Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03058/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
on 3 July 2017	**on 12 July 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JDO
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Asumwe of Pillai & Jones Solicitors
For the Respondent: Ms K Pal Senior Home Office Presenting Officer.

ERROR OF LAW DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Keith promulgated on 10 November 2016 following a hearing at Harmondsworth in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Ghana born in 1976 who entered the United Kingdom on 4 October 2004 via Greece and Belgium on a Schengen Visa. The appellant gave birth to two children, J on 4 September 2005 and K on 29 October 2012. J is a British citizen, a fact recorded by the Judge.

3. Following the rejection of an earlier application for leave to remain under the 10-year route of the Immigration Rules, on 8 May 2015 the appellant applied for leave to remain on the ground her human rights will be infringed if removed, specifically her relationship with her two children and her private life.
4. Having considered the evidence the Judge sets out findings of fact at [29 – 36] of the decision under challenge which may be summarised in the following terms:

    a. The appellant is not regarded as a witness of candour. The Judge was entitled to make adverse findings of credibility where there is readily available evidence, which inexplicably is not produced [29].
    b. The appellant contends that if she were removed the children would be forced to leave with her. Virtually no evidence of family arrangements was provided. Until the appellant gave oral evidence she had provided no substantive evidence about the person she claimed to live with, described as "Auntie". The appellant confirmed she and the children have lived with "Auntie" at the same address which also appears on their birth certificates, however the GP notes for J refer to a different arrangement [30].
    c. The implication from the medical reports shows that "Auntie" lives at the address specified on the children's birth certificates whilst the appellant and Mr J live elsewhere, and for four days each week, J is sent to "Auntie". The consequence of this is that the appellant cannot have been telling the truth about where she lived, and with whom, and had not established where she is living and with whom. It appears the appellant was living with Mr J at an address other than where J lived for the majority of his time, at least in 2007, and that "Auntie" played a role as a primary carer of J. No reliance was placed upon the appellant's assertion that "Auntie" was not a blood relative as there was no evidence of this person's nationality or current immigration status [31].
    d. It was not found that if the appellant were removed from the United Kingdom it would follow that J or his sister would be expected to return to Ghana with her [32].
    e. The nature the appellant's private life is unclear and there is no reason to conclude the appellant could not continue her worship or develop a caring career in Ghana [33].

5. At [34 – 36] the Judge writes as follows:

> "34. Appendix FM of the Immigration Rules and in particular, Section R-LTRPT (Requirements for limited leave to remain as a parent) deal entirely with the Appellant's case. They deal with a qualifying child (paragraph .2.2); and sole parental responsibility (paragraph.2.3 and 2.4, which the Appellant specifically alleges). While I do not propose to repeat their provisions in this determination it cannot be said that

there is any reason whatsoever to consider the Appellant's case outside the Immigration Rules. To do so would be little more than effectively granting a right of appeal under the Immigration Rules, something which I do not have jurisdiction to grant.

35. I conclude that as the Appellant's case fell squarely within Appendix FM and she did not have a right of appeal under the Immigration Rules, the Appellant's claim in outside the Rules in respect of her human rights must fail, as a consequence of the decision in *SSHD v Congo*. I reach this conclusion noting the best interests of the Appellant's children, in the context where the nature of her day-to-day family relations with them was entirely unclear.

36. In the circumstances, I conclude that it was not necessary to consider the Appellant's family life outside the Immigration Rules is a separate Article 8 claim under the European Convention on Human Rights ("ECHR"). Had I needed to do so, the Appellant's assertion that her children would have been forced to leave with her would have been undermined by the lack of clarity over her domestic arrangements."

6. Following the dismissal of the appeal the appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted by a judge of the Upper Tribunal. The operative parts of the grant being in the following terms:

"2. Even though the appellant appears to be legally represented the grounds of appeal are poorly pleaded. They do not seek to identify any arguable errors of law save to disagree with the judge's finding that the appellant had failed to show that she lived with her two children as stated.

3. Given the importance of the human rights issues involved I have considered the First-tier Tribunal decision and conclude that there are arguable errors that are sufficiently obvious on the face of the decision to justify granting permission to appeal despite the poor quality of the grounds.

i. While the judge was correct to say that there is no longer an appeal under the immigration rules it is arguable that the immigration rules are nevertheless relevant to a proper assessment of Article 8. The immigration rules are said to reflect the respondent's policy relating to where the balance will be struck between the right to respect for private and family life and the legitimate public interest considerations; see GEN.1.1. and *SF and others (Guidance, post – 2014 Act) Albania* [2017] UKUT 00120. Whether an applicant meets the private or family life requirements now included in the immigration rules is arguably relevant to a proper assessment of Article 8. It is arguable that the judge erred in failing to consider whether the appellant or the children met the requirements of the rules.

ii. The judge failed to have regard to material issues that were relevant to a proper determination of the appeal. Both children were refused leave to remain alongside their mother. Their immigration status formed part of the decision that was under

appeal. Whether or not the judge accepted that the appellant was living with her children it is arguable that he should have gone on to make findings in relation to the children, in particular, one of the children was naturalised as a British citizen since the respondent's decision.

iii. While it seems clear that the appeal was poorly prepared, and that little evidence was produced in support of the claim, it is at least arguable that the judge erred in relying on rather vague and outdated evidence buried in medical records for 2007, when more up-to-date evidence was available indicating that the appellant and her children were likely to be living at the same address.

4. Permission to appeal is granted and all the above grounds."

Error of law

7. There are several problems with the decision under challenge some of which are highlighted in the grant of permission to appeal. Whilst it is accepted the Judge was not assisted by a poorly prepared case, many the difficulties relate to the Judges approach to the way in which the appeal was determined.
8. The Judge was aware of the fact the appellant had two children one of whom is a British citizen. The Secretary of State's policy in relation to a British national child is that they will not remove the child from the United Kingdom if the effect of that event is to remove the child from the territory of a Member State. This is the application of the *Zambrano* decision within the respondent's policy.
9. If J cannot be removed the Judge was required to consider what other options were available.
10. The Judge did not appear to accept the appellant had sole responsibility for the child, indicating it was in fact shared between possibly three people, but removing the appellant would still have meant that the mother of the children would have been taken away from J or, if the appellant and J's sister left, that J would be deprived the company of his sibling. If the appellant left on her own, leaving the children in the United Kingdom, both children would lose the support and input of their mother.
11. At [34] the Judge found that whilst not treating the Rules as determinative there was no reason to consider the appellant's case outside the Immigration Rules, which is treating the provisions of the Rules as being determinative of the issue on the known facts. Such an approach is based upon a misdirection of law. It is now known that earlier authorities suggesting there was no need to consider the matter outside the Rules are no longer good law. The jurisdiction of the First-tier Tribunal and Upper Tribunal is a human rights jurisdiction meaning that what is required by any decision-maker is a structured application of the *Razgar* guidance.
12. The suggestion by the Judge that considering the matter outside the Rules would "be little more than effectively granting a right of appeal under the Rules" is wrong. It also suggests incorrect thinking as it

maintains the argument that the issue should be determined through the lens of the Rules which is not the view of the Supreme Court.

13. The Judge was right to look at the Rules first as they set out the Secretary of State's view and policy relating to how the balance in human rights questions should be struck. To ignore the merits of an appeal under the Rules would therefore be to exclude from the proportionality assessment the respondent's arguments as to why an appeal should be dismissed. This is not granting a right of appeal under the Rules, as no such right of appeal exists, but incorporating these details into the proportionality assessment, if one is required, as part of a right of appeal on human rights grounds.
14. The Judge in [36] concluded it was not necessary to consider the family life outside the Rules as a separate article 8 claim which, on the facts, is an arguable misdirection in law.
15. At [32] the Judge found that if the appellant were removed from the United Kingdom it would not necessarily follow that J or his sister will be expected to return to Ghana with her. If it was suggested the appellant could leave the United Kingdom and apply to re-enter lawfully this is not expressly made out but, if so, the merits of such a suggestion does fall outside the Rules - see *R (on the application of Chen) v SSHD (Appendix FM – Chikwamba - temporary separation – proportionality) IJR* [2015] UKUT 00189 (IAC).
16. Because the Judge limited consideration of the matter to the Rules, even though they are said to be Section 55 compliant, there are no findings in relation to either the best interests of the children or the reasonableness of the Judges proposals.
17. The Judge was required to determine the matter as a human rights appeal as this is the ground on which the appeal was dismissed.
18. The determination sets out the correct legal self-direction at [28] that if there was a need to consider the appeal outside the Immigration Rules then the decision in *Razgar* must be considered, but the Judge failed to do so.
19. It was agreed between the parties that, considering the fact the Judge had failed to undertake a proper article 8 assessment, the determination had to be set aside as the findings made therein had not been formulated on a proper basis. It was also agreed the appeal had to be remitted to Hatton Cross to be heard by Judge other than Judge Keith.
20. As stated before the Tribunal, it may be that the outcome will be the same it may not. The difficulty is that until a proper approach is adopted, sufficient findings made, and adequate reasons given, it is not possible to say what the outcome of the appeal may be. The error made is therefore material.
21. The status of J as a British national child shall have to be factored into the assessment.

Decision

22. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal hearing centre sitting at Hatton Cross to be heard by a judge nominated by the Resident Judge other than Judge Keith.**

Directions

23. Listing and further case management direction shall be given by the Resident Judge at Hatton Cross.

Anonymity.

24. The First-tier Tribunal made make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 3 July 2017