Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/24563/2012
IA/24592/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 June 2016	**On 01 July 2016**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) JENIFER GARCIA GARCIA
(2) CHRISTOPHER GARCIA GARCIA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Walker, Home Office Presenting Officer
For the Respondent: Mr Pipe, Counsel, instructed by Salam & Co, solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department against a determination of Immigration Judge Edwards

promulgated on 20 February 2013. It is brought with the permission of Designated Judge Shaerf which was granted on 19 July 2013.

2. The appeal was originally heard on 14 October 2013 by Deputy Upper Judge Plimmer whose determination was promulgated on 16 October 2013. The respondents neither appeared nor were they represented at that hearing. However this determination was set aside by direction of Upper Tribunal Judge Rintoul, under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008, on the basis that proper notice of the hearing was not given. Judge Rintoul directed that the matter be listed before Upper Tribunal for the appeal to be determined afresh. It is unfortunate that more than three years have now passed since the matter was before the First-tier Tribunal.

3. The respondents are brother and sister. Jenifer was born on 2 September 1994 and is now aged twenty-one years. Her younger brother Christopher was born on 9 October 1995 and is now aged twenty. He had yet to turn eighteen when the matter was before the First-tier tribunal.

4. Jenifer and Christopher are both citizens of the Dominican Republic. They arrived in the United Kingdom on 22 July 2010 and were allowed entry under visitor's visas until 13 January 2011. On 28 February 2012 (having remained in the United Kingdom beyond their permitted leave) they each applied for indefinite leave to remain as the children of settled parents, under paragraph 298(i) of the Immigration Rules then in force.

5. By a separate refusal letters, each dated 11 October 2012, indefinite leave to remain was refused for both Jenifer and Christopher. The letters went on to consider the matter under paragraph 276ADE of the Immigration Rules, and concluded that neither Christopher nor Jenifer could bring themselves within the scope of the rules. There is no challenge to this conclusion: neither having been resident in the United Kingdom for the qualifying period. Consideration was then given as to whether it would be appropriate to allow them to remain in the United Kingdom exceptionally outside the rules. The Secretary of State concluded that neither had demonstrated any sufficiently compelling factors to justify being allowed to remain. Accordingly the application for leave to remain was refused.

6. Appeals were duly lodged and the matter came on for hearing before the First-tier Tribunal. In paragraphs [5] to [8] of his determination, the judge stated the law by reciting rule 298, setting out Article 8 of the European Convention on Human Rights, and the five-fold test of Lord Bingham from **R (Razgar) v Secretary of State for the Home Department** [2004] UKHL 27.

7. The judge at paragraphs [9] to [13] then summarised the evidence which had been before him and at [14] and [15] the submissions of the representatives of the respective parties. He states his findings on the evidence at [16] to [19], his conclusions under the Immigration Rules at

[20] and those in respect of the Human Rights Act at [21] to [24]. The judge at paragraph [25] dismissed the appeals under the Immigration Rules, but allowed them under Article 8 on a restricted basis at paragraph [26] which reads:

> 'The appeals in respect of the Human Rights Act are allowed to the extent that [the appellants] should be granted leave to remain until such time as they have completed their full time education, or for three years, whichever is the shorter period.'

The three year period expired in February 2016, so in many ways the disposal of the current appeal (which has been delayed for the procedural reasons outlined above) has become largely academic.

8. The grounds of appeal raised a narrow point and were pursued with economy by Mr Walker on behalf of the Secretary of State. He submitted that the judge failed to give adequate reasons for allowing the appeal under Article 8, outside the Immigration Rules. The suggestion in the written grounds that the judge was wrong to take into account section 55 of the Borders, Citizenship and Immigration Act 2009, was properly abandoned by Mr Walker as the younger child, Christopher, was still under eighteen at the time of the hearing before the First-tier Tribunal and the judge was correct to consider it.

9. Mr Pipe, on behalf of Jenifer and Christopher, conceded that the judge's reasoning was somewhat brief, but submitted that it was clear from reading the determination holistically and in context that the judge had properly directed himself on the proper approach to considering human rights claims outside the Immigration Rules. The judge was entitled to state shortly that family life exists, since the issue was not controversial, and to deal with first four of the **Razgar** questions swiftly and peremptorily as he did at paragraph [21] since they were not contentious. The judge was entitled, he submitted, to move promptly to the question of proportionality and to dispose of the appeal in the way he did.

10. We agree with Mr Pipe's analysis. Whilst the conclusion to which the judge came may not have been the one each of us would have reached, it was open to him so to conclude on the basis of the evidence as he found it. We are satisfied that the judge carried out a careful balancing exercise within the parameters of discretion afforded to him, and that the salient paragraphs of his determination give adequate, comprehensible and supportable reasons for coming to the conclusion which he did.

11. The judge took into account that both Jenifer and Christopher were minors at the time of their application, and Christopher remained so at the time of the hearing. He noted that they had both overstayed their visitor visas, and that there was nothing in the evidence to suggest a special dependency as between an adult child and a parent. He took into account the friends and sporting interests that Jenifer and Christopher had established in the United Kingdom, whilst acknowledging that the same

was presumably true in the Dominican Republic. He had in mind the clear public interest in maintaining immigration control. What tipped the proportionality balance in the judge's assessment was the disruption to their education which would arise were they to be compelled to return. On that narrow basis he allowed the appeals to the limited extent that he did, as rehearsed verbatim at paragraph 7 above.

12. Mr Pipe made the further submission that a revised version of pragraph 298 came into force in December 2012, subsequent to the refusal letter but prior to the hearing in the First-tier Tribunal. He argued that the judge would have been entitled to take into account the Secretary of State's change in policy (being one which he submitted would have favoured Jenifer and Christopher) in the proportionality analysis for the purposes of Article 8. However, since this did not form part of the judge's reasoning, it would be inappropriate for us to resolve that matter.

13. We are satisfied that there is no material error of law in the judge's determination. Accordingly it follows that we maintain the First-tier Tribunal's decision with the consequence that the Respondents' appeals are allowed. Paragraph 26 is therefore affirmed in relation to the time-limited grant of leave to remain. Since that time is now expired, it will be for the Secretary of State to decide what steps are to be taken in relation to Jenifer and Christopher's continued presence in the United Kingdom.

Notice of Decision

The First-tier Tribunal's decision does not contain a material error of law. Accordingly the decision is upheld with the consequence that the Respondents' appeals are allowed on human rights grounds, to the extent specified in paragraph 26 of the First-tier Tribunal decision.

Signed *Mark Hill QC* Date 1 July 2016

Deputy Upper Tribunal Judge Hill QC