



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/50399/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 16th July 2014**

**Determination
Promulgated
On 17th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS TAIWO RONKE YUSUF

Respondent

Representation:

For the Appellant: Ms A Everett , Home Office Presenting Officer
For the Respondent: Mr N Aborisade of OA Solicitors

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria born on 11th November 1972. She arrived in the UK on 6th March 2006 with entry clearance as a visitor. She has five dependents: her husband and four children. On 15th March 2011 she applied for leave to remain in accordance with Article 8 ECHR for herself and her family. The application was refused without the right of appeal on 19th June 2012. A new application was made on 13th August 2012, and this was refused with the right of appeal on 14th November 2013. Her appeal against the decision was allowed on Article 8 ECHR grounds by First-tier Tribunal Judge Gibbs in a determination promulgated on the 29th April 2014.
3. Permission to appeal was granted by Judge of the First-tier Tribunal Osborne on 28th May 2014 on the basis that it was arguable that the First-tier judge had erred in law in the approach to Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640. She had also arguably failed to fully engage with Azimi-Moayed and Others (Decisions affecting children: onward appeals) [2013] UKUT 00197, in failing to treat the best interests of the children as simply a starting point, and thus failing to give weight to the lack of leave to remain by the appellant and her dependents and to give reasons why they could not return to Nigeria as a family unit
4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

5. Ms Everett relied upon the grounds of appeal.
6. Ms Everett submitted that in accordance with EV (Philippines) v SSHD [2014] EWCA Civ 874, which at paragraphs 33, 50 and 58 clarified that the principle of best interests of the child had to be looked at in the context of the parents having no leave to remain and thus not being entitled to remain here. It had to be looked at on the basis of real world facts, with the ultimate question being: “is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?” Thus even if the interests of the child were to continue in education in the UK their overall best interests could be to return with their parents to Nigeria. Judge Gibbs had failed to follow the approach set out in this precedent and had thus erred in law as she had not set out what the position of the children would be in Nigeria.
7. She also submitted that Judge Gibbs had erred in her treatment of Azimi-Moayed which, as set out in the grounds, required the start point of the best interests of children to be with their parents who are being removed unless there are reasons to the contrary, and in her failure to give reasons why the children could not return to Nigeria.
8. Mr Aborisade submitted that Judge Gibbs had not erred in law. She had come to a decision that was open to her on the facts. Judge Gibbs had

had material about the situation in Nigeria before her: it was set out in the refusal letter and also in the appellant's bundle at pages 27 to 47. At paragraphs 7 and 9 of the determination Judge Gibbs records the appellant's evidence and submissions on her behalf that she and her husband have family in the UK but not in Nigeria; that she and her husband have been able to work in the UK doing hairdressing and cleaning; that they would have nowhere to live and would be destitute in Nigeria and thus that they would have insufficient money to provide their children with education and medical care if they were returned to Nigeria. At paragraph 10 of the findings and conclusions section of her determination Judge Gibbs states that the appellant is a credible witness and she accepts the evidence that she has given. If the determination is read as a whole it is therefore clear that the situation in Nigeria on return was factored in to the proportionality exercise as required by Judge Gibbs. Further, as was said at paragraph 40 of Mukarkar v SSHD [2006] EWCA Civ 1045: "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law..."

9. I informed the parties at the end of the hearing that I found no error of law in the determination of Judge Gibbs for the reasons set out below.

Conclusions

10. There can be no error of law in relation to the determination of the matter under Article 8 ECHR for failure to identify reasons to look at the matter outside of the Immigration Rules if ultimately the proportionality exercise is conducted properly and a legally defensible decision that the decision of the Secretary of State's refusal of leave to remain is contrary to Article 8 ECHR is reached. This "full" exercise itself must show more than arguable good grounds for granting leave outside the Immigration Rules in accordance with Article 8 ECHR, and thereby satisfy the Gulshan test. I will therefore focus primarily on whether the proportionality exercise conducted by Judge Gibbs discloses any error of law.
11. It is notable however that Judge Gibbs cited Gulshan and before embarking on her general consideration of Article 8 ECHR did identify matters which she considered were arguable good grounds for granting leave outside of the Immigration Rules, which were the medical condition of appellant and her eldest son who has significant hearing loss; the length of residence of the children; the fact none of the children were born in Nigeria or have lived there; and the fact that three out of the four children were in school in the UK. This is set out at paragraph 12 of her determination, referring back to paragraphs 10 and 11.
12. As has been submitted, the case of Azimi-Moayed requires the Tribunal to start from a position whereby dependent children should return to

their country of nationality with their parents if they are unlawfully in the UK unless there are reasons to the contrary. However it also identifies the fact that it is in the interests of children to have stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong, and that seven years is generally seen as a lengthy period of residence which can lead to ties which it is inappropriate to disrupt. As set out in EV (Philippines): “Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin.”

13. Judge Gibbs clearly makes her proportionality decision in the context of acknowledging that the appellant and her family have no leave to remain, see paragraph 15 of the determination in the finding and conclusions section. She also balances the right of the respondent to maintain immigration control and the failure to meet any aspect of the Immigration Rules at paragraph 19 of her determination.
14. I accept the submission of Mr Aborisade that Judge Gibbs does include the evidence of the appellant about the situation in Nigeria in her findings and conclusions at paragraph 10, and thus adopts the submissions that the children would face destitution in Nigeria without a home, access to education and medical treatment as part of her findings. It might have been helpful if she had done this more explicitly but nevertheless the determination should be read as a whole, and she does clearly and unambiguously adopt the evidence of the appellant which she finds credible in its entirety. At paragraph 16 of the determination Judge Gibbs then examines the level of integration of the children in the UK which includes the fact that the oldest child has been in the UK for more than seven years; the fact that the other children have never been to Nigeria having been born in the UK; and that due to their period of residence and integration that all the children “belong to British society”. Judge Gibbs gives some, but not significant weight, to the medical problems of the appellant and her eldest son, having clearly acknowledged that this was not a case that could meet the threshold test under Article 3 ECHR for a medical case – see paragraphs 11 and 17 of the determination.
15. I find that Judge Gibbs has conducted her assessment of the proportionality of the appellant and her children’s removal in accordance with the guidance case law. She has answered the ultimate question as to whether it was reasonable to expect the children to follow the parents with no right to remain in the UK back to Nigeria. She has identified factors which led her to conclude it was not appropriate for the appellant and her children to return in accordance with the approach set out in Azimi-Moayed.

Decision

16. The decision of the First-tier Tribunal did not involve the making of an error on a point of law.
17. The decision of the First-tier Tribunal allowing the appeal under Article 8 ECHR is upheld.

Deputy Upper Tribunal Judge Lindsley
16th July 2014