Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43517/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th March 2014	**On 22nd April 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DOORBIBI D/O ABDUL HUSSAIN

Respondent/Claimant

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mrs T White, Counsel, instructed by Ali Sinclair Solicitors

DETERMINATION AND REASONS

1. On 3rd February 2012 the claimant, through her legal representatives, sought leave to remain in the United Kingdom in order to help care for her grandchildren following the death of their mother. The claimant had

initially entered the United Kingdom lawfully as a visitor and sought a variation of her leave accordingly.

2. The Secretary of State for the Home Department refused to vary such leave in a decision dated 8th October 2013. It was contended that the claimant did not have family life as set out in Appendix FM of the Immigration Rules and did not meet paragraph 276ADE of those Rules.
It was not considered that the circumstances were exceptional because alternative arrangements could be made for the care of her son's children.

3. Thus it was that leave was refused and directions for her removal from the United Kingdom were made under Section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The matter came for hearing before First-tier Tribunal Judge Molloy on 16th January 2014. He considered in detail the family and domestic situation, hearing evidence not only from the claimant herself but from her son and members of the family. The appeal was allowed in respect of Article 8 of the ECHR.

5. The Secretary of State for the Home Department sought to appeal against that decision, essentially on the basis that the reasoning in **MF (Nigeria)** was not followed by the Judge and that inadequate consideration had been given to the public interest in the analysis that was conducted and in the findings that were made.

6. Leave to appeal was granted on the basis of whether Appendix FM of the Immigration Rules was exhaustive of the categories of family relationship that potentially engaged the operation of Article 8, or whether it is confined to the weight that attaches to the public interest in those particular cases.

7. Thus the matter comes before me in pursuance of that grant. I was presented with a skeleton argument on behalf of the claimant. A number of legal authorities were relied upon by both representatives.

8. Mr Wilding, who represents the Secretary of State for the Home Department, relied upon the grounds as drafted. It was significant in this matter that the claimant could not meet the Immigration Rules. Although it may be said that the claimant had a subsisting parental relationship with the children such as required in EX.1 she was a class of person excluded by Appendix FF because she had entered as a visitor. That was significant given that it defined her expectation. She had property and family in Afghanistan and had lived in that country for most of her years. There was therefore no reason why she could not return.

9. Mr Wilding submitted that the First-tier Tribunal Judge had not engaged with the fact that generally speaking the Rules not only are relevant in

themselves but also informed the approach to Article 8. He relied upon the decision of **MF (Nigeria) [2013] EWCA Civ 1192**. That was in its own terms a decision concerning deportation but my attention was drawn to paragraphs 44 and 46 of that decision. The Tribunal held that the new Rules were a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence. I noted the debate as to whether there was a one stage or two stage test in relation to the Rules and to the relevant Article 8 criteria. What was set out is if the claimant does not meet the Rules it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation.

10. Mr Wilding submitted that the Judge at no stage had explicitly recognised that jurisprudence, nor had he identified what was exceptional in the circumstances of the claimant so as to depart from the general consequence of the Rules.

11. Mr Wilding indicated, so far as the grant of permission was concerned, that he was not relying upon paragraph 3 of that grant. He did not seek to argue as to whether or not the categories of family relationship were such as to come within the Rules. It was recognised that it was a family who had been in crisis following the death of the children's mother. It was understandable that reliance was placed upon the good offices of the children's grandmother, the claimant. Nonetheless, as the Secretary of State for the Home Department had indicated in the reasons for refusal, there was no reason at all with the elapse of time since the events that alternative arrangements could not be made to look after the children and to run the home. The circumstances of the case he submits fell well below that strong test of compelling or exceptional.

12. My attention was drawn to the decision of **FK and OK (Botswana) v SSHD [2013] EWCA Civ 238,** a case which cited the importance of maintenance of a generally applicable immigration policy.

13. Ms White, who represents the claimant, invited my attention to her detailed skeleton argument. She submits that the First-tier Tribunal Judge did repeatedly refer to the importance of maintaining immigration control and had, for perfectly legitimate reasons, chosen to find that this was a case in such compelling circumstances as to call for the appeal to be allowed. She invited me to find that there was no error of approach and that the findings were entirely proper and sustainable in all the circumstances.

14. The central issue in this appeal is whether or not the First-tier Tribunal Judge failed to give adequate consideration to the Secretary of State's interest in maintaining an effective immigration policy. In other words in recognising that if the claimant does not succeed under the Immigration

Rules it will only be in most exceptional or compelling circumstances that she will succeed under Article 8 of the ECHR.

15. It seems to me clear, from looking at the determination as a whole, that that was a principle which the Judge had in mind throughout. In paragraph 74 it was conceded by the Home Office Presenting Officer that compassionate circumstances existed but it was contended that on balance these did not displace immigration control "that is the crux of the case". At paragraph 101 of the determination it was recognised that the major issue to be determined under Article 8 was one of proportionality where the interference was proportionate to the legitimate public end sought to be achieved.

16. At paragraph 122 it was noted that the Tribunal appreciates and gives due deference to the democratic will of the people of the United Kingdom as expressed through the Immigration Rules which have not been the subject of any negative resolution in Parliament.

17. Finally at paragraph 131 the Judge recognised the interface between Article 8 and the new Immigration Rules and the authority of **Gulshan**, **MF** and **Ogundimu**. The Judge found that this was a rare case in which it would be both unreasonable and disproportionate for the appellant to be removed from the United Kingdom.

18. At paragraph 126 the Judge cited **Gulshan** and other competent authorities speaking as to compelling circumstances which are not significantly or sufficiently recognised under the Immigration Rules.

19. Looking at the matter as a whole it is clear that the Judge has in mind that it is in the most compelling situation, and circumstances, arguments under Article 8 would succeed.

20. Although it might have been of greater assistance if those principles had been stated in one place with particular clarity nevertheless it is clear that throughout the lengthy determination the Judge has that matter well in mind. I do not find therefore that there is any error of law in the understanding by the Judge as to what is required.

21. The Judge looks at the matter also on its merits. The argument that is addressed on the merits by the Secretary of State for the Home Department is noted at paragraph 72 in particular. It is the position of the Secretary of State for the Home Department that there were other family members in the United Kingdom who could take the responsibility thus allowing the appellant to return.

22. The Judge however did not find in favour of that proposition. The Judge having heard witnesses, evidence and argument, concluded that it was not possible for the uncles to step in and help with the children and reasons were given for that. He noted that the children's father worked but it was

not practical for any other member of the family to help, given their responsibilities of the children. In paragraph 95 the issue of family life was very much before the Judge in the consideration of the case of Kugathas. It noted that there is an element of dependency of the children upon their grandmother and that there existed family life for the reasons that were set out in detail in the determination.

23. It was noted that the children were all British citizens entitled to be present and settled in the United Kingdom. The ages and vulnerability of the children were noted in paragraph 119. The family ties would have been strengthened during the passage of time since the application was made. The Judge recognised that there may come a time when the necessity of the appellant's presence in the United Kingdom would lessen but that time had not come. The Judge's view was that there were some cases where it "literally leaps from the page that an appeal ought to be allowed". The Judge found that the compassionate circumstances were so compelling in this particular case as to outweigh the public interest of enforcing the Immigration Rules. I detect no error in that approach.

24. It is said in the grounds of appeal that the Immigration Judge has failed to give adequate reasons for his findings. I do not agree. The first ground of appeal seeks in reality to raise the merits argument. The second ground the jurisdictional one.

25. I find that the Judge has properly focussed the issues as to how to assess proportionality in the light of the Immigration Rules. It was perfectly properly open to the Immigration Judge on the facts that was presented to come to the conclusion which he did that there were compelling circumstances for allowing the appeal.

26. Having read the skeleton argument filed on behalf of the claimant in some detail I find that the arguments set out therein have considerable weight.

27. In the circumstances I find there to be no error of law in the approach taken by the Judge in this case. Consequently the appeal by the Secretary of State for the Home Department is dismissed. The findings by the First-tier Tribunal Judge that it will be disproportionate to remove the appellant and that to do so would be in breach of her fundamental human rights are to stand.

28. Thus the decision in respect of Article 8 of the ECHR stands and the appellant's appeal is allowed.

Signed Date

Upper Tribunal Judge King TD