**UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)** **APPEAL NUMBER: IA/05073/2014**
**IA/05074/2014**

**THE IMMIGRATION ACTS**

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**Heard at: Field House**
**On: 2 October 2014**
**Prepared: 10 October 2014**

**Determination Promulgated**
**On 13 October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MS SALAMATU FREEMAN**
**(NO ANONYMITY DIRECTION MADE)**

**Respondents**

**Representation**

**For the Appellant:** **Mr S Whitwell, Senior Home Office Presenting Officer**
**For the Respondents:** **Mr M A Rana, counsel (instructed by Daniel Aramide Solicitors)**

**DETERMINATION AND REASONS**

1. For the sake of convenience I shall refer to the appellant as "the secretary of state" and the respondent as "the claimant."

2. The claimant is the mother of Titus Samura born on 14th December 2008. His appeal was allowed on 11 July 2014 by First-tier Tribunal Judge R I Kanagaratnam as referred to below.

3. His mother is a Sierra Leone national, born on 19th July 1972.

4. The claimant and her son originally appealed against the decision of the secretary of state dated the 10th January 2014 refusing their applications for leave to remain in the UK on the basis of Article 8 of the Human Rights convention.

5. The secretary of state had considered the applications pursuant to Article 8 under paragraphs 276ADE of the rules, finding that they had not met the relevant requirements.

6. Their appeals against those decisions were allowed by First-tier Tribunal Judge R I Kanagaratnam in a determination promulgated on 11th July 2014. Although it is stated that the case was heard at Hatton Cross on the papers, it is evident that both parties were represented at the hearing, where evidence was given.

7. The Judge found that the claimant did not have sole parental responsibility for her son although she had a genuine parental relationship with him [7]. The Judge referred to the requirements under paragraph 276ADE setting out the requirements to be met by an applicant for leave to remain as a parent on the grounds of private or family life in the UK.

8. He also referred to the requirements to be met as a partner as contained in R-LTRP.1.1 (d) of Appendix FM. He found that she was not married to Mr Sanura and had not been able to establish at least two years' cohabitation with him prior to the date of her application. She admitted having lived in Bristol. She provided documentation confirming that she was living in Bristol in December 2013. She subsequently moved to her brother's residence and thereafter to "Mr Sanura's place in London" [7].

9. In considering her claim to remain as a parent, the Judge noted that she had claimed to live with the father of their child in a family unit. He proceeded to consider her evidence as to whether she had sole responsibility for the child. He concluded that she had not established that she has sole parental responsibility as required, despite the fact that she has a genuine parental relationship with her son.

10. Judge Kanagaratnam then considered her application under the Human Rights Convention ".....on a stand alone basis of **Izuazu (Article 8 – new rules) [2-13] UKUT 0045 (IAC)**".

11. He set out the steps referred to in **Razgar**. He noted that it had been conceded "on new evidence" that her son (the second claimant before the First-tier Tribunal) is a British citizen. His father had not been present at the hearing. Her son is six years old and both parents are of Sierra Leonean origin.

12. He also considered the rights of the claimant child "upon which much emphasis has been placed" and in considering s.55 of the Borders, Citizenship and Immigration Act 2009, noted that the child is British.

13. In considering his best interests he directed himself in accordance with **ZH (Tanzania) [2011]**. He stated that while the interests of the child "may be the overarching issue" he went on to consider the "specific question of circumstances and whether it is permissible to remove a non citizen parent."

14. He found that, given the case specific nature of the claimant's case and the position in **EM and Others (Zimbabwe)** the tender age of the child would cause the Article 8 balance to be tipped in favour of the claimants.

15. He had regard to the precarious immigration circumstances in which the child was conceived. Despite those circumstances, the child had not been party to any of the "breaches". He found that the child's welfare would be prejudiced by the removal of his mother, whom he accepted had cared for him as the main, albeit not sole carer.

16. He also considered in this context "the position" in **Chikwamba v SSHD [2—8] UKHL 40** and found that it would be disproportionate to ignore the fact that the father has indefinite leave to remain and little is known as to the future plans of the parents who now live together.

17. For those reasons he found that it cannot be said that there are no countervailing factors "that weight (sic) towards consolidating this family in the UK." Accordingly, their removal would be disproportionate.

18. The grounds accompanying the application for permission to appeal argued that the claimant did not have sole responsibility for her son and did not meet the requirements of the Immigration Rules as a partner. The Judge however had failed to consider at all whether there was "arguably good grounds for proceeding to assess the appeal as a free standing Article 8 claim (**Nagre [2013] EWHC 720 (Admin)**).

19. On 19th August 2014, First-tier Tribunal Judge Reid granted the secretary of state permission to appeal in respect of the claimant, Ms Freeman. The Judge pointed out that the determination was also in respect of the claimant's British son, Titus, but no application for permission to appeal by the secretary of state appears to have been lodged.

20. In granting the secretary of state permission to appeal, she found that it was arguable that the Judge failed to make adequate findings in respect of the

Immigration Rules and also failed to address what grounds there were for proceeding to make an Article 8 assessment "outwith the rules."

21. Mr Whitwell relied on the reasons for appealing identified in the secretary of state's application.

22. Having found that the claimant could not qualify for leave to remain under the Immigration Rules, it was only if there may be arguably good grounds for granting leave to remain outside the rules that it would be necessary for the Judge to proceed to consider whether there are compelling circumstances not sufficiently recognised under them.

23. The Judge had failed to consider the claimants' case "correctly" outside the rules, having regard to **Nagre**. There were no findings or reasons as to why there are arguably good grounds for granting leave outside the rules.

24. The claimant could return to Sierra Leone and apply for entry clearance as the partner of a settled person in the UK under Appendix FM. The child could remain here with his father or go with his mother to Sierra Leone, pending that application.

25. There were accordingly no compelling circumstances not sufficiently recognised under the rules.

26. Mr Rana submitted that the Judge has appropriately dealt with the claimants' case under paragraph 276ADE of the rules. He also considered the case under Appendix FM, finding that she failed to meet the eligibility requirements for limited leave to remain as a parent as she did not show that she had sole parental responsibility for the child.

27. The Judge was accordingly entitled to proceed to consider the appeal under the Human Rights Convention (Article 8). He submitted that the Judge took into account all the relevant factors including the interests of the secretary of state [8]. He balanced the interests of the child, noting the fact that he was a British citizen of a tender age. He also balanced that against the precarious immigration circumstances in which the child was conceived. He accordingly found that it would be a disproportionate interference were the mother and/or child to be required to make an application from abroad.

**Assessment**

28. I have had regard to the recent decision in **MM (Lebanon) and Others v SSHD and others [2014] EWCA Civ 985 (Court of Appeal)** where Lord Justice Aikens had regard to **R (Nagre) v SSHD [128]**.

29. He noted that the secretary of state had issued guidance in the form of instructions regarding the approach of officials in deciding whether to grant leave to remain outside the rules in the exercise of the residual discretion that the secretary of state had to grant such leave. It could be granted in "exceptional circumstances". He recognised that the new rules could not provide for all possible circumstances that might arise under Article 8. The new rules would guide the decision makers in most cases. In those cases not covered by the new rules, only if there is an "arguable case" that there may be good grounds for granting leave to remain outside the rules by reference to Article 8 would it be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances to grant leave.

30. Lord Justice Aikens also considered **MF (Nigeria) v SSHD [2014] 1WLR 544** and **SSHD v Shahad [2014] UKUT 85 (IAC)**. At paragraph 135, he stated that where the relevant group of immigration rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular immigration rule or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in circumstances with that code, although references to "exceptional circumstances" in the code would nevertheless entail a proportionality exercise. If the relevant group of rules is not such a "complete code" then the proportionality test will be more at large, albeit guided by the **Huang** tests and the UK and Strasbourg case law – **MF (Nigeria)**, supra, at [45].

31. In **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**, the judgment of the court was that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. Accordingly, it is not correct that the decision maker is not "mandated or directed" to take all the relevant Article 8 criteria into account.

32. Even if wrong about that, the court went on to hold that it would be necessary to apply a proportionality test outside the new rules, as was done by the Upper Tribunal in **MF**. Either way, the result should be the same.

33. Although the context of the decision in **MF** related to the deportation of a foreign national criminal, said to have been contrary to Article 8 of the Human Rights Convention, the construction by the Court of the new rules applies equally to the present context.

34. Judge Kanagaratnam in effect held that it would be necessary to apply a proportionality test outside the new rules. That approach is consistent with the analysis and conclusions in **MM**, supra [135]. The relevant group of rules applicable

in this case is not a complete code. Accordingly, the proportionality test "will be more at large" albeit guided by the **Huang** tests and UK and Strasbourg case law.

35. Judge Kanagaratnam set out and had regard to the well known questions to be asked in an appeal of this nature as summarised by Lord Bingham (in an appeal against removal on Article 8 grounds) in **Razgar v SSHS [2004] UKHL 27**.

36. In the earlier decision in **Huang**, the House of Lords emphasised the importance of careful investigation of the relevant facts (paragraph 15). At the same time, they acknowledged the need to give weight to the established regime of immigration control. The importance of family life (paragraph 18) was also emphasised as was the nature of proportionality (paragraph 20).

37. **Huang**'s case offered the guidance that in assessing proportionality there is no legal test of "truly exceptional circumstances." It was stated that the ultimate question for the appellate immigration authorities whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the Applicant in a manner sufficiently serious to amount to a breach of fundamental rights protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.

38. Although, as submitted by Mr Whitwell, the basis for the "stand alone" Article 8 analysis was not clearly identified, and although the proportionality analysis might have been the subject of greater detail, I nevertheless find that the Judge has directed himself appropriately and has given sustainable reasons for finding that the interference contemplated would be disproportionate in the circumstances.

39. Having found that the claimant could not succeed under paragraph 276ADE, the Judge properly applied a proportionality test outside the rules in accordance with the authorities, including **Razgar**.

40. Although the analysis, assessment and reasoning undertaken may be sparse, I do not find that the decision reached is in any way irrational or perverse or inconsistent with the evidence before him.

**Decision**

**The determination of the First-tier Tribunal Judge did not involve the making of any material error on a point of law. The decision shall accordingly stand.**

**No anonymity direction made.**

Signed Date 10/10/2014

C R Mailer
Deputy Upper Tribunal Judge