Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/35304/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 August 2015	**On 21 September 2015**

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIA ESTRELLA BENITEZ GIRALDO
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Miss A Fijiwala, Home Office Presenting Officer
For the Respondent: Ms R Akther, Counsel

DECISION AND REASONS

1. The Claimant is a Colombian citizen with two grandchildren by her son. Her grandchildren are British Citizens and her son has indefinite leave to remain. First-tier Tribunal Judge Veloso allowed her human rights appeal under Article 8 against the Secretary of State's decision to refuse her further leave to remain, either pursuant to paragraph 276ADE of the Immigration Rules or outside the Rules, on the basis of *Nagre* exceptionality.

2. The Secretary of State appeals with permission against that decision, arguing that the First-tier Tribunal should have but did not consider the Claimant's case under the Immigration Rules and that insufficient weight was given to the public interest. The Claimant has a son in the UK who has a lifelong condition, for which he has been waiting for an operation. He came to the UK with his father in 1995 at the age of 13, but his father went back to Colombia in or about 2011. The Claimant's son is now 33 years old, with a partner and children of his own: he is working and no longer requires daily assistance. His father remarried in Colombia. The Claimant's son is not the principal carer for his children, who live with his ex-partner during the week and see him and the Claimant on weekends. It is the Secretary of State's case that the relationship between the Claimant and her grandchildren can reasonably be continued by means of modern means of communication.

3. Permission to appeal was granted by First-tier Judge P J M Hollingworth on the basis that arguable errors of law had arisen in relation to the proportionality exercise in respect of those matters to which weight should be accorded and further in respect of the application of section 117 of the 2002 Act.

Submissions

4. Ms Fijiwala submitted that the First-tier Tribunal erred in concluding that the provisions of paragraph 276ADE did not apply to the Claimant. Ms Fijiwala referred us to *Singh and Khalid v Secretary of State for the Home Department* [2015] EWCA Civ 74. The Court of Appeal decided in that case that with effect from the introduction of HC 565 on 6 September 2013 the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE-276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result was that the law as it was held to be in *Edgehill v Secretary of State for the Home Department [2014]* EWCA Civ 40 only obtained as regards decisions taken in the two month-period between 9 July 2012 and 6 September 2012. Since the Secretary of State's decision in this case was made on 2 September 2014 it fell outside this window and therefore the Judge should have applied the provisions of paragraph 276ADE.

5. Ms Fijiwala submitted that the First-tier Tribunal therefore failed to apply the 'two-stage approach'. She referred us to [33] in the judgment of Richards LJ in *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387 and submitted that that compelling circumstances needed to be identified to support a claim for grant of leave to remain outside the new Rules in Appendix FM. The Judge, in failing to undertake the two stage approach, had failed to accord any weight to relevant public interest considerations. At [44 & 45] in the judgment of Richards LJ in *SS (Congo),* the Court gave guidance on the proper approach:

> "44. The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to

be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. 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.

45. Sometimes, the latter stage of the analysis will be covered by the text of the Rules themselves, as in relation to the Rules governing deportation of foreign criminals reviewed in *MF (Nigeria)*. Those Rules laid down substantive conditions which, if satisfied, would lead to the grant of LTR, but also stated that LTR might be granted "in exceptional circumstances" if the substantive conditions were not satisfied in a particular case. Where the Rules take this form, it can be said that they form a "complete code", in the sense that both stages of analysis are covered by the text of the Rules. But this does not take one very far, since under the "exceptional circumstances" rubric one still has to allow for consideration of any matters bearing on the application of Article 8 for the purposes of the second stage of the analysis: see, e.g., *AJ (Angola)*, above, at [46] and [55]. This is the basic point made by this court at paras. [44]-[46] of its judgment in *MF (Nigeria)*."

6. The First-tier Tribunal, in Ms Fijiwala's submission, had not assessed the force of the public interest given expression by the Rules. The Claimant could not have met the requirements of paragraph 276ADE. The First-tier Tribunal found at paragraph 32 that she would have no problems re-integrating. She further submitted, that if the First-tier Tribunal were correct to consider the Claimant's case outside the Rules, the Claimant's son had to undergo an operation but he had a partner in the UK and this was not considered in the proportionality balance. He did not require help on a daily basis. It was unclear from the evidence whether at the date of hearing a further operation would be needed. The Judge should have considered the circumstances at the date of the hearing. The effect of her return on the grandchildren was considered at paragraph 36. It was accepted that the children lived with their mother and had their parents.

7. Ms Fijiwala also submitted that the First-tier Tribunal had not properly applied s117B (4) of the 2002 Act. The First-tier Tribunal had made material errors of law.

8. Ms Akther submitted that the First-tier Tribunal had made no material errors of law in the decision. The First-tier Tribunal said at paragraph 26 of her decision that the consideration of the Claimant's application under

paragraph 276ADE had not materially impacted on the Secretary of State's decision. Miss Akther submitted that the Claimant could not in any event succeed under paragraph 276ADE. The Rules were the first port of call but the First-tier Tribunal could not be criticised for applying Article 8 outside the Rules. Family life in the UK had been established between mother and son. In 2002 her son was only just an adult. He was her only son and she could not go back to other children. The First-tier Tribunal had given full reasons for the decision. Her son had a severe heart condition. He was still awaiting further surgery. There was the ongoing danger of a heart-attack. The Article 8 exercise was carried out correctly considering the *Razgar* test. The provisions of section 117B (4) were not engaged as the Judge's findings were in relation to family rather than private life. With regard to s55 of the UK Borders Act, the Secretary of State was wrong to distinguish between parents and grandparents.

Decision and reasons

9. We deal with each of the Secretary of State's grounds in turn. The first ground is in essence that the First-tier Tribunal erred in concluding that the provisions of the new Rules were not material. The appeal to the First-tier Tribunal is against a decision made on 2 September 2014 to remove the Claimant by way of directions under section 10 of the Immigration and Asylum Act 1999, over two years after the introduction of the new Rules.

10. The grounds of appeal are dated 1 February 2015 and rely on the case of *Edgehill v Secretary of State for the Home Department* [2014] EWCA Civ 40. On 12 February 2015 the Court of Appeal handed down the judgment in *Singh***.** The *Edgehill* principles are now restricted to decisions made between 9 July 2012 and 6 September 2012: the decision under appeal was taken on 2 September 2014, well outside the *Edgehill* window of application, and we are satisfied, having regard to the *Singh* guidance, that the First-tier Tribunal erred in applying *Edgehill* to the facts of this case.

11. The First-tier Tribunal failed to approach the appeal on the basis of the guidance given by the Court of Appeal in *Singh*. Failure to apply the *Singh* guidance is a plain error of law. The question for us is whether it is material, that is to say, whether applying the correct approach, the outcome might have been different. The new Rules do apply and the correct approach therefore was for the First-tier Tribunal to apply the provisions of paragraph 276ADE and Appendix FM, and then to consider exceptionality.

12. The Appellant cannot meet the requirements of paragraph 276ADE. As stated above, she falls short of the residence requirements by seven years and it has not been argued on her behalf that there are very significant obstacles to her integration in Columbia. The evidence recorded by the First-tier Tribunal was that she had run businesses and had family there. Her inability to meet the requirements of the Rules by a significant margin weighs heavily on the public interest side of the scales.

13. For the Claimant, Ms Akther sought to persuade us that the error was immaterial, since the claimant could not have succeeded within the Rules, applying paragraph 276ADE and Appendix FM. Although the Rules were the first port of call the First-tier Tribunal could not be criticised for applying Article 8 outside the Rules.

14. The Secretary of State's answer to this, as set out at paragraph 6 of the grounds and expanded on by Ms Fijiwala, is that the First-tier Tribunal misdirected itself as to the threshold of proportionality.

15. We have considered the case law in relation to the two-stage approach and the interaction between the Immigration Rules and the public interest considerations in the assessment of proportionality.

16. In *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin), Sales J (as he then was) stated at [29] that:

> "... the new Rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave".

17. The two-stage approach has been approved by the Court of Appeal in a number of cases including *Singh and Khalid v SSHD* [2015] EWCA Civ 72. The decision-maker should adopt a two-stage process. The first question is whether the individual can succeed under the Rules and the second is, if not, can he or she succeed outside the Rules under Art 8. There is no threshold requirement of arguability before a decision maker reaches the second stage. However, the extent of any consideration outside the Rules will depend upon whether all the issues have been adequately addressed under the Rules. In *Singh and Khalid* in the Court of Appeal, Underhill LJ opined at [64]

> "...there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

18. In *SS (Congo)* [2015] EWCA Civ 387 at [32] Richards LJ in the Court of Appeal clarified the relationship between the Immigration Rules and the public interest considerations:

> "However, even away from those contexts, 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. As Beatson LJ observed

in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558; [2014] Imm AR 6, at [40], the new Rules in Appendix FM:

> "… are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been."

Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (para. [47])."

19. At 33 Richardson LJ further observed:

> "In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM."

20. At paragraphs 44 and 45 the Court set out the proper approach cited at paragraph 5 above. It is clear therefore, that in an appeal under the new Rules, where an applicant cannot satisfy the requirements of the Rules, the Rules are to be given greater weight than a starting point and will inform the proportionality assessment as an expression of the public interest. Even if an applicant is unable to satisfy the requirements of the new Rules, they remain material to the assessment of the weight to be attached to the public interest in the proportionality exercise. The Tribunal's failure to consider the two stage test therefore in our view inarguably impacted on her assessment of proportionality.

21. For the above reasons we conclude that the First-tier Tribunal materially erred in law and the decision is to be set aside.

Re-making of decision

22. We proceed to re-make the decision on the basis of the evidence before us and the parties' respective submissions.

23. It was conceded by Mr Akther that the Claimant cannot meet the requirements of paragraph 276ADE. It is also conceded that she is unable to demonstrate that there would be very significant obstacles to her integration into Colombia. The existence of family life is not disputed.

24. We have therefore considered whether there is a good claim outside the Rules. We remind ourselves that the Rules are to be given greater weight

than a starting point and will inform the proportionality assessment as an expression of the public interest.

25. We must however consider the nature of that family life, for the purpose of assessing the proportionality of removing the Claimant. The Claimant's grandchildren do not live in the same household as she, nor in the same household as her son. The Claimant's son and the children's mother separated in 2012.

26. The Claimant has obtained a Contact Order dated 9 January 2012 under which she sees her grandchildren when they stay with her from Saturday to Sunday afternoon and she stays at their mother's house at least one day during the week. A letter before the First-tier Tribunal from the children's mother dated 27 November 2014 confirms that the Claimant sees them regularly and states that she has had 'huge impact' on their lives. This evidence was not challenged in the submissions recorded by the First-tier Tribunal. Until they were 6 and 3 years old the Claimant lived with her grandchildren. We accept on the basis of this evidence that she has a close relationship with her grandchildren.

27. The medical evidence goes back to 1997 and demonstrates that her son's heart condition arose as a result of rheumatic fever. The Claimant's statement describes her concerns and fears as the mother of a sick child. His witness statement describes a special bond with his mother as a result of the fact that she was always by his side. We accept, that particularly in view of her son's serious health condition and the period they have lived together in the United Kingdom, their relationship is a very close one.

28. In addressing the questions in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 we find that the proposed interference is of sufficient gravity to engage the operation of Article 8, the interference is in accordance with the law and necessary in a democratic society. The remaining question is therefore whether the interference is proportionate to the legitimate public end sought to be achieved.

29. By virtue of section 117A of the Immigration Act 2014, in considering the public interest question, we must have regard to the considerations listed in section 117B. Subsection (2) provides that "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). The public interest provisions are contained in primary legislation and override existing case law. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise.

30. In *Dube (ss.117A-117D)* [2015] UKUT 90 the Upper Tribunal held that Judges are duty bound to "have regard" to the specified considerations. In *AM (S117B) Malawi* [2015] UKUT 260 the Upper Tribunal held that an appellant can gain no positive rights to a grant of leave to remain from either s117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. Since family life is not in dispute, section 117B(4) has no impact on our decision, since it only directs that

little weight be given to *private* life established when the person has precarious or no status in the United Kingdom, so that no difference exists in relation to family life between the pre- and post- July 2014 position.

31. We have considered the strength of the Claimant's family life ties in the United Kingdom. The Appellant's son is her only child and his children are her only grandchildren. He is 33 years old and his children are 9 and 7 years old.

32. According to the medical evidence in the Claimant's bundle with which no issue was taken before the First-tier Tribunal, her son suffers from post-traumatic heart disease. He had an aortic and mitral valve repair in 1997 due to severe aortic mitral regurgitation, and a further procedure in 2002 also due to severe residual aortic regurgitation. He had a 'redo-operation' in 2002. According his consultant's letter dated 7 October 2014, although he appears well, he has ongoing dilation of his aortic root and significant regurgitation from his aortic valve and requires a further "re-do" operation which "constitutes extremely high risk surgery".

33. We have considered the best interests of the children which are a primary consideration. The Secretary of State considered the position of the children in the refusal letter of 2 September 2014. She considered section 55 of the Borders, Citizenship and Immigration Act. She concluded that it was not disproportionate for the Claimant to return to Columbia where should could keep in touch through mediums such as Skype and would be able to enter as a visitor to see her grandchildren. Although the Claimant was mentioned on a contact order so were both the children's parents who would be able to provide for their safety and welfare.

34. The evidence before us in relation to their best interests consists of witness statements of the Claimant, her son and his current partner and a letter from his former partner. There are also photographs of the Claimant and her grandchildren. All witnesses attest to a close relationship.

35. In *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4 Lady Hale held that that identifying the best interests of children would not lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. She endorsed the UNHCR Guidelines on Determining the Best Interests of the Child (May 2008) at paragraph 1.1 which state "The term 'best interests' broadly describes the well-being of a child." The age of the children, the closeness of their relationship with the other family members in the United Kingdom and whether the family could live together elsewhere are to be important factors which should be borne in mind.

36. The children currently live with their mother and see their father and the Claimant and weekends. We find that their best interests are to remain

living with their mother in the United Kingdom who is their primary carer and see their father regularly. It is also clearly in their best interests to enjoy the benefits of health care and education to which they are entitled as British citizens. The children are of an age where their focus will be on their parents. In view of the Claimant's presence in their lives since their birth they would without doubt miss her a great deal and communication by modern means would not allow the level of interaction and contact which currently exists. Their mother is a British Citizen as are they and they cannot be expected reasonably to relocate to Colombia. Consequently, if the Claimant is removed, any meaningful family life between them is likely to be interrupted.

37. With regard to the factors in section 117B, we take account of the fact that the maintenance of immigration controls is in the public interest. It is also in the public interest that a person seeking to enter or remain speaks English. The Appellant has studied English and produced certificates at pages 42 to 47 of her bundle demonstrating that she had been awarded the Cambridge ESOL Entry Level Certificate in ESOL Skills for Life. We accept therefore that she speaks English. This does not of course, give her a positive right to leave to remain.

38. It is in the public interest that persons who seek to enter or remain in the United Kingdom are financially independent which the Claimant is not, as she depends entirely on her son. She has not, however, been a burden on the state. In *Forman (ss 117A-C considerations)* [2015] UKUT 00412 (IAC) the Upper Tribunal held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

39. According to section 117B, 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. Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. We therefore give little weight to the Claimant's private life as it has been established whilst she was in the UK unlawfully.

40. The Claimant's case is advanced on the strength of her family rather than private life. The Claimant arrived in the UK with a valid visit visa on 18 March 2002. She was subsequently granted an extension of stay until 30 December 2002. On 15 November 2002 she applied for leave as a parent of a settled person and this application was rejected on 7 February 2003 as her son had not been granted settled status. An application for leave outside the rules on the basis of a need to care for her son was made on 28 February 2003 and this was refused on 26 August 2003. An application was then made on 28 February 2012 based on the Claimant's human rights which was refused on 19 March 2013.

41. The Claimant's son does not currently require her care. Indeed, he is working. However, he continues to be unwell: he was scheduled to have his fourth surgery to replace his aortic valve with a mechanical valve on 11 December 2013, but his surgeon decided not to operate on him because of the high risk involved and also knowing that there is a fifth surgery to replace his pulmonary valve lined up. His surgeon therefore suggested prolonging the surgery delay, to see if both valves could be replaced at the same time, even though the risk became greater. He states that his cardiologist said he needed this surgery as soon as possible or there was a chance he could 'just drop dead' or his heart will tear with irreversible repairs.

42. The letter from Dr Cullen does not specify a date for surgery but states that he has arranged for a further cardiovascular MRI scan and the timing of the surgery will depend on the serial echocardiograms and MRI scans. Although no date is specified we do not find the information provided by his cardiologist inconsistent with the Appellant's son's statement that he requires surgery as soon as possible. In view of the fact that the surgery is 'extremely high-risk' we conclude that there are exceptional and compelling circumstances in this case. In view of her son's condition, it would not be reasonable for him to relocate to Colombia to continue family life with his mother there. We note that he gave evidence before the First-tier Tribunal that he was unable to fly and that evidence was accepted. We do not find that this is unlikely in the light of the evidence in relation to his heart condition.

43. We have carefully weighed the public interest considerations set out above against the strength of the Claimant's family life and the interests of her son and grandchildren. We find that there are strong factors on the public interest side of the balance consisting of her inability to satisfy the Immigration Rules by a significant margin, her absence of leave and the s117 factors discussed above. We have also taken account of the fact that her son has a partner who would be able to provide him with care after an operation. However, her son with whom she has a very close relationship is facing extremely high-risk surgery which we accept is likely to be urgent. Her presence during this surgery is of extreme significance to both of them. We also take account of the fact that it will be a very difficult period for the children. We consider that the refusal of leave to remain in these circumstances is disproportionate.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision.

We re-make the decision in the appeal by allowing it.

Consequential Directions

Forthwith on receipt of this decision the respondent shall grant the appellant leave to remain for such period as is necessary to give effect to this determination.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and there is no application before us nor any reason on the evidence why such an order would be necessary.

Signed Date

Deputy Upper Tribunal Judge L J Murray

Fee Award

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award (rule 9 (1) (costs) of the Tribunal (Procedure) Rules 2014 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

We have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

We have decided to make no fee award.

Reasons:

We have allowed the appeal on the basis of the evidence that was not before the Respondent at the date of the decision.

Signed Date

Deputy Upper Tribunal Judge L J Murray