Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05928/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 6 February 2015	**On 16 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

ABIGAIL MARQUEZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby counsel instructed by the Appellant.
For the Respondent: Mr T Wilding Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Heynes promulgated on 24 June 2014 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 15 August 1973 and is a national of the Philippines.

4. On 29 December 2008 the Appellant entered the United Kingdom with entry clearance as a student valid until 28 February 2011. The Appellant was granted further leave as a student until 30 December 2012.

5. On 19 December 2012 the Appellant made an application for one years discretionary leave outside the Rules as her son had had open heart surgery in late October 2012 and according to her representatives letter dated 27 December 2012 her son would need a long period of recovery in the UK. The supporting letter also stated that the Appellant and her ex husband share custody of their son and that her ex husband was applying with her son as family members of an EEA national and had been granted a certificate of application. The letter also suggested that the Appellant had established a private life with family and colleagues and friends within the meaning of Article 8 and suggested that the right to private life included a right to work and pursue her studies.

6. On 9 January 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:

   (a) The health care plan provided by the Appellant dated 21 November 2012 stated that the Appellant's son had made a full recovery. Further documentation provided from the NHS stated that within 12 months the Appellant's son would be fully capable of engaging in vigorous exercise and contact sports as by this time the breast bone would have fully healed.

   (b) From the evidence provided the Appellant's son is capable of returning to his home country and the Appellant could care for him there if she wished.

   (c) The Appellant had also failed to respond to a request dated 10 December 2013 requesting further information to be used in consideration of her application. No response was received by the deadline of 24 December 2013.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Heynes ("the Judge") dismissed the appeal against the Respondent's decision. The Judges full findings were as follows at paragraph 7 of the decision:

   "*The Appellant has provided no up to date medical evidence to show that he requires anything more than monitoring. It is not even clear whether the removal of the Appellant would trigger the removal of her son who, it appears, is seeking to stay in the United Kingdom with his father on the basis of an application under EU law*."

8. Grounds of appeal were lodged and permission was initially refused. The application was renewed and on 18 December 2014 Upper Tribunal Judge Allen gave permission to appeal stating that he was:

"… concerned at the minimal reasoning in the determination. It may make no difference at the end of the day, but the matters raised in particular at paragraphs 1.3, 1.4 and ground 2 of the grounds are matters of concern."

9. At the hearing I heard submissions from Mr Sowerby on behalf of the Appellant that :

(a) He relied on the grounds of appeal.

(b) There was a statutory duty to consider the best interests of the child and he relied on JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC) to suggest that extensive fact findings were required. Neither the refusal letter nor the decision of the Judge referred to the best interests of the child in this case and there had been no proper assessment of the facts.

(c) The circumstances of the family as a whole had not been considered as there was reference to the father's situation in the letter accompanying the application.

(d) There was no consideration of the mothers Article 8 rights in the decision and these were raised in the accompanying letter.

10. On behalf of the Respondent Mr Wilding submitted that :

(a) It was the Appellant's decision to have her case considered on the basis of the papers presented to the Judge.

(b) The application was for leave outside the Rules in order for her son to rest and recuperate.

(c) The witness statements from the Appellant and her son were not before the Judge as they post date the decision.

(d) The Tribunal was not required to make additional enquiries beyond the information provided by the applicant.

(e) He relied on AJ (India) and Others v SSHD [2011] EWCA Civ 1191 the Court of Appeal considered whether the Tribunal can deal with Section 55 of the Borders, Citizenship and Immigration Act 2009 even where the respondent has not. The court concluded in paragraph 24 that it can and it is not necessary to remit the matter. The court also concluded that it is not necessary to refer to Section 55 in terms if it is clear that it has been applied.

(f) The Judge in this appeal concluded that the Appellant, on the basis of the evidence before him, did not require more than monitoring.

(g) He reminded the tribunal that this was an appeal made by the Appellant not her son as he was not to be removed: there was no evidence of any care she gave to her son.

(h) The Judge could not have come to a different conclusion on the basis of the evidence before him.

11. In reply Mr Sowerby on behalf of the Appellant submitted :

(a) This was not just an application made for leave outside the Rules on the basis of the Appellant's child's ill health, there had also been reference made to the Appellant's private life.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no errors of law that were material to the outcome of the decision.

13. The Appellant made an application for leave to remain outside the rules on 29 December 2012 and this was accompanied by a letter from her legal representatives dated 27 December 2012. The letter set out the background to the application that the Appellant came to the United Kingdom as a student in 2008 leaving her husband and child Dale in the Philippines until at some point prior to 2012 they joined her in the United Kingdom. The Appellant and her husband divorced in March 2012 and the letter indicated that her ex husband and son were applying as family members of an EEA national for a permit to remain in the United Kingdom. The letter went on to say that prior to her sons ill health the Appellant intended either to continue her studies in the United Kingdom or seek overseas employment. In mid 2012 Dale was diagnosed with a heart murmur and required open heart surgery which he had in October 2012. The letter asked for 1 years discretionary leave '*to allow Ms Marquez to look after her son as he recovers*.' The application was refused for the reasons set out above.

14. It was against this background that the Judge dealt with the Appellant's appeal against the refusal of leave on the papers. The Judge had before him the application and supporting letter together with letters from Barts Health up to and including a health plan dated 21 November 2012. There were no witness statements from either the Appellant, her son or her ex husband enlarging upon the evidence set out in the supporting letter and accompanying documents. Although a request was made in a letter dated 10 December 2013 for more up to date information in relation to her son's health given that in fact a year had passed since the date of the application, there was no response to that request. The Appellant has now produced a letter dated 26 November 2013 from Dr Graham Derrick but I have looked at the file of papers the Judge had and there is no correspondence to suggest that the letter was before Judge Heynes and indeed the copy of Dr Derrick's letter is attached to statements from the Appellant and her son that clearly post date the date of the decision.

15. The Judge dismissed the appeal and his findings were on any analysis extremely brief and do not make explicit findings by reference to Article 8 either in relation to Dale or to the Appellant herself, refer to any caselaw or refer to the best interests of the child. They could not be described as the 'scrupulous analysis' referred to in JO. I am satisfied that the findings made by the Judge were inadequate given their brevity and the material he had been before him and the facts in issue.

16. However I have looked at the recent Court of Appeal decision in SSHD v AJ (Angola) [2014] EWCA Civ 1636 that an error of law by the First-tier Tribunal may be considered immaterial –

" *… if it is clear that on the materials before the Tribunal any rational Tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instruments, the Tribunal has in fact applied the test which it was supposed to apply according to those instruments.*"

17. I am satisfied that on any rational analysis of the material that was before the Judge any Tribunal would inevitably have come to the same conclusion albeit they may have set out the basis for reaching that conclusion more fully. It is clear that if the Tribunal had adopted the structured approach set out in Razgar [2004] UKHL 27 the issue would have been one of proportionality as the first 4 questions in Razgar would have been answered affirmatively. In assessing proportionality the starting point would be that the best interests of Dale would have been a primary consideration. I remind myself that in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC) (Blake J) which was relied on by Mr Sowerby the Tribunal held that although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child's best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter.

18. The material before the Judge showed that Dale had been successfully operated on in October 2012 and there was a health care plan dated 21 November 2012 that stated that he had made a full recovery and within 12 months would be fully capable of participating in vigorous exercise and contact sports as his breast bone would have been fully healed. What he required was 6 monthly check ups. Indeed the medical evidence dated 26 November 2013, while not seen by the Judge, confirmed that he was 'generally well' and again simply required a six monthly follow up.

19. The year that the Appellant had originally applied for had passed by the time the Judge came to decide this case and there was no evidence before the him on which he could have concluded that the removal of his mother would impact on his well being in any way given the medical evidence and factually the period of recuperation she had requested had passed by and there was no indication that Dales condition had done anything other than improve.

20. While the best interests of a child are to be brought up by both parents this had never been the expectation in this case: the Appellant and her son had lived apart when she came to the United Kingdom by the choice of her and her then husband and then they had divorced while she was in the United Kingdom and were never going to be brought up by both parents. What brief information was provided with the application suggested that the Appellant had anticipated the possibility of working abroad while her son lived in the United Kingdom with his father and his father's new partner and again this was their choice. Looking at the evidence that the Judge had before him I am satisfied that while his findings were brief they reflected a conclusion that would have inevitably have been reached by any Judge applying the relevant law that there was nothing to suggest that the Appellant's removal was not in his best interest.

21. In relation to the failure to assess the Appellant's own Article 8 claim I am satisfied that the principal basis for the claim for discretionary leave was Dale's health. The only reference to the Appellant's circumstances was that she had established *'a private life with family, colleagues and friends within the meaning of Article 8 .....(and) the right to private life includes the right to work, and pursue her studies.'* Even had the Judge addressed this aspect of the claim I am satisfied that he would inevitably have concluded that it was proportionate to remove the Appellant. There was no evidence provided as to the Appellant's private life claim other than in relation to Dale and the undisputed fact that she was in the United Kingdom as a student and had apparently completed the course for which she had been granted leave. On the basis of the material before the Judge there was no evidential basis for concluding that it was other than proportionate to remove the Appellant.

CONCLUSION

22. **I therefore found that errors of law have been established but they were not material to the outcome of the decision.**

DECISION

23. **The appeal is dismissed.**

Signed Date **6 February 2015**

Deputy Upper Tribunal Judge Birrell