Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03700/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Sent**
on 5 November 2013	**on 11 November 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

TABARA TOURAY (also known as RUBA JAYE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr E MacKay, of McGlashan MacKay, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction.

1) The appellant presently identifies herself as Tabara Touray, a national of Gambia, born on 25 December 1981. She has previously used the identity of Ruba Jaye, born on 11 December 1981.

2) The appellant says that she entered the UK unlawfully in 2000 and worked unlawfully here from 2006 to 2011. She has a son, born in the UK on 24 October 2009. The birth certificate names Tabara Touray as his mother and a Gambian-born student as his father. The appellant does not claim to be in any current family relationship other than with her child.

3) The appellant applied on 3 March 2011 for leave for herself and her child to remain, outwith the Immigration Rules, on the basis of Article 8 of the ECHR. That application seems to have been refused, and not to have been appealed. She made an asylum application on 25 February 2013. The respondent refused that application for reasons explained in a letter dated 2 April 2013. The refusal is made by reference the Refugee Convention; to humanitarian protection; and under the ECHR, including consideration of Appendix FM of the Immigration Rules, and the best interests of her child.

4) First-tier Tribunal Judge McGavin dismissed the appellant's appeal for reasons explained in her determination promulgated on 6 June 2013.

Grounds of appeal to the UT.

5) The grounds on which permission was granted are as follows:

Article 8 Claim: (paragraph 40-53): the FTTIJ has erred in law in concluding (paragraph 53) that interference in her family and/or private life is proportionate:

(i) An arguable case: although it is accepted that the appellant cannot succeed *within* the Immigration Rules (*for reasons set out between paragraphs 41-47),* the FTTIJ then needs to consider whether:

"*… there remains an arguable case (emphasis made) that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 … (only then) … 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" (Nagre v Secretary of State for the Home Department (2013) EWHC 720 (Admin).*

The test of a "good arguable case" has now been adopted by the Inner House of the Court of Session (*See MS v Secretary of State for the Home Department (2013) CSIH 52 9para 28)).*

(ii) Exceptional factors: the FTTIJ has not only applied this test, but applied one which is wrong in law: she has considered whether there are any "*… exceptional factors not contemplated by the said Rules …" (paragraph 48).* This she has done in line with the decision in *Green (to which she refers)* but the UT in that case referred to not only exceptional factors but also whether the "*… decision is an unlawful one and disproportionate to the legitimate aim …" (Green at Head Note 2).* She has erred by focussing *only* on exceptional factors and not carry out a balancing exercise *(taking into account the Razgar questions).*

(iii) Unjustifiably harsh consequences: having regard to the above authorities, the FTTIJ should not have considered *only* whether there were any exceptional factors but rather considered if there was a good arguable case that despite the fact that the appellant could not succeed within the Rules, there might be compelling circumstances (*as these are described in paragraph 13 in Nagre – by reference to Policy*

Guidance issued by the SSHD) not sufficient recognised under the Rules. This required the FTTIJ to adopt a far wider approach than simply addressing the question of whether it was in the best interests of the child to remain in the UK. The term "exceptional" (or any variant of the term) is ambiguous, and should not be used *(see the Inner House in MS at paragraph 27 and the decision of the UT in Izuazu (referred to by the FTTIJ at paragraph 41 (of her decision) at paragraph 50).*

(iv) Conclusion: the FTTIJ has erred in law by not assessing whether the appellant may have a good arguable case that there may be grounds for granting her leave outwith the Rules; by confining her assessment of exceptional factors to only one issue (*best interest of the child);* and not adopting a sufficiently rounded or wide approach to the issue of proportionality by taking into account all the circumstances which might amount to a good arguable case.

Submissions for appellant.

6) Mr MacKay firstly sought to identify an error which is not in the grounds (including the grounds on which permission was refused). The judge said at paragraph 46 of her determination, based on paragraphs 33-36 of the refusal letter, that the respondent did not accept that the appellant has a son. The judge went on, "The appellant has provided no credible evidence … that she is Tabara Touray or … that she has used this name … in the UK for work and other purposes … the claimed father of the child did not give evidence." Mr MacKay said that the refusal letter, in particular at paragraphs 12, 42, 50, 52 and 53, did acknowledge that the appellant had a child, although that was not set out in the recital of material facts accepted at paragraph 34 and 35. The judge misunderstood the respondent's position. Mr MacKay accepted that the judge went on to consider the case on the alternative basis that the child is the appellant's (paragraph 47 onwards of the determination). He also accepted that on all information available the child would have Gambian citizenship and would not be eligible for any other citizenship. He did not say what consequences should flow from the error, if there was one, of misunderstanding whether the respondent accepted that the appellant has a child.

7) Turning to Article 8, Mr MacKay relied on the grounds set out above. He accepted that the judge considered Article 8 "outwith the Immigration Rules", but said that broadly she did so on the wrong test of exceptional circumstances rather than the correct tests of compelling circumstances and unduly harsh consequences of return. The determination at paragraph 41 records Mr MacKay's submission in the First-tier Tribunal that it would not be in the best interests of the child to return to the Gambia which is a small, socially and religiously conservative, country, as the child of a single woman, born out of wedlock. He accepted that the judge had not found the appellant credible and that her claim to have been disowned by her family had not been established. Nevertheless, he submitted that the factors in the appellant's favour cumulatively – in particular the length of her residence, 13 years, the age of the child and his best interests – pointed to a proportionality outcome in her favour. The determination should be reversed.

Submissions for respondent.

8) Mr Mullen acknowledged that the refusal letter was framed on the basis that the child is the appellant's, but said that the issue raised by Mr MacKay was of no substance. The judge did not make a positive finding that the appellant does not have a child. She merely pointed to the unsatisfactory state of the evidence about the true identity of the appellant. There was no reason why the appellant could not have provided good evidence on that point, as she has never said she has reason to fear her national authorities.

9) In any event, the determination went on to resolve the case on the footing that the child is the appellant's. The rest of the determination resolved around the child's best interests. The judge plainly found herself bound to make a free standing Article 8 assessment, irrespective of the rules, and irrespective of the respondent's decision. She took into account factors such as citizenship, relationships with parents, and such meagre information as she had on what might be in the child's best interests. No significant case was before her to show that the best interests of the child would be adversely affected by removal to Gambia as opposed to remaining in the UK. The appellant relied on her long residence, but she had not proved the time she claims to have spent in the UK, having been found an unreliable witness. Her adverse immigration history and unauthorised employment was against her. Her son was aged 3½ at the time of the First-tier Tribunal. That is an age which the child could not be expected to have formed significant links other than with his mother, in the home. The judge properly struck the Article 8 balance and her decision should not be interfered with.

Discussion and conclusions.

10) The judge was entitled to comment as she did on the lack of credible evidence of the appellant's true identity. Misunderstanding over whether the respondent accepted that the appellant has a son is irrelevant to the outcome, because it was plainly reached by the judge accepting that she does. There was no application to amend the grounds of appeal, and no submission as to what the outcome should be should be, were this alleged error established. The point does not take the appellant's case any further.

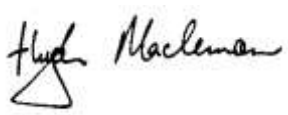
11) On Article 8, I find the grounds and submissions formulaic rather than substantial. They do not amount to more than disagreement with the expression of the tests to be applied under Article 8 and with the outcome. The case was not complicated or unusual. The best interests of the child are served by his remaining with his mother, and he is very young. It was not shown that anything significantly adverse to his interests might come about by moving to Gambia. It was not established that there would be a lack of family support. Even if that had been proved, it would have been far from decisive in the appellant's favour. A good arguable case under Article 8 of the ECHR opens the way for a decision to be made. It is not a test requiring that decision to be in an appellant's favour. The judge did find an Article 8 case to be resolved. I

detect no error of law in her approach which might have had any effect on the outcome.

12) While it is not necessary to go any further for present purposes, the case is of an overstayer with nothing to her credit in the immigration history; a 3 or 4 year old child; and no serious evidence of disadvantage through return. It might have been difficult to justify an outcome in her favour.

13) The determination of the First-tier Tribunal shall stand.

14) No anonymity order is in force, and none was requested.



7 November 2013
Judge of the Upper Tribunal