Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05902/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 April 2015	**On 5 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MICHELLE HANNAH WINDSOR-BRAITHWAITE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Collins counsel instructed by M J Solomon & Partners

For the Respondent: Ms A Broklesby-Weller Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Scobbie promulgated on 9 September 2014 which dismissed the Appellant's

appeal against a refusal of leave to remain on the basis of 10 years lawful residence on all grounds .

Background

3. The Appellant was born on 23 May 1975 and is a national of Trinidad and Tobago.

4. The Appellant arrived in the United Kingdom on 17 October 2002 with entry clearance as a working holiday maker until 26 April 2004. On 18 October 2004 the Appellant submitted an out of time application for leave to remain as a work permit holder which was subsequently granted on 2 December 2004 until 31 August 2005.On 6 October 2005 the Appellant submitted an out of time application for leave to remain as a work permit holder which was subsequently granted on 12 October 2005 until 6 August 2008. On 6 August 2008 the Appellant submitted an application for leave to remain as a work permit holder which was granted on 28 August 2008 until 6 August 2013.On 6 August 2013 the Appellant applied for indefinite leave to remain on the basis of 10 years continuous lawful residence.

5. On 10 January 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:

   (a) The Appellant could not establish that she had 10 years continuous lawful residence as there were two breaks in the period of residence when she was without leave. The circumstances in which she submitted out of time applications were not such as to warrant an exercise of discretion.

   (b) The application was considered under Appendix FM in relation to leave as a partner but there was no evidence that the Appellant's spouse was a British citizen and if he was there were no insurmountable obstacles to the Appellant and her husband continuing their family life in Trinidad and Tobago.

   (c) The application was considered under Appendix FM for leave to remain as a parent and the Appellant could not meet the requirements.

   (d) In relation to private life there was no suggestion that the Appellant has no ties to Trinidad and Tobago.

   (e) There were no compelling or compassionate grounds advanced to suggest that a grant of leave outside the Rules was warranted.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Scobbie ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :
   (a) The Appellant could not meet the requirements of paragraph 276B as there were two periods during which she was without leave.
   (b) The Judge accepted that the Appellant's spouse and child were United Kingdom citizens.
   (c) The Judge found that the Appellant could not meet the requirements of Appendix FM as a partner or parent.
   (d) The Judge considered EX.1 both in by reference to her relationship with her child and her husband applying the test of whether it was reasonable for the child to leave the United Kingdom and were there insurmountable obstacles to family life continuing with her husband outside the United Kingdom.
   (e) The Judge found that the Appellant had indicated the family would relocate to Trinidad and Tobago if the application was refused.
   (f) He found that the Appellant would prefer not to return to Trinidad and Tobago because her husband was a United Kingdom citizen and all their friends and connections were in the United Kingdom and she would have to re train in order to teach there. He found that she had a close relationship with her family there and she had returned regularly to visit them.
   (g) The Judge found that it was in the best interests of their child to remain with the parents and that is what the Appellant had indicated they would do. At age 1-2 the child was adaptable.
   (h) The Judge did not accept that her teaching qualification was worthless in Trinidad and Tobago but even if there was a period of retraining she would find work.
   (i) The Appellant's husband was currently unemployed but was fit and healthy and could find work in Trinidad and Tobago.
   (j) The connections the Appellant had with the Church could resume in her home country.
   (k) He considered paragraph 276ADE(vi) and found for the same reasons that there was no evidence that there would be 'very significant obstacles' for the Appellant and her family reintegrating into life in Trinidad and Tobago.

(l) The Judge found that there was nothing exceptional or unusual that would lead to a favourable result under Article 8 outside the Rules.

7. Grounds of appeal were lodged arguing that :

(a)The Judge did not properly assess whether the Appellant could meet the requirements of paragraph 276B.

(b) If continuity of residence was broken the Judge should have considered whether this was a case where the Respondent should have exercised discretion in the Appellant's favour.

(c) The Judge made no findings as to why the Appellant could not meet the requirements of the Rules as a partner or parent.

(d)The Judge did not consider the two routes under EX.1 as a parent and partner.

(e) The Judge did not properly assess whether it was reasonable for the child to leave the United Kingdom or whether there were insurmountable obstacles to the Appellant's spouse leaving the United Kingdom.

(f) The Judge failed to consider Article 8 outside the Rules.

8. Permission was initially refused on 3 November 2014 and the grounds were renewed

9. On 15 January 2015 Upper Tribunal Judge Chalkley gave permission to appeal stating that it was arguable that the Judge should have demonstrated that he had given consideration to s117 of the Nationality, Immigration and Asylum Act 2002.

10. There is a Rule 24 response from the Respondent dated 25 February 2015 in which it is submitted that the Judge directed himself appropriately. The Judge carried out an analysis of the Appellant's circumstances and was entitled to find that she could return o Trinidad and Tobago accompanied by her child and husband. While the Judge did not specifically refer to s 117B of the Nationality, Immigration and Asylum Act 2002 his conclusions were consistent with the provisions.

11. At the hearing I heard submissions from Mr Collins on behalf of the Appellant that:

(a) He relied on the grounds of appeal.

(b) He accepted that there was no merit to the challenges raised in relation to paragraph 276B

(c) He relied on the case of Dube (ss117A-117D) [2015] UKUT 90 (IAC) (24 February 2015)

(d) The Judge in considering paragraph 276ADE (vi) had considered the wrong version of the Rules and should have made findings in relation to whether she had ties to Trinidad and Tobago.

(e) The Judge had not assessed whether the Appellant's husband could live in Trinidad and Tobago given that he was a British citizen with Barbadian ancestry. It would not be reasonable for the Appellant's spouse and child to live in Trinidad and Tobago if it were not possible.

(f) The Judge should not have refused to consider Article 8 as the test is not whether there were exceptional circumstances.

12. On behalf of the Respondent Ms Brocklesby - Weller submitted that :

(a) In relation to any issues in the Judges assessment of paragraph 267B these were not material to the outcome.

(b) The argument that was being advanced by Mr Collins that it might not be possible for the Appellant's spouse and child to live in Trinidad and Tobago was not advanced before the Judge. Nationality is not a trump card.

(c) In relation to paragraph 117B and the Appellant's relationship with a 'qualifying child' this envisaged the possibility of circumstances were it was reasonable for a child to be required to leave the United Kingdom. In this case the child was only 21 months old and the Judge's assessment of the circumstances by reference to EX.1 adequately addressed this issue: Dube found there was no error of law if the Judge had applied the test he was supposed to apply according to its terms because what matters is substance not form.

(d) In relation to Article 8 Singh and Khalid [2015] EWCA Civ 74 found that there was no requirement for a full consideration of Article 8 outside the Rules if all of the circumstances had been considered under the Rules.

13. In reply Mr Collins on behalf of the Appellant submitted:

(a) There was nothing in the decision to show that the principles in Dube had been addressed

Finding on Material Error

14. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

15. This was an appeal against a refusal of leave to remain based on 10 years lawful residence under paragraph 276B of the Immigration Rules. Mr Collins properly conceded in my view that there was no merit in the grounds which challenged the Judges findings in relation to this provision. The Judge was entitled on the clear and persuasive evidence before him to find that there had been two breaks in the continuity of the Appellant's residence such that she could not succeed under the Rules and both gaps were in excess of 28 days which is the maximum period in relation to which the Respondent might exercise a discretion to grant the application.

16. The decision was challenged on the basis that the Judge did not set out why he found that the Appellant could succeed under Appendix FM as a partner or parent. I accept that at paragraph 26 the Judge simply stated that he had taken into account the submissions made by the Home Office Presenting Officer as why the only provision of Appendix FM that might be relevant was paragraph EX.1. I am satisfied that any failure to set out the Judges reasoning made no material difference to the outcome of the case. The Appellant could not have succeeded under the partner or parent route because she had not made a valid application for limited or indefinite leave to remain as required by R-LTRP 1.1(b). There was also no evidence that the Appellant could meet the financial requirements accompanied by the mandatorily required documentation.

17. I am therefore satisfied that it was open to the Judge to conclude that the only relevant consideration was whether the Appellant could succeed under EX.1. I am satisfied that the challenge that the judge did not recognise there were two routes under EX.1 was without merit as the Judge made clear at paragraph 28 and 29 that there were two routes and set them out properly directing himself as to what he had to consider.

18. The Judge was entitled to proceed on the basis that the nationality of the Appellant's husband and child was not determinative of this issue. Mr Collins raised the issue of whether the Judge should have considered whether , given that the Appellant's spouse was a British Citizen of Barbadian origin it was possible for him to live with his wife in Trinidad and Tobago . I am satisfied that the Judge asked the Appellant (as recorded at paragraph 19) why they could return to Trinidad and Tobago as a family and it was never suggested that her husband or child would not be entitled to return with her. Her concerns were simply matters of preference.

19. In determining whether it was reasonable for the Appellant's child to return with her to Trinidad and Tobago the Judge set out adequate findings in relation to the child's best interests factoring in its young age and adaptability (paragraph 34). In relation to whether there were insurmountable obstacles to the Appellant's spouse relocating with her it is clear from the Judges findings that the matters raised by the Appellant could not, on any rational analysis, be viewed as 'Insurmountable obstacles' . The Appellant raised difficulties in relation to her husband finding employment but had conceded that he was unemployed in the United Kingdom; while she suggested that her teaching qualification was not transferable the Judge rejected this evidence and while he did not refer to it there was evidence in the bundle from the work permit application of 2004 in which it was clear at question 45 that it was anticipated that she would use the teaching skills she acquired in the United Kingdom on return to her home country.

20. In relation to which version of paragraph 276ADE (vi) applied I am satisfied that this is a challenge with no merit. The version of the Rules that applied at the date of the decision and that the Judge should have applied was whether the Appellant had 'no ties' with Trinidad and Tobago. Given that she had given evidence of a large family both immediate and extended which she had visited every 2-3 years she clearly had not lost ties with her home country.

21. The Judge at paragraph 41 decided that there was 'nothing exceptional or unusual about the Appellant's case which would lead to a favourable consideration outwith the Rules' and therefore carried out no Razgar style assessment. This approach is challenged. I am satisfied that having reviewed the guidance given in Singh and Khalid in which the court endorsed the view at

paragraph 65 that there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules. The Judge in this case found as a fact at paragraph 41 that all the issues had been addressed by application of the Rules and indeed no issues were raised before the Judge or indeed before me that had not been addressed by the application of the Rules. Whether he used the word exceptional, unusual or indeed compelling I am satisfied that he was clear that there were no additional factors to take into account.

22. Given my finding that it was open to the Judge to find that an assessment of Article 8 outside the Rules was not necessary in this case I am satisfied that he was not obliged to consider section 117B of the Nationality Immigration and Asylum Act 2002 as this would only have been necessary if such a free standing consideration had been made.

23. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

24. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

25. **The appeal is dismissed.**

Signed Date 4.5.2015

Deputy Upper Tribunal Judge Birrell