IN THE UPPER TRIBUNAL

R(on the application of Natalia Heritage)v Secretary of State for the Home Department and First-tier Tribunal IJR [2014]UKUT 00441(IAC)

Field House
15 July 2014

BEFORE

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PITT

Between

NATALIA HERITAGE

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

FIRST-TIER TRIBUNAL

Respondents

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Mr M Symes of Counsel, instructed by Wilton Solicitors, appeared on behalf of the Applicant.

Mr J Lewis of Counsel, instructed by the Treasury Solicitor appeared on behalf of the first Respondent.

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JUDGMENT

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JUDGE STOREY:

1. In this substantive judicial review hearing, the applicant is a Russian citizen. She married a British citizen in July 1989, but a Russian court terminated their marriage on 16 November 2011. She has two adult sons by this marriage who

are at university in the UK, A, born on 20 August 1991 and G, born 15 February 1994. Both the sons are British citizens.

2. The applicant arrived in the UK in August 2008 as a spouse.

3. She was granted leave to remain on that basis until her divorce. Subsequently she was granted leave to remain until 13 April 2012 in order for her to exercise rights of access to her sons. On 12 April 2012, one day before her leave to remain expired, she applied for further leave to remain on the same basis, both of her sons still being in education. She completed and signed the relevant part of the form to authorise payment of the application fee of £561.00. The first respondent acknowledged receipt of her application on 24 April 2012 but on 8 May 2012 wrote to tell her her application was considered to be invalid because the specified fee had not been paid. It was stated that the bank which had issued her credit card had rejected the payment.

4. On 9 May 2012 the applicant resubmitted her application. On 1 May 2013 the first respondent refused it with no right of appeal. On 14 June 2013 the applicant lodged a late appeal against that decision with the First-tier Tribunal (FtT). On 19 July 2013 the FtT (Judge Kaler) refused to grant extension of time for an appeal.

5. Against this background, the applicant launched judicial review proceedings. On 22 January 2014 the Upper Tribunal granted her permission, Upper Tribunal Judge Storey stating that it was arguably wrong of the first respondent not to treat the applicant's application of 12 April 2012 as valid and arguably irrational for her decision letter of 1 May 2012 not to contain any "second-stage" Article 8 consideration outside the Rules as to whether there were any exceptional

circumstances. Reference was made to the Court of Appeal judgment in MF (Nigeria) [2013] EWCA Civ 1192. On 11 March 2014 the first respondent issued a supplementary decision letter addressing whether the applicant's circumstances were exceptional so as to justify a grant of leave outside the Rules and concluding they were not. On 30 May the applicant sent a statement which applied to amend the grounds in light of the permission decision and the further decision made by the first respondent on 11 March 2014. The first respondent stated that she had no objection to amendment of the grounds and we proceed on that basis.

The invalidity issue

6. The judicial review claim form sealed in September 2013 identified two "defendants": the FtT, in respect of its decision of 19 July 2013 to refuse to extend time to lodge a statutory appeal; the Secretary of State for the Home Office, for what was described as her "ongoing failure to properly notify the applicant of an immigration decision". So drafted, the principal target of the claim was the decision of the first respondent to treat the applicant's application of 12 April 2012 as invalid and in consequence to classify her as an overstayer with no right of appeal.

7. In the amended grounds, the applicant no longer disputes that the decision of the first respondent of 1 May 2012 to treat the application as invalid was lawful. The applicant now accepts that on the relevant date there were insufficient funds in her bank account to cover the payment of the requisite fee. She continues to assert that she was an innocent victim of circumstances because her ex-husband was supposed to have put funds into this account; but she accepts

that that point is only relevant if at all to her Article 8 grounds of challenge.

Challenge to the First-tier Tribunal decision

8. Hence there is no longer any basis for the challenge to the decision of the First-tier Tribunal. Being an overstayer the decision of the respondent to refuse her further leave to remain was not an immigration decision and did not attract a right of appeal. The applicant's amended grounds sought to maintain her challenge to the FtT decision because Judge Kaler "made comments arguably touching on the merits of the human rights claim", but since as a matter of law Judge Kaler had no jurisdiction to consider the (late) application for a statutory appeal in the first place, her comments regarding Article 8, which were cursory at best in any event, are decidedly irrelevant. The judicial review challenge to the decision of the First-tier Tribunal is accordingly dismissed. Throughout the rest of this decision we refer to the first respondent as "the respondent".

Challenge to ongoing failure to make an immigration decision

9. It is also apparent from the applicant's amended grounds that the second ground of challenge as stated in the original claim form – to the ongoing failure of the respondent to properly notify the applicant of an immigration decision – has also fallen away, being dependent on the first ground challenging the respondent's rejection of the applicant's application for leave to remain as invalid.

The supplementary letter of 11 March 2014

10. We come then to the fact that on 11 March 2014 the respondent issued a supplementary letter stating it was to be read in conjunction with her decision letter of 1 May 2013 and addressing the applicant's application insofar as it raised exceptional circumstances which might merit leave to remain on Article 8 grounds outside the Immigration Rules. This letter states that there were no such circumstances because contact could be maintained between the applicant and her sons and friends in the UK "by alternative methods such as telephone, internet, letters or visits." It was observed that the sons had their paternal grandparents living relatively close by with whom they could discuss personal issues. Adverting to the reference in the original claim that the sons had psychological problems necessitating the presence of the applicant, the respondent's letter stated that such problems had "not seriously impinged upon their lives as shown by their ability to succeed at school and university".

11. In her amended grounds the applicant stated that in her view the supplementary decision letter did not rectify the failings as to "second-stage [Article 8] consideration" that were the subject of (the second reason stated before) the permission grant. It was argued that this letter failed to take account of a number of relevant considerations and a quashing order was sought quashing the decisions of 1 May 2013 and 11 March 2014 as being incompatible with the applicant's right to respect for private and family life. We should mention at this stage that in the course of the hearing it became clear that the points at issue between the parties touched on certain EU law issues that had not been raised hitherto and we granted both a short time to submit further submissions, which for Mr

Symes in effect contained a request to amend the grounds further.

The issue of the "moving target"

12. It is appropriate at this point to highlight the fact that as a result of the series of events just described the decision under challenge has become a "moving target", that of 1 May 2013 being augmented by one of 11 March 2014. Strictly speaking, because the challenge made in the claim form was confined to decisions (or lack of them) made by the respondent up to that point (September 2013), it cannot be the case that the applicant has a right within such proceedings to challenge a later decision. Nor can it be said that the respondent possesses a "right to rectify" the decision under challenge by producing another, especially when (as here) the supplementary decision letter was only produced in response to the terms of the permission grant. In general terms it might be thought that for the Administrative Court or Upper Tribunal exercising judicial review functions freely to allow the respondent to produce and rely upon supplementary decision letters in this way could encourage laxity on the part of original decision-makers, who might think that any shortcomings on their part do not matter as they can be put right if there is any challenge. Such an approach might be thought to be the very opposite of the respondent's ongoing commitment to improvement to the quality of decisions made by her officials ("Getting It Right First Time"). It will be important to consider the motivation behind the further decision and what was said in this regard by Beatson J in Omar, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 3448 at [46], although in a somewhat different context, may be thought to have resonance here:

> "It cannot be an efficient use of resources to create situations in which individuals are forced often at public expense to institute legal proceedings and take up the time of a grossly overworked Administrative Court, only to find at a late stage in the proceedings that the Secretary of State had made a decision which arguably makes the issue moot".

13. At the same time, the practice of the Secretary of State relying on a supplementary decision letter is commonplace and so long as an applicant has proper opportunity to respond to it, there is rarely an issue regarding it. For judges to take too rigid a view as to their admission may well result in a cost to the public purse resulting from the possible need arising for further judicial review proceedings to be brought against a further decision if the original decision is quashed. Obviously any acceptance of such decisions must depend on there being no issue of procedural unfairness, with an applicant being taken by surprise and having no proper opportunity to respond.

14. Mindful of such competing considerations the higher courts have emphasised the need for a flexible, pragmatic approach: see e.g. R v Secretary of State for the Home Department ex parte Turgut [2001] 1 All ER 719; E v Secretary of State for the Home Department [2004] EWCA Civ 49. The need to adopt a flexible approach in this case can be said to be strengthened by the fact that the respondent was only put in the position of having to consider furnishing a supplementary decision letter dealing with Article 8 as a result of a grant of permission.

15. In those cases where the Upper Tribunal considers that the balance of competing considerations makes clear that the respondent's action in seeking to rely on a supplementary decision letter is unreasonable, then, even if it is decided

to treat the decision as a moving target, that may have implications when it comes to awarding costs, although, we hasten to add, that is not an issue which arises in the instant case.

Article 8 consideration outside the Immigration Rules

16. On the logic of the Master of the Roll's reasoning in MF (Nigeria),[2013] EWCA Civ 1192, as supplemented by the judgment in MM & Ors, R (On the Application Of) v Secretary of State for the Home Department [2014] EWCA Civ 985, in assessing whether the respondent acted reasonably in rejecting the applicant's application for leave to remain, it is necessary to have regard to what she said in relation to the applicant's position both under the Immigration Rules and outside the Rules. In her 1 May 2012 letter the respondent first considered the applicant's eligibility under the "parent route" and concluded she could not qualify as both sons were over 18. In respect of "private life" under paragraph 276ADE, she next stated that the applicant did not have twenty years' residence in the UK, had not spent half of her life in the UK and had not shown she had lost all social or cultural ties with Russia. Within that decision it can be seen, therefore, that the respondent did give substantive consideration to at least some essential elements of the applicant's family and private life circumstances.

17. The reasons given in her supplementary letter of 11 March 2014 for maintaining the original decision of 1 May 2013 in respect of family life ties were that contact could be maintained with the applicant's sons from Russia. In giving reasons for concluding that the applicant's case did not disclose any compelling or exceptional circumstances, the supplementary letter stated:

> "Although there may be a degree of hardship for your client in that she would be away from her family if she were to return to the Russian Federation, there is nothing to prevent her from having contact with her family and friends in the UK by alternative methods such as telephone, internet, letters and visits if she so wishes. Furthermore, the sons of your client have their father's parents living relatively close by … with whom they can discuss personal issues. The psychological problems each has suffered from the break up of their parents' marriage has not seriously impinged upon their lives as shown by their ability to succeed at school and university".

18. Before deciding whether these two decision letters, read together, amounted to a rational response, it is necessary to summarise the evidence (and representations) that had been put before the respondent prior to the decision of 1 May 2013.

19. That evidence noted that the applicant was a highly qualified person who had worked in several jobs in Russia and Israel. She had married her husband in July 1989. He had a thriving career as an international correspondent. As a result she and her husband and their two sons, travelled extensively during their early years. She had been granted entry clearance as a visitor to the UK on a number of occasions between 1989 and 2009. She had eventually been granted entry clearance as a spouse valid from 21 August 2008 until 21 November 2010. From August 2008 their children had commenced education in the UK. The applicant would have been eligible to apply for indefinite leave to remain as a spouse by September 2010 but her husband took senior jobs abroad with the result that she could not meet the requirement that he be "present and settled". By that time her husband had also begun a relationship with another woman and in the summer of 2011 he filed for divorce in Russia, which was not contested, the divorce being granted

on 16 November 2011. On 29 September 2010 the applicant made an application for further leave to remain as a person exercising rights of access to children. The respondent decided to grant her leave to remain for twelve months outside the Immigration Rules on 13 April 2011.

20. The applicant had also pointed out to the respondent that she had built up a private and family life in the UK. Her sons' paternal grandparents and their uncle resided in the UK and the family ties with them were close knit. In addition, the applicant had a strong bond with a number of friends and had a cohesive social network in the UK. Letters of support from members of the family and friends were supplied.

21. The respondent's attention was particularly drawn to the strong relationship between the applicant and her children and the fact that they were still in education, G being due to take his A levels and keen to go on to university to study philosophy; A currently studying at the University of Brighton. It was said that both G and A continued to rely on their mother for emotional and financial support. With their father being absent from their lives for long periods their mother was their only immediate family. G continued to live with his mother as did A except during term time.

22. It was also pointed out that with the near-permanent departure of their father, both sons had begun to exhibit signs of withdrawal, depression and other psychological symptoms and were both at different times, referred to child psychiatrists and family therapists. Letters were provided confirming this.

23. In short there was significant evidence submitted pointing to both sons, notwithstanding their age, remaining dependent on

their mother and neither having started to lead an independent life.

The EU dimension

24. As already noted, a question arose at the hearing as to the possible significance for the applicant's case of the rulings of the Court of Justice of the European Union (CJEU) decision in Case C-34/09 Zambrano v Office national de l'emploi (Case C-34/09) and Case C-529/11 Alarape. At paragraphs 28 and 30 of Alarape the court ruled that in relation to Article 12 of Regulation 1612/68:

> "28.…as regards the derived right of residence of a parent who cared for a child who has reached the age of majority and who is exercising the right to continue his or her education in the Host Member State the Court has held that, although the child is in principle assumed to be capable of meeting his or her own needs, the right of residence of that parent may nevertheless extend beyond that age if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.
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> …
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> 30. As the Advocate General stated in points 35 to 37 of his Opinion, determining whether an adult child continues to need the presence and care of his parent in order to pursue and complete his education is a question of fact that falls to be resolved by the national courts. In that regard the national courts may take into account the particular circumstances and features in the main proceedings which might indicate that the need was genuine, such as inter alia, the age of the child, whether the child is residing in the family here or whether the child needs financial or emotional support from the parent in order to be able to continue and to complete his education".

25. Zambrano established that the third country national parents of a Union citizen child could derive a right to reside in the Member State where the child was a national so long as a decision requiring them to leave would have the effect of causing the child to leave the territory of the Union. In the applicant's case, however, her children are Union citizens, but they are young adults, not minors. Alarape, of course, addressed the meaning of Article 12; Regulation 1612/68 which concerns a right of access to education predicated on the child concerned having a Union citizen/ EEA national parent who has been employed in the host Member State.

26. We take Mr Symes' further submissions as a request to further amend the grounds so as to take account of the EU law dimension to the Article 8 consideration and in deciding to permit him to do so we note that Mr Lewis in his further submissions did not seek to argue that they should be treated as outwith the pleadings.

27. Mr Symes re-emphasised the extent of the evidence showing that the applicant's sons remained dependent on her and argued that (i) she was entitled to benefit from the Zambrano ruling firstly because although over 18 her sons were still in education and in that way came within that ruling's personal scope; and secondly because there was a real chance that if the respondent did not permit their mother to stay in the UK they would be driven out of the territory of the Union and so forced to lose the benefits of their Union citizenship and travel to the only other country they could go to, which was Russia, where they would face compulsory conscription for 12 months; (ii) but in any event the applicant had an EU right of residence deriving from the fact that during their marriage her former spouse had worked elsewhere in the EU, for example in Brussels and Paris, before returning to the UK to work in

London and he was thus exercising Treaty rights on the basis of C-370/90 Surinder Singh, whether he was there providing services (Case C-60/00 Carpenter [2002] ECR I-6279) or pursuing professional activities as a worker (Case C-457/12, S v Minster voor Immigratie [2014] EUECJ). The ex-husband's exercise of EU rights whilst they were married brought directly into play the provisions of Article 10 of Regulation No 492/2011 (formerly 1612/68) which had been held in Case C-480/08 Teixeira [2010] ECR I-1107 and Case C-310/08 Ibrahim [2010] ECHR I-1065 to bestow a derived right of residence on the primary carer of a migrant worker's children in education, including university education. His submissions concluded that the fact that the Respondent's decision overlooked the EU law dimension altogether made them unlawful for that reason, for failing to take account of the distinct EU law character of the applicant's historic and present residence here when treating her presence here as precarious.

28. Mr Lewis submitted that the evidence showed that the primary financial support for the sons' education and living expenses came from their father and their situation overall was not one of dependency on the applicant. As regards the relevance of the Zambrano case, he submitted that the applicant had never asserted that her removal would result in her two sons, as a matter of necessity, having to leave the EU; on the contrary they provided evidence that they could not live in Russia as there they would have to do military service to which they were averse. Whilst not addressing the Surinder Singh point as such, Mr Lewis accepted that the boys' father had previously been employed in another Member State and "hence, he was a migrant worker". Finally Mr Lewis submitted that the respondent had committed no error of law in not expressly considering these EU law issues in her decision letters, especially given that they were not raised by the applicant

and because her decisions were actually fully in accordance with EU law. Had the applicant wished to rely on such rights she should have made an application on the correct form.

29. We now turn to evaluate the submissions. In what follows we confine ourselves to the level of EU law without considering, as it would be necessary to do in a fuller examination, the equivalent domestic law provision under the Immigration (European Economic Area) Regulations 2006.

30. We are unable to agree with Mr Lewis that the failure of the applicant to make an application for EEA residence rights can have no impact on the lawfulness of the respondent's decision: It is well-established that EEA rights of residence exist even if not asserted or made the subject of residence documentation:see Royer, Case 48/75, [1976] ECR 497; Secretary of State for Work and Pensions v Dias [2009] EWCA Civ 807 at [33]. We would accept that if the respondent had sought to object to the applicant being permitted at a late stage of proceedings, to deal with the EU law point at all, we would have had to think twice about whether we allowed it, but Mr Lewis did not do that. Further, although we describe it as an EU law point, it is not a discrete point but is confined to its potential impact on the Article 8 assessment.

31. As regards the potential relevance of Zambrano, we consider that whilst the CJEU in Alarape was dealing with Regulation 1612/68,not the rights of Union citizens, its observations on children in education are a strong indication that, as in Alarape, the question whether Union citizen children come within the personal scope of the Zambrano ruling, so that their primary carer can derive a right of residence, is not to be decided by reference to whether they are still minors by age but by reference to a factual examination of whether they

are still in a situation of dependency in which they continue to need the care and presence of a primary carer (parent). However, leaving aside for the moment, the issue of dependency, we agree with Mr Lewis that the applicant could not be said to have shown that if she was not permitted to stay in the UK her sons would be forced to leave the territory of the Union, as they had made clear that their anxiety about military service in Russia would mean they would not return there. Thus Zambrano does not avail the applicant.

32. There remains, however, the significance of the acceptance by the respondent that whilst still married to the applicant, her husband was a "migrant worker" exercising Treaty rights by working elsewhere in the EU and then returning to the UK. There are two dimensions to that, one relating to the applicant's immigration history (what Mr Symes called the "historic position") and one relating to the situation as at the date of the two decision letters. As regards the latter, without further information we cannot resolve the matter of whether at the date of the decision letters the applicant stood to benefit from a derived right of residence as the primary carer of children (of a EU migrant worker) still in education (although if she came within the scope of Article 12 of Regulation 1612/68 it would not matter that she became divorced or even that her husband had left the UK). We are, however, able to be sure as regards her historic position that at least for some of the period when she was in the UK she had a right of residence as a family member of an EEA national. As we have seen, the respondent's consideration of the applicant's Article 8 case has proceeded hitherto on the assumption that she was subject to immigration control and entitled only to leave under domestic law provisions governing visitors and spouses and carers of children. Had the respondent appreciated that the applicant was exercising

Treaty rights as a family member for some of that period, that may have had a material effect on how she viewed the applicant's immigration history (which was in any event one of lawful stay at all times until rejection of her application for invalidity) and her overall proportionality assessment. That in our judgement is sufficient to establish that the decisions made by the respondent were Wednesbury unreasonable, in failing to take into account a relevant legal consideration. The fact that the evidence put before the respondent also raised at least an arguable case that the applicant had a derived EU right of residence as a primary carer reinforces us in this view.

33. Given the above finding relies on EU case law which itself draws heavily on Article 8 jurisprudence (see e.g. Carpenter), it may assist the respondent to know how we have viewed other aspects of the Article 8 claim at issue in this case.

Family life

34. The respondent in her decision letters did not dispute that the applicant's ties with her adult sons amounted to family life within the meaning of Article 8(1) ECHR. In his submissions at the hearing Mr Lewis initially sought to argue to the contrary on the basis that Article 8 case law, e.g. Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, only accepted that there could be family life between a parent and adult children when there were ties over and above normal emotional ties. During discussions he accepted that reliance on Kugathas was misplaced because the respondent had accepted in her two decision letters that the applicant did have family life notwithstanding that her sons were young adults. In further submissions dealing with the EU dimension, by re-asserting the view that the application had

not established that her sons were dependent, Mr Lewis would seem to have reverted to his initial positon, but in any event, applying Kugathas, there was strong evidence that had been sent to the respondent indicating that there were indeed emotional ties between the applicant and her sons over and above those normally found and also that the sons were in continued need of her presence and care. In his EU law-related further submissions, Mr Lewis pointed out that at the hearing Mr Symes had confirmed that the younger son, G, was no longer attending university and so could not benefit from EU jurisprudence concerning children still in education. Leaving aside that we are concerned with decision letters written at a time when G was still in education, we would observe that even if G is no longer in university education, we do not know whether he is still in a situation of dependency; and even if he is not, the applicant's eldest son was still in education and that suffices to make necessary still for there to be an assessment within the context of Article 8 of the present EU dimension to the applicant's case.

Continuation of family life by indirect means

35. The respondent's position in relation to the proportionality of the interference her decision posed for the applicant's family life was that it was open to the applicant to continue her ties with her sons by alternative means from Russia.

36. It is sometimes asserted by reference to reported Upper Tribunal decisions such as LD (Article 8- best interest of child) Zimbabwe [2010] UKUT 278 (IAC) and Omotunde (best interests - *Zambrano* applied - *Razgar*) Nigeria [2011] UKUT 247 (IAC) that it is in principle disproportionate to expect family ties especially between parents and children to be continued by alternative means. Such an assertion goes

further than what these cases hold. It is integral to Strasbourg jurisprudence on Article 8 that families do not have the right to choose the country where they live (other than in their own country) and hence can only succeed on Article 8 grounds if able to establish that it would be disproportionate not to allow them to remain in the contracting state. And the extent to which it can be proportionate to expect family life to be maintained abroad by alternative means will depend, among other factors, on the relative strength of the family ties in question and of the connections family members have with the UK. In the applicant's case, as we have seen, the evidence presented indicated that her sons were British citizens who were in education here and that her ties with them were strong and were characterised by their continuing need for her presence and care. There was therefore at least some factual basis for considering that the reasoning set out in LD and Omotunde had analogical bearing.

37. The only two reasons given by the respondent pertaining to the issue of the strength of the family ties were that the two sons continued to benefit from family life ties with their paternal grandparents and their apparent ability to pursue their education notwithstanding their psychological difficulties. The difficulty with the first reason is that it does not address the nature of the tie between the applicant and her sons and secondly, it appears to have been offered in ignorance of the evidence as to the age of the grandparents. In a letter sent to the respondent the grandfather had stated that they were 79 years old and due to their circumstances were unable to house their grandchildren. In addition, although it is evidence that postdates the two decision letters, Mr Lewis did not object to the Tribunal having regard to further letters indicating that both grandparents had

health problems, the grandfather having recently been in hospital with pneumonia and pleurisy. The grandfather's stated opinion was that "these boys still need the guidance and love of their mother".

38. The other reason given by the respondent was that the evidence as to the boys' psychological difficulties "has not seriously impinged upon their lives as shown by their ability to succeed at school and university", but educational performance is not necessarily an indicator of the seriousness of psychological difficulties (We would add by way of comment on Mr Lewis's further submissions dealing with the EU law dimension, that if the youngest son is known to be no longer in education, then that does raise questions as to whether his psychological difficulties have in fact impinged on his life.) In relation to the point regarding the evidence showing that the boys were not financially dependent on the applicant but on their father, that does not in our view negate the strong evidence of ongoing emotional dependency.

39. It is true that the respondent had stated in her decision letters that in her assessment the problems facing the applicant and her sons would give rise to hardships but not ones that were exceptional; but this statement appears to have been based on the two reasons whose validity we have just doubted.

Article 8 case law on adult children continuing in education

40. We should make it clear that even if we had not treated the respondent's failure to deal with the EU law dimensions of the applicant's basis of residence in the UK as vitiating her decisions, the proposition that Alarape advances in respect of children in education is also to be found in Article 8

jurisprudence. As the Grand Chamber stated in Maslov v Austria 1638/03 [2008] ECHR 546 at [62] and as the ECtHR stated in AA v United Kingdom (app. no. 8000/08) [2011] ECHR 1345, family life can still be said to exist between a parent and an adult child who is still involved in education. We have already indicated that we consider that the evidence placed before the respondent pointed strongly to the two children continuing to need the presence and care of their mother.

Other aspects of the respondent's consideration of the applicant's Article 8 circumstances outside the Rules

41. We have already explained that we consider the respondent's failure to take into account the applicant's undoubted historic right of residence under EU law rendered her decisions Wednesbury unreasonable and that there was also a failure to give adequate consideration to the nature and extent of the applicant's family life ties with her British citizen children who were still in education. Whilst we do not need to go further, we would add two observations. First, even in domestic law terms, it is clear that the respondent had previously been prepared to grant the applicant further leave to remain in order for her to continue to have access to her sons and at a time when one of them, A, was already over 18. If (as seems likely) that grant was made on the basis that the sons were in education and needed her continuing presence and care, then it is difficult to follow why the subsequent decision letters of 1 May 2013 and 11 March 2014 did not explain why they considered that situation had changed. Second, which is a matter going to the proportionality of the decision letters, whilst the applicant did submit evidence relating to her own private life ties in the UK, it is clear that the principal basis of Mr Symes' submissions was that her sons needed her presence and care whilst they were still in

education. Inherently that was a time-limited matter. The respondent was being asked to grant her limited leave only for so long as her sons' pursuit of education required her continued presence and care. She was not asking for, nor could she expect to be granted, indefinite leave to remain. Whatever EU rights she had were likewise time-limited in the same way, by reference to her sons' ongoing pursuit of education (and we have heard that the youngest is no longer in education).

Edgehill and the pre 9 July 2012 Article 8 jurisprudence

42. Mr Symes submitted that the decisions of the respondent were flawed by a failure to decide the applicant's application by reference to the new Immigration Rules in force from 9 July 2012. He accepted that the applicant cannot benefit from the Rules in force at the date of application (which also excluded as ineligible spouses who were overstayers) but argued that the ambit of the Court of Appeal judgment in Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402 covered not just the pre-9 July 2012 Rules but the state of the pre-9 July 2012 case law.

43. Whilst we discern some force in Mr Symes' submission, it is not necessary for us to decide on it here because even if such a reading of Edgehill is right, it can only have a limited legal effect. It is clear that even under pre-9 July 2012 case law on Article 8, for an immigration decision to give rise to a breach of a third country national's right to respect for family life, it would be necessary to show compelling circumstances, the expectation being that only a small minority of cases would succeed: see Huang v Secretary of State for the Home Department [2007] UKHL 11. It would be wrong to say that the new Rules impose legal tests of exceptional circumstances or insurmountable obstacles contrary

to Huang or VW (Uganda) [2009] EWCA Civ 5: see Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 (IAC).

44. That said, it is clear from MF (Nigeria) in the Court of Appeal and subsequent cases on Article 8 that the new Rules did herald a greater emphasis on the importance of the public interest in the maintenance of effective immigration control. Whilst we think therefore that failure to apply pre-9 July 2012 case law to the applicant's case did represent a failure on the part of the respondent, we do not find that it was not one that made a material difference. Our earlier finding considers that even under the post-9 July 2012 regime applied by the respondent in this case, the decision she made was an irrational one.

The intense scrutiny issue

45. Mr Symes sought in his skeleton argument and submissions to persuade the Tribunal that we should apply a degree of judicial review scrutiny at the most intensive end of the scale such that it was equivalent to a merits review. In support he cited Lord Hoffmann's statement in Nasseri v SSHD [2009] UKHL 23 that on judicial review, when the challenge is based on an alleged infringement of a Convention right, the position was different from normal domestic judicial review proceedings. He also cited Lord Mance's observation in Miss Behavin' [2007] UKHL 19 that where the court is deprived of the assistance and reassurance provided by the primary decision-maker's 'considered opinion' on Convention issues "…its scrutiny is bound to be closer". In the event we have not found it necessary to decide this issue, but we would point out that Mr Symes' submission was somewhat weakened by his failure to object to the respondent seeking to rely on her supplementary refusal letter which (unlike that of 1 May 2012)

did set out the respondent's 'considered opinion' on Article 8.

The new provisions giving statutory effect to certain Article 8 considerations

46. Mr Symes finished his submissions at the hearing by alerting the Tribunal to the coming into force on 28 July 2014 of Article 8-related provisions inserted in the Nationality, Immigration and Asylum Act 2002 by s.19 of the Immigration Act 2014, namely ss.117A-C. It suffices to say that we have considered and applied those provisions. The only provision that might possibly have a significant bearing on the applicant's case is new s.117B(6), which provides that 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 relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom". But even assuming we considered this provision could not avail the applicant, that does not impact on the reasons we have given for finding the decisions of the Secretary of State in this case Wednesbury unreasonable.

47. For the above reasons:

We refuse the judicial review challenge to the decision of the First tier Tribunal;

We grant judicial review against the decisions of the Secretary of State for the Home Department dated 1 May 2013 and 11 March 2014 and make an order quashing them.

Upper Tribunal Judge Storey

11 September 2014

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