Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/35218/2014**

THE IMMIGRATION ACTS

Heard at Glasgow
On 28 April 2015

Decision and Reasons Promulgated
On 12 May 2015

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Morocco, born on 3 August 1987. On 8 April 2013 she was granted limited leave to enter the UK until 8 October 2013 as a visitor. On 8 October 2013 she applied for variation of her leave to enter or remain, based upon her relationship with Mr H ("the sponsor"). He is a citizen of Sudan who has been recognised as a refugee in the UK.

2. In a letter dated 12 December 2013 the respondent considered the requirements of the Immigration Rules, Appendix FM, and refused the application for the following

reasons. Although the application says that the appellant and her partner have not previously been married, her UK marriage certificate gives her marital status as divorced. She had not provided "evidence that these relationships had broken down permanently" so the Secretary of State was "not satisfied that you can meet E-LTRP.1.9 of the Immigration Rules." The minimum income threshold requirement was not met. The appellant was in the UK as a visitor and therefore could not qualify for leave. Exception EX.1 did not apply because although relocating to Morocco might cause "a degree of hardship" for the sponsor, the Secretary of State was not satisfied that there were any insurmountable obstacles. The application failed to meet the private life requirements (as to which the appellant raises no significant dispute). Finally, the respondent found no exceptional circumstances to warrant consideration outside the Rules.

3. By the time the appellant's appeal came before First-tier Tribunal Judge Doyle on 17 December 2014 she and her husband had a child, born on 13 April 2014, who is a UK citizen. She conceded that she could not meet the requirements of the Rules but submitted that there were "good arguable reasons for considering her case outwith the Rules" (paragraph 8).

4. In his determination, promulgated on 29 December 2014, Judge Doyle found no such good arguable reasons, but that even if there were, "After considering all of the factors in the evidence which weigh in the appellant's favour, I would still find that the respondent's decision is not a disproportionate breach of the right to respect for either private or family life" – paragraph 15(m).

5. Mr Winter applied to amend the grounds of appeal to the Upper Tribunal. Mr Matthews had no objection. The amended grounds are as follows:

> Ground 1
>
> 1 The FtT erred in law at paragraphs 12(f), (g), (i), (j), (k) and (m) by failing to conduct the assessment on the basis of separation of the family. The FtT has proceeded entirely on the basis that the appellant's husband and child can go with her to live in Morocco. That approach ignores the fact that the child is British and the husband has indefinite leave to remain and appears *prima facie* entitled to be naturalised as a British citizen; it fails to consider that the refusal of leave may result in the indefinite separation of the family and whether that indefinite separation can be justified as a proportionate interference with their fundamental right to cohabit as a couple and as a family. By ignoring the rights flowing from the child's nationality and the husband's status and assuming they must go to Morocco to preserve family life is an error of law. The FtT assumes that Morocco must accord its nationals a right which the Immigration Rules do not accord to British nationals or those with indefinite leave to remain, namely an unqualified right to be joined in Morocco by a non-national spouse (with the spouse being able to find employment) and child (see *Gulshahbaz Ahmed Mirza v Secretary of State for the Home Department [2015] CSIH 28* at paragraph 20 per Lord Eassie.) Further and in any event, the appellant's spouse and child fall into the concession given in *Ogundimu (Article 8-New Rules) [2013] Imm AR 422* at paragraph 112.) Such a concession renders the FtT's findings at paragraph 12(h) erroneous in law.

Ground 2

2. The FtT has erred in law at paragraph 12(i) in appearing to rely on insurmountable obstacles. This is simply a factor. A disproportionate decision or measure is not to be equipirated with the existence of an "insurmountable obstacle" (see *Mirza, supra* at paragraph 20 per Lord Eassie.) Further, the FtT has erred at paragraph 12(k) by failing to recognize that there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature and assessment and the reasoning which are called for are informed by threshold considerations, those threshold considerations include (a) whether an arguable basis for the exercise of the discretion has been put forward; (b) whether the relevant factors have already been assessed; (c) whether a repeat evaluation is unnecessary (see *R (on the application of Ganesabalan) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin)* at paragraph 23-32 per Deputy High Court Judge Fordham QC; *Singh v Secretary of State for the Home Department [2015] EWCA Civ 75.)* The factors relied upon demonstrated there was an arguable basis for the exercise of discretion. If that is not correct, then in terms of ground 1, the FtT has erred in finding that there is not a good arguable case. The FtT erred by failing to recognise that features, aspects of features and combinations of features already addressed, whether in full or in part, by reference to the Immigration Rules do not in principle become irrelevant to the discretion and the evaluation of proportionality for Article 8 purposes (see *Ganesabalan, supra* at paragraph 33-37; *Muhammad Irfan Khan v Secretary of State for the Home Department [2015] CSIH 29* at paragraph 11 per Lord Eassie.) Further it is unclear what the FtT means at paragraph 12(g) in finding that the fact the parties have different nationalities is not a reason to ignore the Immigration Rules. It appears the FtT has erred in law by concentrating on the wrong question. It is not a question of ignoring the Immigration Rules but whether the decision is disproportionate having regard to all relevant factors.

Ground 3

3. The FtT erred in law at paragraph 12(1). Although immigration control is relevant to the economic well-being of the UK, it is still necessary to make a judgment as to how significant the aim, and how far the removal of the particular claimant in the circumstances of his case is necessary to promote that aim when viewed in the context of other material considerations outlined above (see for example *Mansoor, supra* at paragraphs 35 *per* Blake J.) The FtT erred by failing to make this judgment. Further the FtT erred in law by failing to recognise that the facts in *FK and OK Botswana v Secretary of State for the Home Department [2013] EWCA Civ 238* were materially different where the parties involved did not have British nationality or indefinite leave to remain.

6. In a Rule 24 response to the grant of permission dated 2 March 2015 (filed prior to amendment of the grounds) the respondent argues as follows:

…

2. In a detailed and comprehensive determination the judge considered the factual background of this case, applied the ratios of relevant case law and concluded by giving adequate reasons that the appellant cannot succeed under the Rules. The judge at paragraph 15(m) also concluded that he would dismiss the appeal even if he were to consider the matter outside the Rules as the respondent's decision

was not a disproportionate breach of the appellant's rights under Article 8 of ECHR. This finding was open to the judge.

3. There is a remedy for this appellant and that is if the appellant chooses to do so to make the necessary entry clearance application when the family is in a position to meet the requirements of the Rules.

Submissions for appellant.

7. Mr Winter referred firstly to *Ogundimu* at paragraphs 108 and 112. The respondent had conceded that it was not reasonable to expect a UK citizen spouse to relocate outside the EU where there was in addition a UK citizen child. In this case the spouse has indefinite leave to remain and the child is a UK citizen, so the circumstances are very close. Mr Winter acknowledged that in *AQ (Nigeria) and Others* [2015] EWCA Civ 250 it was recorded at paragraph 62 that the respondent did not concede "that there would never be circumstances in which it would be proportionate to require the British child of a non EU carer to relocate with that carer to a country outside the EU." At paragraph 64 the Court said that "the question whether in a deportation case the proportionality assessment should proceed on the basis that a British child may be required to leave the EU with his non EU carer (so as to render proportionate the interference with family life) must await argument on a future occasion." Mr Winter submitted that the Court had not been referred to *Ogundimu*.

8. Mr Winter next referred to part 5A, section 117B(6) of the 2002 Act:

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where:
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

9. He submitted that the provision is determinative in a case such as this, involving a qualifying child. The important facts were that the sponsor has indefinite leave to remain and having been recognised as a refugee from Sudan, he cannot return there. He does not share the appellant's country of origin. He has *prima facie* become entitled to naturalisation as a British citizen. The child is a UK citizen. On the basis of the concession in *Ogundimu* the child cannot reasonably be expected to leave the UK.

10. Alternatively, Mr Winter sought to build his case on *Mirza* and *Khan*. He referred also to *Asif Ali Ashiq* [2015] CSIH 31, which he said diverged from *Mirza* and *Khan*, in particular at paragraph 24, which lists factors relevant in accordance with ECtHR jurisprudence and finds it appropriate for a judge to place particular weight on the precarious nature of a party's immigration status at the time of marriage. In *Khan,* however, the Court found that such precarious immigration status was not of such significance that some exceptional circumstances had to be found before an infringement of Article 8 might arise. Mr Winter said that insofar as different divisions of the Inner House came to different conclusions, then the decisions in *MS*

and in *Ashiq* were generally in line with the authority of the Court of Appeal in England and Wales, but he invited me to prefer and apply the decisions in *Mirza* and *Khan*. He said that taken together those authorities showed that Grounds 1 and 3 disclose error of law.

11. I queried whether it is an error to proceed on the basis that the appellant's spouse may move to Morocco, because it is generally for an appellant to establish the primary facts on which an Article 8 breach may occur. Mr Winter founded upon the observation at paragraph 20 of *Mirza* that the respondent [wrongly] assumed that the spouse might live in Pakistan, although a similar right was not accorded to UK nationals by the Immigration Rules to be joined by a non-national spouse.

12. Finally, Mr Winter said that on either or both of those lines of submission the decision should be reversed.

Submissions for respondent.

13. Mr Matthews firstly submitted that section 117B(6) is not to be read outside the context of the rest of Part 5A of the 2002 Act or the context of the Immigration Rules. It does not strike out the specific requirements of the Immigration Rules or exclude consideration of an appellant's immigration history, English language requirements financial provisions, current immigration status at time of application, and so on. The correct general approach to a case outside the Rules is now set out in numerous cases including most recently in Scotland *Ashiq* and in England *SS (Congo) and Others* [2015] EWCA Civ 387. *SS* at paragraph 32 recognises that the Immigration Rules seek to reflect a fair balance of interests under Article 8 in the general run of cases and that the Rules thus "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." At paragraph 33 the Court held that although a test of exceptionality did not apply in every case falling within Appendix FM "it is accurate to say that the general position … is that compelling circumstances would need to be identified to support a claim for grant of leave to remain outside the new Rules and Appendix FM." This reflected the formulation in *Nagre* which had been approved in *MS* and in a line of authority in the Court of Appeal. The present appellant could not meet the terms of the Rules due to her capacity here as a visitor. There was a longstanding public interest consideration in the Rules that such "switching" should not be permitted. She failed to show that she could meet financial requirements. Notwithstanding *Mirza* and *Khan* the criterion of an "unjustifiably harsh outcome" was approved in *MS*. That point was not *obiter*. Insofar as there was any relevant difference the Upper Tribunal should follow *MS*, *Ashiq* and the consistent line of authority in the Court of Appeal rather than *Mirza* and *Khan*. The Rules struck the appropriate balance.

14. *Ogundimu*, a decision of the Upper Tribunal, did not take the law further than before. The respondent was not bound by any concession which would require the present appeal to be granted. Matters stand as set out in the Court of Appeal decision in *AQ*.

It is now plain from statute that there are circumstances where it may be found reasonable to expect a qualifying child to leave the United Kingdom. That is the question posed by section 117B(6). That question may be answered by reference to the respondent's guidance. At paragraph 11.2.3 there is the heading, "Would it be unreasonable to expect a British citizen child to leave the UK?" The guidance is that the assessment should always be on the basis "that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer", but that section is for cases considered within the Rules. The scheme of the guidance is that cases outside the Rules fall under 11.3, "Exceptional circumstances relating to a child's best interest":

> Where the applicant does not meet the requirements of the family and private life rules, refusal of the application will normally be appropriate, but in every case falling for refusal under the Rules the decision maker must consider whether there are exceptional circumstances warranting a grant of leave to remain outside the Rules. Occasionally these exceptional circumstances will be obvious, but generally it is for the applicant to raise them.

15. The phrase "exceptional circumstances" in the guidance equated to the phrase "compelling circumstances" in *SS*. The facts here were that this was a very young child, very likely entitled to three nationalities [Morocco, Sudan and the UK], with a parent subject to removal who has not been here for a particularly long period, and at a time when the child's life was essentially focused on its parents. The appellant accepted that she could not meet the terms of the Rules, and even if she were to apply out of country, it appeared she would probably be unable to succeed, because the sponsor's circumstances fell short of the income threshold. The First-tier Tribunal had gone squarely to the correct question, which was whether or not it would be reasonable for the child to leave the UK – paragraph 14(h). The answer reached was not legally erroneous.

16. On the wider argument, Mr Matthews submitted that although the Division of the Court deciding *Mirza* and *Khan* found the term "insurmountable obstacles" to be inappropriate, that was not the consistent approach of the Inner House in other cases including *Ashiq*. There was no error of law to require the determination to be set aside.

Reply for appellant.

17. Mr Winter in reply said that the respondent's argument arose primarily from applying the Rules, but the most important consideration was now in section 117B(6). As primary legislation that takes precedence. If the application of that subsection were to render redundant a large part of the Rules and guidance, so be it. He accepted that 11.2.3 of the respondent's guidance is intended for cases within the Rules, but said that nevertheless it was apt to govern the question of when a UK citizen child may reasonably be required to leave the country. To apply that part of the guidance gave the answer required by section 117B(6). On cases falling outside the Rules, the guidance at 11.3 required "exceptional circumstances", which was not

the test. The guidance was therefore misconceived and was not a good reference for what should be found to be reasonable.

18. On conflict of authority, Mr Winter said on reflection that *Khan* and *Mirza,* rather than *Ashiq*, were in line with the reconciliation of the various cases in *Ganesabalan* and *Singh.*

19. The respondent did not have the authority of the courts to reverse the concessions recorded in the cases leading up to *Ogundimu* and so should continue to be bound by those concessions.

20. Although the appellant did not meet the terms of the Rules, her case did not present features which went significantly against the public interest. She had been here lawfully as a visitor at the time of her marriage and when she made the application leading to these proceedings. There was no adverse immigration history. Although she could not meet the strict income threshold she and her husband were able to show that they could establish financial independence. Applying section 117B(6) in the proper light the determination should be set aside and reversed.

Decision.

21. In so far as there is any conflict of authority which may be relevant to whether the First-tier Tribunal's determination errs in law, I find that *MS*, *Ashiq* and the line of authority in the Court of Appeal are consistent and ought to be followed, rather than *Mirza* and *Khan* (in which Part 5A of the 2002 Act did not arise for consideration).

22. The appellant's first argument is in essence that the appeal had to succeed because it is never reasonable to expect a UK citizen child to leave the UK. Such a clear principle would be easy to apply. If it exists, it should be readily identifiable in some or all of statute, the Immigration Rules, the case law, and the respondent's policies and guidance. I have been shown that there is any such principle. If there were, there would be no sense in section 117B(6) posing a question. No source discloses a single answer to the question. There is no principle that Article 8 always overrides the Immigration Rules to prevent removal of the parent of a UK citizen child.

23. The judge was not referred to the respondent's guidance. I do not agree that the guidance has to be read as binding the respondent to one answer. That is not its structure or intent. The use of one phrase rather than another of the many which may be applied should not be over-analysed. It does not appear unreasonable to have a policy of refusing cases which do not meet the Rules unless there are exceptional circumstances.

24. The judge had to decide whether on the facts of the case it was reasonable to expect the child to leave the UK. The answer he reached left nothing relevant out of account, and was open to him. It discloses no legal error.

25. The grounds query the burden of establishing whether the appellant's husband was able legally to move to Morocco. The Court's observation at paragraph 20 of *Mirza*

does not seem to be the product of live debate. The appellant in this case was on notice from the refusal letter of the respondent's position. She did not present evidence in the First-tier Tribunal that her husband might not be able to move to Morocco, nor did she submit that there should be presumed to be an impediment unless the respondent proved otherwise. The grounds attempt to make a point which was not put to the First-tier Tribunal, and which I think is in any event doubtful.

26. The grounds in my view seek to overcomplicate the issue of how the judge ought to have approached the ultimate proportionality question, again in ways which are not said to have been argued in the First-tier Tribunal. *Macdonald's Immigration Law and Practice*, 9th ed., vol 1, at paragraph 7.96 and footnote 10 understandably finds unhelpful the recent proliferation of formulae. What the grounds obscure is that (as pointed out in the Rule 24 response) the judge made it entirely clear at paragraph 15(m) what his final assessment was, whether considered in or out of the Rules, through one or two stages, or applying whatever formula. The appellant's complaints are of form rather than of substance. The case was an anxious one for the appellant and sponsor, but it presented no feature which is unusual or which is not contemplated by the Rules.

27. The determination of the First-tier Tribunal **shall stand**.

28. Neither party made any submissions about anonymity. An order by the First-tier Tribunal remains in place.

7 May 2015
Upper Tribunal Judge Macleman