



The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: OA/15536/2013

THE IMMIGRATION ACTS

Heard at Manchester
On December 11, 2014

Determination Promulgated
On December 15, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

ENTRY CLEARANCE OFFICER

and

MISS FATOU GUEI
(NO ANONYMITY DIRECTION MADE)

Appellant

Respondent

Representation:

For the Appellant: Mr McVeety (Home Office Presenting Officer)

For the Respondent: Mr McIndoe (Legal Representative)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, born December 27, 2002 is a citizen of the Ivory Coast. On April 26, 2013 she submitted an application for settlement as the child of a

person settled in the United Kingdom. The respondent refused her application under the Immigration Rules on July 9, 2013 under paragraph 297 HC 395.

3. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on July 23, 2013. On April 9, 2014 Judge of the First Tier Tribunal Devlin (hereinafter referred to as the "FtTJ") heard her appeal. He refused the appeal under paragraph 297 HC 395 but allowed the appeal under article 8 ECHR.
4. The respondent lodged grounds of appeal on May 12, 2014 and on June 10, 2014 Judge of the First-tier Tribunal Denson granted permission to appeal finding it arguable the FtTJ may have erred by dealing with the claim under article 8 ECHR without any reference to the approach set out in Gulshan [2013] UKUT 00640 and Nagre [2013] EWHC 720.

PRELIMINARY ISSUE

5. Mr McIndoe had submitted a bundle of document and included with this bundle was a cross application for permission to appeal. Contained on the court file was a letter dated June 17, 2014 from Latitude Law that referred to a cross application and indicated a decision was awaited on that application.
6. I checked the court file and there was no application on the file. The Tribunal in EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143(IAC) confirmed at paragraph [46]-

"If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal."

7. As there was no cross appeal before me I indicated to Mr McIndoe that I was unable to consider his appeal as permission to appeal had not been granted.
8. The only appeal before me was the respondent's appeal and I invited Mr McVeety to address me on why he felt there had been an error.

ERROR OF LAW SUBMISSIONS

9. Mr McVeety adopted the grounds of appeal and the grant of permission. He submitted that whilst the Immigration Rules are not always a complete code he submitted that in light of the FtTJ's findings there should have been no consideration of the claim under article 8. The FtTJ had erred because:

- a. There had been no assessment under either paragraph 276 ADE or Appendix FM.
 - b. There was no need to consider the appeal outside of the Rules because of the FtTJ's finding on sole-responsibility and there were no countervailing circumstances that justified consideration outside of the Rules.
 - c. Even if the FtTJ could have considered the application outside of the Rules he failed to have regard to the non-compliance with the Rules.
 - d. in light of the fact firstly there had been no assessment outside the Rules and secondly the findings on the substantive application meant that there was no need to consider the appeal outside of the Rules. Alternatively, the FtTJ had erred by not considering the non-compliance with the Rules when considering proportionality and
10. Mr McIndoe adopted a Rule 24 statement that he submitted at the hearing. He maintained the FtTJ was entitled to consider the application outside of the Rules following decisions of Ganesbalan v SSHD [2014] EWHC 2712 (Admin), R (on the application of Aliyu) v SSHD [2014] EWHC 3919 (Admin) and R (on the application of Oludoyi and Ors) v SSHD (Article 8-MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) the approach in Gulshan was wrong and a FtTJ should consider a standalone article 8 claim. Paragraph 297 HC 395 did not have regard to article 8 ECHR and the argument that a parent has to prove sole responsibility has no echo in the article 8 enquiry. He submitted there was no error in law.

ERROR OF LAW ASSESSMENT

11. In considering whether there has been an error in law I have considered the FtTJ's determination and the grounds of appeal. The grounds of appeal maintained the Immigration Rules were met, the decision was not in accordance with the law and in the alternative refusal would amount to an interference with private and family life under article 8 ECHR.
12. The FtTJ's determination is detailed and the submissions are set out between paragraphs [14] and [34]. I have also referred to the FtTJ's notes of evidence on the Court file. The Presenting Officer submitted the appellant's mother had failed to demonstrate she had sole responsibility of the appellant and there was no exceptional circumstances or good arguable case to consider under article 8. Mr McIndoe argued the sole responsibility point and submitted the oral and written evidence addressed the concerns raised by the respondent and he submitted the sponsor did have sole responsibility. On article 8 ECHR he relied on his skeleton argument and

oral submissions and he submitted the child's immediate carer was not her closest relative and the appeal should be allowed under article 8 ECHR.

13. I have considered Mr McIndoe's skeleton argument and the FtTJ's notes of his submissions and nowhere in those two documents does Mr McIndoe address the approach to be taken on a family/private life claim. The skeleton argument set out his article 8 submissions from paragraph [13] onwards and commences "In the event that it is not accepted that A meets the requirements of the Immigration Rules it is argued that she should be admitted entry to the UK under article 8 ECHR...." There is nothing additional in his oral submissions.
14. Mr McIndoe's approach has to be compared with that of the original Presenting Officer who whilst not quoting Gulshan or Nagre submitted that there had to be exceptional circumstances or a good arguable case to consider this appeal outside of the Rules.
15. When the FtTJ heard this appeal the decision of Gulshan was good law but Mr McIndoe now argues that the grounds of appeal no longer identify an error in light of the recent cases in the Administrative Court.
16. I will refer to these cases in a little more detail in due course but the starting position must be how did the FtTJ approach this issue. Until anyone says otherwise the FtTJ concluded at paragraph [123] the appellant did not have sole responsibility and therefore did not meet paragraph 297(i)(e) HC 395 and he further recorded at paragraph [125] that "no point was taken in regard to paragraph 297(i)(f) HC 35 nor on the evidence available to me could any point have been properly taken." He dismissed the appeal under the Immigration Rules having concluded the appellant's aunt and grandmother had day to day control of her and had done so since the sponsor left home with her other son.
17. The FtTJ then immediately recited a variety of case law on article 8 ECHR. He did not approach the case from the perspective could the appellant satisfy Appendix FM or paragraph 276 ADE HC 395. Between paragraphs [143] and [177] the FtTJ considered article 8 outside of the Rules. He found at paragraph [148] there was family life between the sponsor and appellant because although they were apart they were still mother and daughter. The FtTJ was also conscious of the relationship between the appellant and her aunt who had been responsible for her since 2007 and concluded this relationship must be a key factor in determining what was in the child's best interests albeit that had to be balanced against the fact the child's best interest is to be with her parents. The FtTJ considered from paragraph [166] the needs of the child and he concluded at paragraph [169] her best interest lay in being reunited with her mother and sibling in the United Kingdom.

18. The FtTJ at paragraph [171] did have regard to the public interest and noted the appellant did not meet the Immigration Rules. He concluded this assessment at paragraph [176] that refusing entry would breach the appellant's human rights.
19. In approaching the issue of whether the FtTJ erred in his approach to the appellant's family/private life claim I have had regard to the following matters:
 - a. Section 86 of the 2002 Act places a responsibility on the judge to deal with every ground of appeal. The grounds of appeal raised article 8 ECHR and it is arguable that by dealing with the appellant's article 8 claims the FtTJ complied with his duties under the 2002 Act although it is also arguable that since July 2012 article 8 is enshrined within the Rules.
 - b. In Ganesbalan Michael Fordham QC sitting as a Deputy High Court Judge stated:

"10(i) Unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned.

11. Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision. "Plainly", as was held in Amin at paragraph 26, they are not "exhaustive"; but there is "always a residual discretion" (see paragraph 42). As the Court of Appeal explained in MM (Lebanon) (paragraph 134): " ... if the relevant group of [Immigration Rules] is not ... a 'complete code' then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law".

12. The Immigration Rules are the important first stage and the focus of Article 8 assessments. Indeed it will be an error of law not to address Article 8 by reference to the Rules....
 - c. Judge Grubb sitting as a Deputy High Court Judge in R (on the application of Aliyu) v SSHD [2014] EWHC 3919 (Admin) stated:

"59. In my judgment, the Secretary of State (apart from 'complete code' situations) always has a discretion to grant leave outside the Rules. That discretion must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2. There is, in principle, no "threshold" criterion of "arguability". I respectfully agree with what Aikens LJ said in this regard in MM (at [128]). However that factor, taken together with other factors such as the extent

to which the Rules have taken into account an individual's circumstances relevant to Article 8, will condition the nature and extent of the consideration required as a matter of law by the Secretary of State of an individual's claim under Article 8 outside the Rules. If there is no arguable case, it will suffice for the Secretary of State simply briefly to say so giving adequate reasons for that conclusion. At the other extreme, where there are arguable good grounds that the Rules do not adequately deal with an individual's circumstances relevant in assessing Article 8, the Secretary of State must consider those circumstances and identifiably carry out the balancing exercise required by proportionality in determining whether there are "exceptional circumstances" requiring the grant of leave outside the Rules under Article 8.

- d. Upper Tribunal Judge Gill in R (on the application of Oludoyi and Ors) v SSHD (Article 8-MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) stated:

“There is nothing in Nagre, Gulshan or Shahzad that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the IRs and which could lead to a successful Article 8 claim. If, for example, there is some feature which has not been adequately considered under the IRs but which cannot on any view lead to the Article 8 claim succeeding (when the individual's circumstances are considered cumulatively), there is no need to go any further. This does not mean that a threshold or intermediate test is being applied. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance given must be read in context and not construed as if the judgments are pieces of legislation.”

20. The FtTJ allowed this appeal under the family life provisions of article 8. He carried out a full Article 8 assessment and he had regard to public interest and the issue of immigration control. As detailed above he noted the Immigration Rules were not met and whilst he did not set out each Rule it seems clear that the appellant could not meet paragraph 276ADE and the FtTJ had already found the child could not meet the Immigration Rule that governed entry clearance. She could also not meet the requirement of Section E-ECC because her mother has indefinite leave to remain. Having regard to these facts and the above case law I am satisfied the FtTJ was entitled to consider the appeal under article 8. He carried out a thorough examination of the evidence including the fact he had previously found the aunt had more control over the child than the mother. However, for the reasons he gave he concluded refusing entry would breach the child's article 8 rights. There is nothing in the above case law that suggests his

approach was wrong based on the findings he made. He had regard to Immigration Rules and those he did not refer to were not material.

21. I therefore find there is no error in law and I dismiss the respondent's appeal.

DECISION

22. There was no material error of law I uphold the original decision.
23. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated: **December 15, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

There was no application for a fee award and I uphold the original fee award decision.

Signed:

Dated: **December 15, 2014**

Deputy Upper Tribunal Judge Alis