Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17998/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 March 2016	**On 11 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FATMA ELZAHRAA KHALIL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs. N. Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Hindson, which was promulgated on 7 August 2015. Mrs Khalil (hereafter "the claimant") is a citizen of Egypt born on 23 April 1966.

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2. The claimant's application for indefinite leave to remain as a partner was refused by the Secretary of State on 28 April 2015. The appeal was decided by First- tier Tribunal Judge Hindson on the papers. The Judge noted that the claimant had extant leave to remain as the dependent of a Tier 1 Migrant, valid until September 2016. The Judge concluded that as the claimant did not have leave to remain as a partner under Appendix FM of the Rules, she could not qualify for leave in that category there under. The Judge proceeded to consider the appeal contrary to Article 8 of the ECHR. The Judge was of the view that the facts in the appeal required consideration of the principles enunciated in **Chikwamba v SSHD [2008] UKHL 40** as the sole basis of refusal was to require the claimant to return to Egypt to make an application for entry clearance. The Judge noted that there was no dispute the claimant's husband had been granted ILR. The Judge noted with reference to the refusal letter that one of the claimant's children was "settled" in the UK, but there was no explanation why the other child was not. The Judge concluded that it was unreasonable to expect the claimant to return to Egypt with either one or both of her children, or to leave them behind in order to make and application to return. The Judge then stated as follows at paragraph 14:

   "I therefore allow the appeal under Article 8 but to this limited extent. The decision is to be remitted back to the Secretary of State so that a decision can be made on consideration of those components of the Rule that have not been considered."

   The Judge gave notice of his decision in the following terms:

   "The appeal is allowed on human rights grounds."

3. The appeal by the Secretary of State is pleaded on the grounds that the Judge erred by requiring the Secretary of State to consider the Immigration Rules when a finding had been made that the claimant did not meet the Rules. It was further argued that the Judge erred in allowing the appeal under Article 8 of the ECHR.

4. The Secretary of State's appeal against this decision came before a Judge of the First-tier Tribunal to review it and to decide whether or not to grant permission to appeal. On 16 February 2016 Judge Chohan granted permission to appeal finding that the Judge had arguably erred in law.

The hearing before the Upper Tribunal

5. The claimant failed to attend the hearing. The Tribunal was satisfied that the claimant had been duly notified of the date, time and place of hearing. There was no explanation for the claimant's absence. As I was not satisfied that the situation would be any different if the Tribunal adjourned the appeal, I considered that it was in the interests of justice to proceed in the claimant's absence pursuant to rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008. I heard submissions from Mrs Willocks-Briscoe at the end of which I reserved my decision.

Decision on Error of Law

6. I am satisfied that the Judge's decision involved the making of errors of law such that his decision must be set aside.

7. With respect to the Judge, this is a confused decision which lacks clarity and reasoning. At [11] he finds that the claimant cannot meet the requirements of Appendix FM of the Rules. However, at paragraph 14 he states thus:

> "... The decision is to be remitted back to the Secretary of State so that a decision can be made on consideration of those components of the Rule that have not been considered".

8. It seems that the components of the Rule the Judge concluded had not been considered was in respect of the financial requirements [12]. Whilst, it is apparent from the letter of refusal that the financial requirements had not been considered because the claimant could not meet the Rules on grounds of eligibility, there was simply no basis in fact and law to remit the appeal to the Secretary of State for reconsideration. The Rules could not be met.

9. Notwithstanding the flawed approach under the Rules, the Judge ultimately allowed the appeal on human rights grounds contrary to Article 8 of the ECHR. In so doing his findings encapsulated at [13] state as follows:

> "It is not disputed by the decision maker that the appellant's husband has ILR. The refusal letter makes reference to one of the appellant's children being "settled", though it does not explain why, or why the other child is not. In any event, it seems to me to be entirely unreasonable to expect the appellant and one or both of her children, to leave the UK and return to Egypt in order to make an application there to join her settled husband. It is equally unreasonable to expect her to leave one or both of her children in the UK whilst she goes back to Egypt."

10. It was fundamentally on this basis that the Judge allowed the appeal. Whilst the decision is silent as to the answer to the first four questions in **Razgar [2004] UKHL 27** and fails to have regard to the public interest, which is in itself a material error, the difficulty with [13] is that it is conclusionary and stands unsubstantiated by reference to any evidence either at this juncture or elsewhere in the decision. I thus have no hesitation in finding that the Judge's decision lacks sufficient reasoning and cannot stand. I set aside the decision of the First-tier Tribunal.

Re-making the Decision

11. The claimant waived her right to an oral hearing before the First-tier Tribunal. She has had sufficient time to submit evidence in support of the appeal and she has not attended today. I am satisfied that I can and should proceed to remake the decision as Mrs Willocks-Briscoe invited me to do.

12. I re-make the decision on the basis of the evidence before the First-tier Tribunal, and the submissions that I have heard today. I am dismissing this appeal for the following reasons.

13. Whilst Mrs Willocks-Briscoe pointed out that the claimant is not facing removal as she has extant leave to remain until September 2016, the claimant nevertheless has raised Article 8 and, whilst the exercise is somewhat academic in the circumstances,

section 82 of the Nationality, Immigration and Asylum Act 2002 permits a hypothetical consideration of Article 8 in the event of a removal.

14. The evidence in the appeal is limited to say the least. Neither party provided an appeal bundle. There is a copy of the refusal letter, Notice of Appeal, Grounds of Appeal and some supporting documents.

15. I first turn to consider the Immigration Rules. It is apparent that the claimant does not qualify for leave as a partner under Appendix FM of the Rules on eligibility grounds for the reasons given by the Secretary of State in her decision. As the Exception to Appendix FM is not a freestanding provision the claimant does not qualify for leave on that basis either and, in any event, there is no evidence to substantiate that the criteria under either limb of the exception is met. Further, the claimant fails to qualify for leave on private life grounds pursuant to paragraph 276ADE of the Rules. She has not lived in the UK for a continuous period of 20 years. In relation to paragraph 276ADE(1)(vi) there is no evidence to substantiate a finding that the claimant has no ties to Egypt (that being the version of the Rule in force at the date of application). Indeed the claimant's passport shows that she has visited that country on several occasions since her arrival in December 2009.

16. As for Article 8 outside of the Rules, there is no dispute that the claimant has an established family life with her settled husband and her two children one of which is also settled here. Other than these bare facts there is no evidence as to the nature and circumstances of the claimant's family life or private life for that matter. I thus concur with the submission of Mrs Willocks-Briscoe that there is no evidence that could substantiate an interference of sufficient gravity so as to engage Article 8, but even in the event that there was such an interference, there is no evidence that it would be unreasonable to expect the claimant to return to Egypt either permanently with her family or on a temporary basis. For similar reasons, the claimant has failed to prove that the public interest considerations that the Tribunal must have regard to should not prevail in her case. In the absence of any evidence in respect of the children's age, health and circumstances the only conclusion that I can draw is that it is in the best interests of the children, which I have considered as a primary consideration, for them to remain with their mother. Such is the lacuna in the evidence in this case that it only permits one conclusion.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Bagral