Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/49349/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 August 2015	**On 22 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms AMAL KHAFIF
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr Khan, instructed by KC Chambers.

DECISION AND REASONS

1 This is an appeal brought by the Secretary of State against the decision of the First tier Tribunal (Judge James) dated 6 May 2015. In this decision, I shall refer to the parties as they were in the First tier i.e. Ms Amal Khafif is the Appellant and the Secretary of State for the Home Department is the Respondent.

2 In that decision Judge James allowed the Appellant's appeal against the Respondent's decision of 20th November 2014 refusing to vary the Appellant's leave to enter the UK, and making a removal decision under section 47 Immigration Asylum and Nationality Act 2006.

Background

3 The Appellant is a national of Morocco born on 20 March 1988. The Appellant's husband, Mr Nadeem Siari ('the Sponsor'), is a British national resident in the UK, and of Moroccan descent. The Sponsor had previously been married to Meriem Siari, and together they had four children: three daughters, aged 16, 13, and 9, and a son aged 6, at the time of the FtT hearing. Regrettably, Meriem Siari died in 26 October 2012 of breast cancer.

4 The Sponsor and Appellant met on an internet marriage site in May 2013. They first met in person in June 2013. They married on 4 November 2013 in Morocco. The Appellant made an application for entry clearance as a family visitor, which was granted on 13 February 2014, valid until 13 August 2014. She entered the United Kingdom on 24 February 2014 and then again on 29 March 2014.

5 On 11 August 2014 the Appellant applied for further leave to remain in the United Kingdom, on form FLR(FP). Representations from Kings Court Chambers dated 8 August 2014 accompanying the application made submissions as to the Appellant's entitlement to leave to remain under Appendix FM of the immigration rules, but accept (M8 Respondent's bundle) that the Appellant was at the time of that application present in the United Kingdom as a visitor. Although the representations do not accept in terms that this results in the Appellant not being able to satisfy the 'immigration status requirements' of Appendix FM, the remaining arguments within the representations focus on Article 8 ECHR.

6 By email to Kings Court Chambers dated 3 November 2014, the Respondent requested further evidence in support of the application; original passports and birth certificates for the Sponsor's four children, and documentary evidence that the children resided with the Appellant at their current address. That evidence was to be provided by 17 November 2014 (Respondent's bundle, O2). That email received an acknowledgment (which appears to be an automated response) from Kings Court Chambers on the same date (P2)

7 It would seem that no substantive response was provided to that request for further evidence.

8 In a decision dated 20 November 2014, the Respondent made the decision refusing to vary leave, and to remove, on the basis that the application was to be refused:

(i) under S-LTR.1.7 App FM (a mandatory ground on which an applicant 'will be refused limited leave to remain on grounds of suitability' (S-LTR.1.1)), on the basis that the Appellant had failed without reasonable excuse to comply with a requirement to provide information;

(ii) either as a partner, under E-LTRP.2.1, or as a parent under E-LTRPT.3.1, on the grounds that, as a visitor, the Appellant did not satisfy the relevant immigration status requirement;

(iii) as a parent, under E-LTRPT.2.2, on the grounds that it was not established that the children were in the UK, and under E-LTRPT.2.3 on the grounds that the Appellant did not have sole responsibility for the children, and claimed to live with her partner and the children;

(iv) on private life grounds, on the basis that the requirements of 276ADE were not met;

(v) as the decision was not disproportionate under Article 8 ECHR outside the rules.

The FtT hearing

9 The Appellant appealed against that decision, the appeal coming before Judge James on 10 April 2015. The Appellant clarified that she no longer sought to advance her appeal under the immigration rules, but under Article 8 ECHR only. The Appellant and sponsor gave evidence.

10 The Judge found at [43] that while the relationship between the Appellant and the Sponsor and his children had been relatively short, there was a family life established between the all in the UK. The Appellant relied upon changes in her position since entering the UK as a visitor; the children had became attached to her such that she could not 'abandon' them [19], [35]; and the Sponsor's mother Mrs Habiba Siari (dob 10 October 1950 and therefore 64), had been looking after the children since their mother died, but her eyesight was deteriorating and her arthritis was bad [24].

11 In that regard, there was a letter before the Judge relating to the health of the Sponsor's mother, from Dr Chana of the Watford General Hospital dated 29 April 2014, addressed to Mr Frank Larkin, Consultant Ophthalmic surgeon at the Moorfields Eye Hospital. The letter is a referral to Mr Larkin. Dr Chana describes Mrs Siari as having corneal scarring in the right eye, left childhood amblyopia, and a right cataract. The old scarring in the right was probably from HSV keratitis. This was her only good eye with a visual acuity of 6/60. She was 'very visually disabled now'. It was said that 'in view of the corneal scarring we can't go ahead with the cataract surgery. I have reassured her that it will be a very guarded prognosis. Could you kindly send her an appointment to reassure her or offer her any assistance necessary."

12 It is not stated when Mrs Siari first had symptoms arising from a cataract in her right eye, but it is to be noted that the scarring, which 'probably' arose from herpes simplex virus keratitis, was 'old', and the amblyopia in her left eye is a condition that she has had since childhood. There was no further evidence before the Judge

as to what if anything had arisen since the referral to Mr Larkin. The Judge acknowledged that there was no evidence that Mrs Siari's eyesight had deteriorated, but concluded that the Sponsor's mother had 'very poor eyesight and was therefore limited in the support that she can provide the children' [46]. The Judge had previously found [43] that the Sponsor's mother, who had been helping to look after the children, was no longer able to do so as she was visually impaired..

13 The Judge held that it was not practicable or reasonable to expect that Sponsor and the children to move to Morocco for a variety of reasons set out at [45]; a finding which is not challenged by the Respondent. The Judge also held at [47] that in light of the needs of the children and the family life that has been established, the suggestion that the Appellant return to Morocco to study for the English language test, before applying for entry clearance to return to the UK, was not a 'reasonable requirement'. The Judge noted that the Appellant was at the tine of the FtT hearing pregnant and about to give birth, and ultimately held that the proposed removal of the Appellant would amount to a disproportionate interference with her family life [48].

The Respondent's appeal

14 The Respondent challenged that decision in grounds dated 13 May 2015, which argue that the Judge erred in law by:

(i) failing to acknowledge and balance the public interest in maintaining an effective immigration control against the rights of the individual, in the overall proportionality assessment;

(ii) failing to treat the rules as an important starting point in that process;

(iii) failing to refer to the considerations within Part 5A NIAA 2002; s.117B in particular.

15 Permission to appeal was granted on these interlinked grounds by Judge of the First tier Tribunal Fisher on 7 July 2015 on the basis that the grounds were properly arguable.

Hearing

16 I heard submissions from both parties. Mr Kandola adopted the grounds of appeal, amplifying them on them very little.

17 For the Appellant, Mr Khan sought to argue that there was no material error of law in the decision. He argued that the Judge had demonstrated within the determination that he had taken into account the importance of maintaining immigration control. For example, at [8], there was reference to that issue. He also referred to the Sponsor's evidence set out at [22] that he fully understood the need for immigration control. Finally, at [45] the Judge held "I have considered whether

such interference is proportionate to the need to maintain effective innovation controls." The determination disclosed no material error and was sustainable, he argued.

Discussion

18 I am of the view that the Judge has materially erred in law in determining the appeal, in the manner set out in the Respondent's grounds of appeal and summarised at paragraph 14 (i)-(iii) above. Mr Khan's references to certain passages of the decision do not indicate that the Judge adequately held in mind, as a public interest consideration, the importance of maintaining immigration control. At [8], the Judge merely recites the Respondent's position, and does not demonstrate that he engaged his own mind to address the issue of the maintenance of immigration control. Similarly, at [22], there is merely a recitation of the evidence given by the sponsor. The Judge's comments at [45] do not in my opinion establish that the Judge held clearly in mind the importance of considering the public interest question of maintaining immigration control when performing the proportionality balancing exercise.

19 As argued by the Respondent, the Administrative Court held in, *R (Ganesabalan) v SSHD* [2014] EWHC 2712:

> "12.The Immigration Rules are the important first stage and the focus of Article 8 assessments. Indeed it will be an error of law not to address Article 8 by reference to the Rules. The position is explained by the Court of Appeal in *Halleemudeen* at paragraphs 40 to 42, 47 and 51."

And, as per *Halleemudeen v SSHD* [2014] EWCA Civ 558, para 47:

> "The passages from the judgments in the cases of Nagre and MF (Nigeria) appear to give the Rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights.""

20 Having observed at [4] that "As the Appellant does not seek to rely upon the Rules in this appeal, it suffices to say that after analysis the Respondent determined that the Appellant had failed to meet the requirements of the Rules." I would respectfully disagree; it is not sufficient merely to acknowledge that an appellant does not meet the rules; rather, some degree of reference must be made to the reason why the appellant does not do so, together with a consideration of whether a particular rule closely follows rights enshrined in the ECHR, or whether there is a noticeable gap between the two.

21 Further, I am of the view that the Respondent's second ground, that the Judge did not consider the terms of the immigration rules as being a relevant starting point for the proportionality consideration, is made out.

22 Relevant to these two issues ((i) the degree to which a failure to meet the immigration rules is relevant to the assessment of the proportionately of an immigration decision, and (ii) the appropriate starting point in that assessment) is the recent case of *SS (Congo) v SSHD* [2015] EWCA Civ 387. I understand the following points to have been made within the Court's single judgment (emphasis added):

(i) If there was a wide gap between the way in which immigration rules were framed, and the protection that was rightfully afforded under Article 8 ECHR, then the practical guidance from the rules as to public policy considerations in a proportionality balancing exercised was reduced [17].

(ii) On the other hand, if the rules were fashioned so as to strike an appropriate balance under Article 8, and any gap between the rules and what Article 8 required was narrow, the court will give weight to the Secretary of State's formulation of the Rules as an assessment of what public interest required [17].

(iii) Following *MM v SSHD* [2014] EWCA Civ 985, there will generally be no or only a relatively small gap between the new LTE Rules as promulgated by the Secretary of State and the requirements of Article 8 in individual cases, including those involving Sponsors who are British citizens or refugees located in the United Kingdom [24]. Further, outside of the context of precarious family life or deportation: '...if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision.' [32].

(iv) Where the immigration rules were not satisfied, different types of cases required the presence of different factors to outweigh the public interest in the maintenance of immigration control:

* precarious in-country cases not involving children: exceptional factors [29];

* deportation: very compelling reasons [30];

* **refusal of leave to remain or leave to enter cases: compelling circumstances** [33], [40].

(v) The state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has

already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. [40].

(vi) 'The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases' [40].

(vii) 'However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave' [40].

(viii) The approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with [51].

23 Finally, s.117A NIAA 2002 now provides that in determining "the public interest question", ie the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2), Tribunals and Courts must have regard to the following considerations (in a non-deport case) set out in s.117B:

> "(1)The maintenance of effective immigration controls is in the public interest.
> (2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a)are less of a burden on taxpayers, and
> (b)are better able to integrate into society.
> (3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
> (a)are not a burden on taxpayers, and
> (b)are better able to integrate into society.
> (4)Little weight should be given to—
> (a)a private life, or
> (b)a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
> (5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom."

24 It is not necessary to set out those provisions in terms within a decision, so long as it is apparent that the relevant test has been applied (Dube (ss.117A-117D) [2015] UKUT 90 (IAC)). However, I am not satisfied that the present decision discloses that the Judge had considered the above considerations adequately or at all.

25 I am of the view that these matters amount to material errors of law in the manner in which the Judge allowed the appeal under Article 8 ECHR. I am of view that the determination is unsustainable and I set it aside, although I have retained certain findings of fact, as discuss below.

Submissions - re-making

26 I reserved that decision in the hearing, but invited the parties to make submissions as to how the appeal should be re–decided by the Upper Tribunal, in the event that I were to find that the Judge's decision contained a material error of law. The parties agreed that, given the findings of fact made by the First tier Tribunal, which would not in themselves be vitiated by error of law by the challenge brought by the Respondent, that no further oral evidence would be necessary. The parties therefore made further oral submissions, which I have recorded in the record of proceedings.

27 Mr Kandola relied on the reasons for refusal letter dated 20th of November 2014, and re-iterated the points made in the Respondent's grounds of appeal to the Upper Tribunal which have just been discussed above. Mr Khan made submissions in support of the appeal, including asserting that but for the Appellant having limited leave to remain in the UK as a visitor, she would have satisfied the rules. If the Appellant had merely waited to become an overstayer and then made her application for leave to remain, she would not be excluded under immigration status requirements, so long as she satisfied Section Ex1. To dismiss her appeal on the grounds that she applied sooner, as a visitor, rather than later, as an overstayer, would be perverse. There were compelling reasons to allow the appeal outside the rules.

Discussion - re-making

28 In re-deciding this appeal I retain the following findings of fact from the First tier decision:

(i) The Appellant, sponsor, and his four children have developed a family life in the UK. [43]. The Appellant is the principal carer for the four step children,

including help with schooling, homework, cleaning, cooking and bathing. They have an excellent rapport (evidence at [15], which was credible [41]).

(ii) It would not be practicable or reasonable to expect the sponsor and the children to move to Morocco [45].

(iii) Although I am rather sceptical about the issue of whether the Sponsor's mother has suffered any deterioration in her eyesight or otherwise in her health since the Appellant's arrival in the UK, I accept that due to her very poor eyesight she is of limited support in providing care to the children - [43] and [46].

(iv) The children have come to rely on the Appellant and would be adversely affected by the Appellant's departure from UK [46].

Additionally, I must take into account that the Appellant now has a child who is approximately 3 months old. The house in which the family lives is in fact the Sponsor's mother's house (representations, Respondent's bundle, M5).

29 It is, as per my error of law ruling, necessary to acknowledge that the Appellant fails to meet the immigration rules, in the ways set out at paragraph 8(i)-(iv) above. The Appellant's claim was never seeking to rely on leave to remain as a parent, but in relation to an application for leave to remain as a partner, it is important to note that the Appellant fails:

(i) on a mandatory suitability ground (the failure to Kings Court Chambers to rely to a request for further evidence);
(ii) under the immigration status requirements; and
(iii) by non-satisfaction of the English language requirement (a ground not actually set out in the Respondent's original decision, but it is not disputed that she has not passed a relevant English language test).

30 Neither the suitability ground nor the immigration status requirement can be overcome by the Appellant seeking to establish that she satisfies Section Ex.

The consequence of non-satisfaction of the rules

31 Appendix FM enables family migration under the rules in some, but not all family life scenarios, as is acknowledged by Sales J in *Nagre, R (on the application of) v SSHD* [2013] EWHC 720 (Admin) paras 26-27. That fact did not result in Appendix FM being unlawful (*Nagre*), nor are the financial eligibility requirements unlawful - *MM & Ors, R (On the Application Of) v Secretary of State for the Home Department (Rev 1)* [2014] EWCA Civ 985.

32 The fact that the present Appellant has a family life in the UK, but does not satisfy the requirements of Appendix FM, that does not necessarily mean, applying the analysis of the Court of Appeal in *SS (Congo)*, that there is a wide gap between the

way in which immigration rules are framed, and the protection that is rightfully afforded under Article 8 ECHR. In my view, the rules have indeed been fashioned so as to strike an appropriate balance under Article 8, and the gap between the rules and what Article 8 requires is narrow.

33 The 'gap' between the present Appellant's circumstances, and her satisfaction of the rules, does not arise because the Secretary of State overlooked or failed to cater for some form of family life when drafting the immigration rules. Rather, the Appellant simply fails to satisfy certain conditions that the Secretary of State has consciously decided to include within the immigration rules as pre-requisites for leave to remain under the rules on the grounds of family life: ie, being a 'suitable' candidate; not entering as a visitor and later seeking to remain on family life grounds; and speaking English. The fact that the Appellant does not meet these requirements does not mean that the nature of her family life is not adequately catered for within the rules; rather, the rules consciously preclude her from qualifying for leave to remain on family life grounds.

34 I therefore find that for the Appellant, there is no wide gap between the rules and the nature of the family life that she is seeking to protect. I find the fact that the Appellant does not satisfy the immigration rules them is a weighty factor against her in performing the proportionality balancing exercise.

35 However, I do not search for 'an arguable case that there may be good grounds for granting leave to remain outside the Rules' before proceeding to consider the Appellant's possible entitlement to leave to remain under Article 8 ECHR, as may appear to be indicated by *Nagre* at [30], as the Court of Appeal in *MM Lebanon* at [129] considered that there was "little utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker". The Court of Appeal in *SS Congo* described the task to be performed in the following way:

> "44 ..., If there is a **reasonably arguable case** under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."

36 I find, given the existence of family life, and having regard to the best interests of the children, that there is at least a reasonably arguable case for the Appellant under Article 8, which I therefore go on to consider, taking into account in particular the considerations under s.117B NIAA 2002.

37 I take into account the following considerations:

(i) The maintenance of effective immigration controls, is in the public interest, and I note that the Appellant does not meet the requirements of the rules (s.117B(1) NIAA 2002).

(ii) The Appellant is not able to speak English (at least to the required standard under Appendix FM) (s.117B(2) NIAA 2002).

(iii) The Appellant is probably financially independent, as her husband earns approximately £36,000 per year, although it is doubtful that the Appellant has provided evidence of that fact compliant with Appendix FM-SE. However, for the purposes of this proportionality assessment I am prepared to accept that the Appellant is financially independent (s.117B(3) NIAA 2002).

(iv) The Appellant has not been in the UK unlawfully, and so no issue arises under s.117B (4) NIAA 2002.

(v) The Appellant entered as a visitor and her position in the UK has been 'precarious'. Any private life (as opposed to family life) that she has developed in the UK is to be given little weight, by reason of s.117B(5) NIAA.

(vi) The public interest does not require the Appellant's removal, as she has a genuine and subsisting parental relationship with five qualifying children (all the children are British - the Sponsor's four children, and the Appellant's new born child, by reason of being born in the UK where one parent is British) and, as per the preserved findings of the FtT, it would not be reasonable, to expect these children to leave the United Kingdom.

38 Considerations (i) and (ii) militate against the Appellant. (iv) and (v) are irrelevant. (iii) and (vi) militate in favour of the Appellant; (vi) strongly so. However, I do not consider that positive satisfaction of s.117B(6) as being the end point of the deliberations on whether removal is disproportionate; but rather as a significant factor to take into account.

39 I have regard to the best interests of the children as a primary consideration. I find that the family life that has been developed between the Appellant and her step-children has come about as a result of the Appellant entering the United Kingdom as a visitor, and then deciding to remain in the United Kingdom. Although remaining in the United Kingdom and developing these bonds with the children created a situation where the children were at risk of another separation from a mother-figure, I accept the Appellant's evidence that she took the role of second mother to the children out of a genuine desire to look after the children and cater for then needs. I find that it is in the children's best interest that the Appellant remain in the United Kingdom with them, and to care for them. However, the best interests of the children are not a determinative factor.

40 I hold firmly in mind that the Appellant's step children lost their biological mother only recently, and that they need stability. I accept that if the Appellant had to leave the United Kingdom, even if only for a temporary but uncertain period, for the purposes of learning English and making an application for entry clearance, this is likely to have a very significant averse effect on the children, and that her leaving the UK may feel to them like losing another mother.

41 I am also of the view that requiring the Appellant to leave the United Kingdom to return to Morocco for the purposes of making an application for entry clearance from abroad would require the Appellant to take her newborn child with her to Morocco. She is the primary caregiver for this child. Requiring the Appellant's new born child to leave the United Kingdom would deprive the Sponsor of developing important bonds with their very young child for a number of months at a crucial time in the development of the child and the development of the relationship between father and daughter.

42 Although the Appellant, thought the inaction of her former representative, fails to meet the suitability requirements of Appendix FM, this in my view precludes her from being granted leave to remain under Appendix FM. I do not consider that failure to meet a suitability requirement under Appendix FM mandates refusal of leave to remain outside of the immigration rules. I have taken into consideration the policy issues lying behind the suitability requirements of Appendix FM. The other mandatory grounds for refusal on suitability grounds (S-LTR.1.2 to 1.6) relate to serious criminality, such that it is conducive to the public good for a person to remain in the UK, or issues of character and conduct such it is undesirable for a person to remain in the UK. Although the Secretary of State has found it appropriate to include a failure to respond to a request for further evidence as amounting to a mandatory ground for refusing leave to remain under Appendix FM, it is clear that such a failure is of a different nature than the criminality and conduct issues considered in S-LTR.1.2 to 1.6.

43 Even taking the Appellant's failure to respond to the Respondent's request for further information into account, I find that the Appellant has now produced sufficient evidence to the FtT and to this Tribunal to establish that she lives with the children. The failure to provide that evidence to the Respondent does not in my view represent a significant factor requiring refusal of leave to remain outside the rules.

44 It is ultimately the likely adverse consequences on the Appellant's new daughter and her step children that I find amount to sufficiently compelling circumstances in the present appeal (SS Congo v SSHD, para 33), to find that requiring the Appellant to leave the United Kingdom would amount to a disproportionate interference with the Appellant's right to private and family life in the United Kingdom.

Decision

45 I find that the making of the decisions by the First tier Tribunal involved the making of an error of law.

46 I set aside the First tier decision.

47 I re-decide the Appellant's appeal, allowing her appeal on human right grounds.

Signed:

Deputy Upper Tribunal Judge O'Ryan

Date: 22 September 2015