Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19336/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16th April 2014	**On 1 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS S-AMT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Bobb, solicitor
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Jamaica born on 8th September 1988, the Appellant arrived in the UK in March 2002 on a six month visit visa. The Appellant was joining her mother who had leave to remain as a student. On 2nd March 2009 the Appellant applied on compassionate grounds to remain which was refused on 18th August 2009. The decision was

reconsidered later in the year and on 29th January 2010 she was granted discretionary leave as a dependant of her mother. On 26th November 2010 the Appellant's own dependent daughter S was granted discretionary leave in line with her and on 28th January 2013 the Appellant submitted an application for a further period of discretionary leave for herself and her dependent daughter. That application was refused on both their respective behalves on 26th April 2013.

2. The Appellant appealed and the appeal came before First-tier Tribunal Judge Eldridge sitting at Richmond on 24th January 2014. In considering the application Judge Eldridge noted that the Secretary of State considered that the Appellant and her daughter did not meet the requirements of the Immigration Rules in respect of their family life under Appendix FM. In respect of any private life it was noted that the Appellant had not spent half her life in the United Kingdom and it was considered she had not demonstrated a lack of ties to Jamaica. She was considered not to meet the requirements of paragraph 276ADE.

3. Judge Eldridge noted that the question posed was whether the Appellant was entitled to the leave to remain that she had sought and in a determination promulgated on 30th January 2014 the Appellant's appeal was dismissed on all grounds and the judge made an anonymity direction to protect the identity of the Appellant's child.

4. On 20th February 2014 application was made by the Appellant's instructed solicitor seeking leave to appeal to the Upper Tribunal. The grounds contended that the First-tier Tribunal Judge had failed to apply the policy on discretionary leave and had made a flawed assessment of the analysis under Article 8 of the European Convention of Human Rights. On 13th March 2014 First-tier Tribunal Judge Chohan granted permission to appeal. In granting permission the judge noted that the Appellant had at one time had discretionary leave to remain in the United Kingdom and that that discretionary leave was granted prior to 9th July 2012 and that therefore her application fell to be considered under the transitional arrangements of the discretionary leave policy. Judge Chohan noted that that appeared not to have been considered by the Respondent and certainly it was not brought to the attention of the judge. In granting permission on that ground the judge did however note that whether or not the policy relating to discretionary leave ultimately had any effect on any future decision was open to argument.

5. The judge further noted that contrary to what was stated in the grounds Judge Eldridge had duly considered Article 8 and conducted the proportionality exercise. However he noted that it may be open to argument that had the policy in relation to discretionary leave been brought to the attention of the judge that his findings may well have been different. He concluded that it still will be for the Appellant to establish on what basis the policy relating to discretionary leave undermines the judge's findings in respect of Article 8 and considered that there was an arguable error of law and that all grounds could be argued.

6. On 1st April 2014 the representative of the Secretary of State lodged a response to the Grounds of Appeal under Rule 24. That response opposed the appeal stating that the Judge of the First-Tier Tribunal had considered the evidence before him and made negative findings on the credibility of the witnesses and the strength of the relationship between the Appellant and her partner. The response contended that the judge had considered the best interests of the Appellant's dependent child and the proportionality of the decision.

7. It is pertinent to point out that by letter dated 9th April 2014 an application was made by the Appellant's instructed solicitor to adjourn the appeal on the basis that further information was required as to the grounds or basis for the original grant of discretionary leave to remain. That application was refused by the Tribunal pointing out that the hearing that comes before me was for error of law only and that the new evidence the Appellant wished to obtain could not assist in that matter. In any event in responding the Tribunal noted that it was questionable although the information sought by the Appellant namely the reasons for her previous grant of discretionary leave to remain were essential to any remaking as appears to be suggested in the adjournment request.

8. It is on that basis therefore that this appeal comes before me purely for the determination as to whether or not there is a material error of law. The Appellant appears by her instructed solicitor Mr Bobb. Mr Bobb is familiar with the matter. He is the author of the Grounds of Appeal to the Upper Tribunal and also the author of the letter requesting an adjournment. The Secretary of State appears by her Home Office Presenting Officer Mr Deller.

Submissions/Discussions

9. Mr Bobb submits that the Appellant having been granted an initial period of discretionary leave to remain prior to 9th July 2012 therefore fell into the transitional arrangements of the discretionary leave policy. He takes me to the policy and to the relevant paragraphs then sets them out.

> *"Those who, before 9th July 2012, have been granted leave under the discretionary leave policy in force at the time will normally continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing six years' continuous discretionary leave). A further leave application from those granted up to three years discretionary leave before 9th July 2012 are subject to active review."*
>
> *"Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of three years' discretionary leave should normally be granted …"*

10. He submits that the Secretary of State has failed to consider the Appellant's case under the discretionary leave policy and applied the transitional arrangements rendering the decision not to be in accordance with the law. He submits that to disapply the policy there has to be a significant change of circumstances and that it is his submission there had been no change in the Appellant's circumstances since the grant of leave and that this is evidenced by the finding of fact in the determination. He further points out that the judge has not mentioned discretionary leave at all and that this in itself constitutes an error.

11. Secondly Mr Bobb turns to the assessment under Article 8 submitting that the determination is flawed and that there has been no consideration of the impact on the Appellant's daughter, and that whilst noting that at paragraphs 48 to 50 and 57 the judge has dealt with the Appellant's daughter's best interests, the findings he has made are he submits at best confusing pointing out that there is no discussion as to how the separation from the Appellant's father might affect the child and whether that would be in her best interests. Further he makes reference to the ophthalmic treatment required by Miss S and the letters from Lewisham Healthcare NHS Trust to be found at pages 70 to 71 of the bundle and submits that the judge has not considered these and that he should have done so. Further he submits that so far as the Appellant herself is concerned the judge ought to have given more weight to the fact that she came here as a child and had he done so then a different finding may have been made and therefore there are material errors of law which make the decision of the First-tier Tribunal unsafe.

12. Mr Deller responds by pointing out that whilst there may be no reference to the discretionary policy in the judgment it begs the question as to whether it was ever raised before the Tribunal in the first place. It is not in the skeleton argument that was before the First-tier Tribunal and whilst Mr Bobb may consider it to be an obvious point the question of whether it is obvious goes to the arguments as to whether there is an error of law and any impact on a fundamental right. Mr Deller submits there is no reason why the judge should be aware of any discretionary policy in transition and submits that everything that needed to be said has in fact been said by the judge. He submits it is not a correct analysis of case law to merely have a tacit acceptance of policy and that there is no error of law on this aspect.

13. So far as Article 8 is concerned he agrees with Mr Bobb that it is quite right to say that it is unarguable that the First-tier Tribunal Judge has not given consideration of Article 8 principles. The question therefore he submits remains as to whether or not the determination is flawed. He acknowledges that the judge at paragraphs 43 and 44 of his determination did not look at paragraph 276ADE of the Immigration Rules to see if they were met and as to the Appellant's apparent ties with Jamaica but points out that this does not matter in that firstly the issue was not raised and secondly the manner in which the judge has dealt with the issue of ties is cured by the way he has addressed Article 8 within his determination.

Thus even if there were to have been an error of law in not directly referring to paragraph 276ADE he submits that any such error is not material. Further he points out that the fact that the Appellant entered as a child does not make it a good point and that so far as the phrase "best interests of a child" are concerned he acknowledges that the correct approach is that they are a primary interest and it has to be considered how they impact on other factors for example the position of the Appellant's grandmother was not given a great impact before the First-tier Tribunal Judge. He points out that the judge has in the view of the Secretary of State carried out a detailed and proper analysis and that there is no material error of law and that the appeal should be dismissed.

14. In brief response Mr Bobb points out the policy is mentioned in the Appellant's witness statement if not in the skeleton and therefore it was raised before the Tribunal.

The Law

15. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

16. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

17. The question that is before me is to determine whether or not there are material errors of law in the decision of the First-tier Tribunal. I am satisfied that there are no material errors of law and that the determination properly considers all the relevant factors that were before the Tribunal. It is not the role of the Upper Tribunal to go remaking the decisions unless there are material errors of law. The judge has carried

out a very detailed analysis of the factual information to be found at paragraphs 9 to 37 of his determination. He has made findings of fact and credibility at paragraphs 40 to 58. Those findings of fact are not specifically challenged in either the Grounds of Appeal or Mr Bobb's submissions. The judge may well not have specifically referred to the discretionary policy but the judge has carried out a proper and detailed analysis. He has considered the family arrangements and bearing in mind the way in which the case is put it cannot be said that the judge should have looked at all the relationships with more distant family members as is put to me by Mr Bobb and I find the submissions made on this point to be little more than disagreement and argument rather than any proper challenge that there is an error of law and indeed if there were such an error of law that it is material to the First-tier Tribunal's determination.

18. So far as the judge's analysis on human rights is concerned it is true that the judge has not gone into a detailed analysis by following the now perhaps accepted policy of looking at the Immigration Rule and thereafter considering whether there are exceptional circumstances to allow the appeal. Firstly Mr Bobb is wrong to raise the position with regard to how the judge has or has not addressed the problem that Miss S has with her eyes. He has looked at this in considerable detail and addressed it at paragraph 49 of his determination. He has further found quite properly that if the Appellant and her daughter are returned to Jamaica they would be returned as a family unit and he has looked at the implications to the Appellant's father or more importantly the importance to Miss S so far as any relationship with her father is concerned at paragraph 52. I agree with Mr Deller's submission that the judge has given full and proper consideration to the best interests of Miss S albeit that I do acknowledge he has not gone into any great analysis of the current case law. The judge has made reference to *ZH (Tanzania) v The Secretary of State for the Home Department [2011] 2 AC 166*. Those basic principles were re-established by the Supreme Court in *Zoumbas v The Secretary of State for the Home Department [2013] UKSC 74.* At paragraph 10 of *Zoumbas* the principles to be applied were set out namely:

    (i) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR.

    (ii) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration.

    (iii) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.

    (iv) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the

best interests of a child might be undervalued when other important considerations were in play.

(v) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations.

(vi) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment.

(vii) A child must not be blamed for matters for which he or she is not responsible such as the conduct of a parent.

19. It cannot be said that that approach has not been adopted by the judge in his analysis. Miss S's welfare and safety is addressed at paragraph 48 and the manner in which she would be returned with her mother to Jamaica. Her problems with her eyes are addressed at paragraph 49 and her heritage and ties are addressed at paragraph 50 as is her age. Paragraphs 52 to 56 carry out a proper effective analysis of proportionality and the legitimate aim of immigration control applying the test in *Razgar* and the judge ties matters up by considering the principles in *ZH (Tanzania)* reiterated in *Zoumbas* in paragraph 57 and making findings at paragraph 58 that it is reasonable to expect the family to relocate to Jamaica and that the Appellant's interests and those of her child and other family members do not outweigh those of the state.

20. The decision maker has assessed the proportionality of the interference with private and family life in the particular circumstances of this case in which the decision is made. Judge Eldridge has evaluated Miss S's best interests, has evaluated the circumstances and considered the interference proportionate even where as it would in this instant case have very severe consequences upon Miss S. The judge has in fact followed the process and analysis that he is supposed to as set out by the Supreme Court in more than one authority. In such circumstances the judge's decision is safe and there is no material error of law disclosed and the appeal for all these reasons is consequently dismissed and the decision of the First-tier Tribunal is maintained.

Decision

21. The decision of the First-tier Tribunal discloses no material error of law, the Appellant's appeal is consequently dismissed and the decision of the First-tier Tribunal dismissing the appeal both under the Immigration Rules and pursuant to Article 8 of the European Convention of Human Rights is maintained.

22. The First-tier Tribunal did make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and I continue it.

Signed Date

Deputy Upper Tribunal Judge D N Harris