Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05141/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2015	**On 12 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

MR V D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Bonavero, Counsel instructed by Kilby Jones Solicitors LLP
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, a citizen of Albania, appealed against the refusal of the Respondent of her application for political asylum and protection on human rights grounds.

2. The Appellant's appeal was heard by Judge Macdonald sitting at Taylor House on 9 July 2015. The Appellant was represented, by Counsel; the Respondent was not. The Appellant gave evidence. In a determination of

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13 July, promulgated on 24 July 2015, the judge dismissed the appeal on political asylum whilst allowing it on human rights grounds.

3. The Appellant has not appealed on political asylum grounds. The Respondent has appealed on human rights grounds. Permission to appeal was granted on 14 August 2015 by Judge Parkes in the following terms

> "1. The respondent seeks permission to appeal against a decision of First-tier Tribunal Judge Macdonald promulgated on 24 July 2015 whereby the Appellant's application against the Secretary of State's decision was dismissed. The application is in time and is admitted.
>
> 2. The Appellant's asylum application was refused. The appeal was allowed on human rights grounds on the basis of the Appellant's relationship and twin sons who are British nationals.
>
> 3. The grounds argue that the judge erred in failing to identify the compelling circumstances that justified considering the Appellant's case outside the Immigration Rules, the finding that the family could not relocate was inadequately reasoned and did not properly consider the public interest which had to be set against the findings made in respect of the asylum claim.
>
> 4. The judge does not appear to have considered the applicable or relevant aspects of the Immigration Rules before considering the position under article 8, the case of **Chen** is also relevant. Given the need to assess article 8 with reference to the Immigration Rules it is arguable that the judge erred.
>
> 5. The grounds are arguable and permission to appeal is granted."

4. The Appellant and her partner attended the error of law hearing, which took the form of submissions. These I have taken into account, together with the permission application and the skeleton argument of the Appellant.

Determination

5. The essence of a challenge to the decision is that the judge did not identify compelling circumstances requiring Article 8 consideration outside the scope of the Immigration Rules, and ought not therefore to have embarked upon the Article 8 proportionality assessment which he did.

6. At the error of law hearing there were competing submissions on the law on this matter. **Singh v SSHD [2015[EWCA Civ 74**, heard on 12 February 2015, considered and upheld, especially at paragraphs 61, 62 and 67, the judicial approach in **Izuazu (Article 8 – new Rules) [2013] UKUT 45 (IAC)** and **R (Nagre) v SSHD [2013] EWHC 7200 (Admin)**. It held that only if, after addressing the Immigration Rules, there remains an arguable case that there may be good grounds for granting leave to

remain outside the Rules by reference to Article 8 will it be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Immigration Rules to require the grant of leave. If it is clear that consideration under the Immigration Rules has fully addressed any private of family life issues arising under Article 8 it would be sufficient simply to say that, without any need to go on to consider the case separately from the Immigration Rules. **SSHD v SS (Congo) and Others [2015] EWCA Civ 387**, heard on 23 April 2015, held, especially at paragraphs 47, 48 and 51, that while the basic two stage analysis will apply, whether or not the Immigration Rules are considered to constitute a complete code, compelling circumstances have to apply to justify a grant of leave to enter or remain where the Rules are not complied with. In short, therefore, compelling circumstances are required, and must therefore be identified, to empower the Tribunal to undertake a freestanding Article 8 proportionality assessment.

7. In the present appeal, the judge considered the Appellant's asylum claim and in conclusion rejected it [78]. "There is, however her claim under Article 8. I assess this as at the date of hearing on 9 July 2015." [80]. He considered the applicable law, including Section 117B of the 2002 Act, and applied the five stage **Razgar** tests [82 -112]. He found that the Appellant did not meet the financial requirements of Appendix FM of the Immigration Rules [100] "I have considered whether the appellant meets the requirements for leave to remain outside the rules and I have taken into account the matters to be considered under Section 117B [101]. I have come to the conclusion that the appellant should be granted leave to remain outside the rules" [102]. Accepting that the maintenance of effective immigration control was in the public interest [103], the judge considered factors relevant to the Appellant and her partner: "On the evidence before me I allow the appellant's appeal on human rights grounds" [112].

8. What is missing from this analysis, the Respondent submits, is any recognition of the need for exceptional circumstances, or identification of them, in order to ground the Article 8 proportionality assessment. I accept this submission. If any of the factors identified in paragraphs 102 to 110 was considered to meet the criterion of exceptionality, it should have been identified, individually or cumulatively. The judge should not simply have embarked upon a freestanding Article 8 proportionality analysis. To have done so was an error of law, material because it was capable of affecting, as it did, the decision upon the appeal.

9. Mr Bonavero submitted that, even if established, this error of law was immaterial, because it would not have affected the outcome: **R (Iran) [2005] EWCA Civ 982** at paragraph 10. He argued that the Appellant satisfied the relevant requirements of Appendix FM, including paragraph EX.1, relating to the Appellant's relationship with children who are British citizens and whom it would not therefore have been reasonable to expect to leave the UK: **Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048** at paragraph 95. Since paragraph EX.1

was satisfied, the financial requirements in paragraph E-LTRP3.1 of Appendix FM would not have been required to be satisfied.

10. The difficulty with the submission is that it requires consideration of these numerous requirements, and thus establishing that the financial requirements were not in point. This might prove to be the case, but it cannot be assumed without an assessment of those factors which, since Mr Bonavero handed in his skeleton argument shortly before the start of the hearing, the Respondent cannot have come prepared to address. I might have reached a different conclusion had this argument been adduced in a Rule 24 response, but it was not.

11. The decision contains an error of law and, in relation to human rights grounds, cannot stand. I accordingly set aside paragraphs 79 to 112. I preserve the remainder of the determination, which dismisses the appeal on political asylum grounds.

12. The appeal must accordingly be reheard on human rights grounds. This will afford the Appellant the opportunity to submit that Appendix FM of the Immigration Rules is complied with.

Decision

13. The original decision contains an error of law. I set aside paragraphs 79 to 112, in which it allowed the appeal on human rights grounds. I preserve the remainder of the determination, in which it dismissed the appeal on political asylum grounds.

14. The appeal is to be reheard on human rights grounds. This should take place in the First-tier Tribunal, to enable the Appellant to make arguments not previously heard about compliance with the Immigration Rules.

Signed Dated: 11 November 2015

Deputy Upper Tribunal Judge J M Lewis