE, the Judge merely stated that he accepted the Presenting Officer's submission that the appeal could not succeed under that Rule. The submission which is quoted in paragraph 10 is that, "the appellant does not qualify under para 276ADE of the Rules". The substance of any such submission is not recorded and no reason is given for accepting it. If the Judge was dismissing the appellant's reliance upon para 276ADE on the basis that she did in fact have some ties with Zimbabwe, the Judge neither sets out the evidence which could lead him to that conclusion and made no finding on that specific issue.

14. In my judgment, the "caveat" to the two stage approach set out in MF, Izuazu and Green cannot be applied in practice. The Judge's findings, in fact, only cover para 295D and Appendix FM in particular EX1. The Judge made no relevant finding in concluding that the appellant cannot succeed under para 276ADE. The latter would, certainly, raise relevant matters under Article 8.
15. It was not argued before me that the Judge's decision under the Rules should not stand. The findings, as a result, remain. However, their nature is such that they are an incomplete assessment of the appellant's case under Article 8. In my judgement, the "caveat" can only properly be applied if the judicial assessment of the relevant factors under the Rules is full and complete. Here, that is not the case: it cannot be said that the consideration of the rules "fully addressed" the art 8 issues. Whilst those findings stand, they do not determine (beyond argument) that the appellant cannot succeed on the basis of her Article 8 rights.
16. For those reasons, I reject Mr Hibbs' submission that the Judge's error of law in failing to consider Article 8 was not material and, alternatively, that her appeal under Article 8 would necessarily fail.

Decision and Disposal

17. Thus, the decision of the First-tier Tribunal involved the making of an error of law. The decision to dismiss the appeal under the Immigration Rules stands.
18. The appeal is remitted to the First-tier Tribunal to determine the appellant's appeal under Article 8 of the ECHR.
19. The Secretary of State's decision to make a contemporaneous removal decision under s.47 of the Immigration, Asylum and Nationality Act 2006

was 'not in accordance with the law (see, SSHD v Ahmadi [2013] EWCA Civ 512). A decision to that effect is substituted.

20. Although Mr Takavada invited me, if the appeal was to be remitted, not to remit the appeal to Judge Archer, there is no valid reason why Judge Archer should not continue to hear the appeal and, in the light of this decision, determine the Article 8 issue. His primary findings under the Rules stand and he found both the appellant and sponsor to be credible.
21. On the basis of the evidence presented to him at the hearing, subject to the reserved findings under the Rules, the appeal is remitted to the First-tier Tribunal (Judge Archer) to determine the appellant's Article 8 claim.

Signed

A Grubb
Judge of the Upper Tribunal

Date: