Upper Tribunal
(Immigration and
Asylum Chamber)
Number: IA/11536/2014

Appeal

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 31 March 2015	**On 16 April 2015**

Before

DEPUTY JUDGE DRABU CBE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SARITA TELLEZ MERUBIA
ANONYMITY DIRECTION NOT MADE

Respondent

Representation:
For the appellant: Ms A Fijiwala, Senior Presenting Officer.
For the Respondent: Ms V Hutton of Counsel instructed by Farani, Javid, Taylor Solicitors.

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State, hereinafter referred to as the appellant in this determination against the decision of Judge Owens, a Judge of the First-tier Tribunal, allowing the appeal of the respondent, a Bolivian national whose application for issue of residence card pursuant to Regulation 18A of the 2006 Regulations as a third country national who has a derivative right of residence under Regulation 15 A had been refused by the appellant.

2. Permission to appeal to the Upper Tribunal was granted by Judge Coates, a Designated Judge of the First-tier Tribunal for reasons given in his written decision dated 2 January 2015. The grounds of appeal challenged the decision of Judge Owens to allow the appeal of Mrs Sarita Tellez Merubia under Article 8 finding on the basis of the evidence adduced that the removal of respondent from the UK would be a disproportionate interference with her private and family life. The appellant, Judge Owens found, was correct in refusing the application made by the respondent under EEA Regulations. The reasons for that finding are in paragraph 33 of the determination. That finding has not been challenged by the respondent.

3. The Secretary of State (Appellant in this appeal) in her grounds of appeal dated 17 November 2014 contends that in allowing the appeal under Article 8 grounds the Judge erred in law in that only "part consideration" was given to the new Immigration Act 2014 when assessing proportionality, and the Judge did not as he should have given little weight to the family and private life that the respondent had established in the United Kingdom when she was here in breach of her conditions. The grounds relied on the decisions in **Gulshan [2013]UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin** and contended that Article 8 assessment could only be carried out when there are compelling circumstances not recognised by the Immigration Rules. The appellant asserted that such compelling circumstances did not exist in this case.

4. At the hearing before me, Ms Fijiwala representing the appellant asked that she be permitted to amend the grounds upon which she had been granted permission to appeal. When asked why such application had not been made in advance of the hearing, she was not able to provide any explanation. When asked what amendment she was seeking to make, it became clear that her amendments to the grounds went far beyond "amendment" and in effect meant "substitution" of the grounds upon which permission had been granted. Bearing in mind that if that proposed substitution were allowed, it would necessitate an adjournment of the hearing to enable me to first consider whether the substituted grounds merited permission and second, if permission were granted, the respondent would need to prepare her case in the light of the "substituted grounds". In the interests of justice and fairness I refused the request from Miss Fijiwala first because no reason had been advanced for the last minute request and further delay in the resolution of this appeal was unjustified.

5. I then invited Miss Fijiwala to address me on the grounds upon which she had been granted permission to appeal drawing her attention to the grounds submitted by D Neal of the Home Office and the decision made thereupon by Judge Coates on 2 January 2015. Miss Fijiwala drew my attention to paragraphs 41 and 54 of the determination and argued that the contents thereof showed that the Judge had given insufficient consideration to the status of the appellant as an over stayer. I read out paragraph 54 of the determination, which says, "In this case the main countervailing factor is that the appellant remained in the UK unlawfully

after her leave to remain expired in 2006 and that she entered into her relationship at a time when she knew that her immigration status was precarious. There is no suggestion that she has an appalling immigration history, has made spurious applications, used deception or absconded. Neither does she have any criminal convictions." and sought her comment. I also drew her attention to the contents of paragraph 55, which says, "I have also taken into account the wording of section 117B (6) of the Nationality, Immigration and Asylum Act 2002. This states that in the case of a person not liable to deportation (such as the appellant) that the public interest does not require the person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom." I also pointed out that in the next paragraph the Judge had said, "I find that the appellant has a genuine and subsisting relationship with her son who I find is a qualifying child because he is British". Ms Fijiwala said she did not wish to advance any further arguments to support her grounds. She agreed that the authorities relied upon in the grounds did not necessarily reflect the latest understanding of the jurisprudence and/or their relevance to the facts of this particular case where a young British child was involved.

6. Ms Hutton representing the respondent described the determination of Judge Owens as impeccable. She drew my attention to her skeleton argument and argued that the Judge had taken full and proper account of all the relevant factor and had made clear and reasoned findings of fact. She prayed in aid the principles set out by the decision of the Upper Tribunal in **Dube (ss 117A-117D) [2015] UKUT 90 (IAC).** It states inter alia sections 117A -117 D do not represent any kind of radical departure from or "override" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in **Razgar [2004] UKHL 27**. Sections 117A – 117 D are essentially a further elaboration of Razgar's question 5 which is essentially about proportionality and justifiability."Ms Hutton after taking me through a number of paragraphs in the determination namely 52, 53, 54, 55, 56 and 57 said that the grounds relied upon by the appellant were no more than a disagreement with the Judge on the facts found. She urged me to consider and accept the points made in paragraph 40 of her written skeleton argument dated 30 March 2015. Ms Fijiwala had nothing more to say.

7. I announced at the hearing that I do not find any error of law in the determination of Judge Owens. I accept Ms Hutton's' description of the determination as being "impeccable". Judge Owens has given due and proper consideration to all the relevant factors including the best interests of a British citizen child and has taken full account of all the relevant jurisprudence as is evident from paragraph 38 of the determination.

8. This appeal by the Secretary of State is accordingly dismissed. The decision of Judge Owen to allow the appeal must therefore stand.

K Drabu CBE
Deputy Judge of the Upper Tribunal
Date: 13 April 2015

Anonymity Direction:
Such direction is not necessary or appropriate in this case.

The decision of Judge Owen regarding fee must stand.

K Drabu CBE
Deputy Judge of the Upper Tribunal