



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

Appeal Number: IA/50589/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham

**Determination
Promulgated**

On 27 October 2014

On 14 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

**MORIAM YETUNDE ADELOWO
ANONYMITY DIRECTION NOT MADE**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Davison, Counsel, instructed by Perera & Co.

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

Claim History

1. The Appellant, who is a citizen of Nigeria, applied for leave to remain in the UK on the basis of her private and family life. She is married to a British citizen, Mr Aura Musa Alidu, the Sponsor, and they have two children: Idera who was born on 2 March 2013 and Muyideen, who was born on 7 July 2014, both of whom are British citizens. Her application was refused and her appeal against that decision was dismissed by First-tier Tribunal Judge J

C Hamilton, who heard the appeal on 25 March 2014 and his determination was promulgated on 13 August 2014.

2. The Appellant sought permission to appeal against the decision of Judge Hamilton. The Appellant was unrepresented and no particular error of law was asserted in her grounds of application. On granting permission to appeal, Judge N J Osborne states:

“...having read the application in detail and having read the determination in equal detail, it is at least arguable that the Judge erred in law in failing to consider the Appellant’s appeal under Article 8 ECHR outside the Immigration Rules. The evidence of the Appellant is that her husband works whilst she looks after the two children of the relationship. The Judge considers that if he considered the Appellant’s appeal under Article 8 he would be guilty of the sort of “freewheeling” approach deprecated by the Upper Tribunal in **Gulshan**. I disagree. At [25] the Judge identified that “exceptional” does not mean unusual or unique but means circumstances in which refusal of the application would result in unjustifiably harsh consequences for the applicant and their family such that refusal would be considered in relation to each constituent member of the family as a whole. These two baby girls are presently cared for by their mother. It is arguably an error of law for the Judge to have found that so far as those two children are concerned it is not disproportionate to remove their mother from this country. It is further arguable that the Judge failed to consider adequately the best interests of the children.”

3. Permission was granted on all grounds.

The Hearing

4. At the hearing, Mr Davison, relying on the skeleton argument, submitted that:
 - a. The Judge appeared to accept that the only reason why the Appellant could not succeed under the partner route was because they had not been living together in a relationship akin to marriage for two years. However, it is recorded in the determination at [14] that they had been living together since June 2011. This evidence was not addressed anywhere within the determination and the Judge therefore gave inadequate reasons for finding that the Appellant could not succeed under the partner route. When asked if he was saying that the only provision under the partner route which the Appellant fell foul of was the living together provision, he said that that was the only provision that was highlighted by the Respondent, although often if a person did not meet one of the provisions, the Respondent did not go on to consider any other provision.
 - b. The determination was difficult to follow. The Judge set out the findings at [27] and seemed to say that the Appellant could return

to Nigeria with the children at [35] but then he refers to the jurisprudence and concludes at [43] that there is likely to be a prolonged separation if the Appellant is required to leave because her Sponsor will not be able to meet the maintenance requirements. This is contrasted with the position in **MK (Best interests of child) India UKUT 00475** and **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013]** which is set out at [24 - 25], in which it is established, as provided in **MK**, that during the early period of a child's life he is focussed on his parents and, as provided in **Azimi-Moayed**, that the starting point is that it is in the best interests of children to be with both parents. This contradicts the position at [43] where the Judge states that there is nothing unreasonable about the Appellant and the children returning to Nigeria and the Judge's acceptance that if the Appellant had not failed to meet the eligibility requirements, she would have been entitled to succeed under EX (ii) on the basis of her relationship with her children. Mr Davison stated that he accepted that the Appellant could make an application for her children to be citizens of Nigeria as well, he believed, without losing their British citizenship, but it was not certain that they would be granted citizenship. He submitted that when considering the best interests of the children, the loss of the benefits attributed to citizenship had to be weighed in the balance.

- c. Whilst the Judge did refer to **Chikwamba v SSHD [2008] UKHL 40** and **Huang v SSHD [2007] UKHL 11**, he made a finding that there was family life between the Appellant, her children and the Sponsor. Mr Davison argued that there is a tension or irrationality in the Immigration Rules because the only way in which the Appellant could remain within the UK were if she had sole responsibility and did not live with the father of the children or she is separated from the children's other father, who must have sole responsibility (SA at para 11). The Immigration Rules discriminated against married couples and those who are in a relationship. The Judge expressly accepted that the Appellant would have been able to meet the provisions of EX.1(ii) if she had not been excluded from relying on it by her failure to meet the eligibility requirements [34].
5. Mr Tarlow submitted that the letter from the Appellant's representatives dated 11 April 2013 confirmed that the relationship between the Appellant and the Sponsor did not become serious until May 2012 and they did not start living together until June 2012 and this must have been written after taking instructions from the Appellant. There was therefore evidence before the Judge that the couple did not start living together until June 2012.
 6. He submitted that basically the Appellant's case was that the determination was 'all over the place', and moving in two directions. However, the determination is balanced. The Judge set out the law extensively, considered both sides of the case and then reached a decision he was entitled to reach and a material error of law had not been established. As to the submission that there was 'discrimination' or unfairness between the

treatment of couples and single parents, the Immigration Rules were government policy and should be read as such.

7. In response, Mr Davison submitted that he accepted that it was stated in the letter sent by the Appellant's representatives that the Appellant and her Sponsor had lived together since June 2012 but submitted that there was evidence before him that they had lived together since June 2011. There may have been a period of cohabiting at each other's homes and this aspect of the case should have been considered. He reiterated that the Rules were 'unfair' because if the couple were to split up, they would meet the Rules. The fact that they are in a relationship disqualified them.
8. On conclusion of submissions, I reserved my decision which I give below together with my reasons.

Analysis and reasons

9. Before the First-tier Tribunal, it was submitted that the provisions of the Immigration Rules in relation to the parent route were irrational because single parents could benefit from the provisions of the Rules but a married couple could not, and because the Appellant would have benefitted from the provisions of EX.1 but for the eligibility requirements, the Immigration Rules were unlawful or irrational. I do not have jurisdiction to declare particular provisions within the Immigration Rule unlawful or irrational. Moreover, the Immigration Rules are the Secretary of State's attempt to incorporate into the Rules the principles which are applied in Article 8 claims. In most circumstances, the Immigration Rules are a complete code for Article 8 purposes (see **R (on the application of Nagre) v SSHD [2013] EWHC 720 (Admin)** and **MF (Nigeria) [2013] EWCA Civ 1192**). However, where there are particular circumstances which cannot be adequately considered under the Immigration Rules, a Judge can apply the provisions of Article 8 directly. There is scope within the Rules to apply EX.1 of Appendix FM in certain circumstances. It appears that the Judge correctly stated that the provisions of paragraph E-LTRPT.2.2-2.4 (which includes the need to establish sole responsibility) must be complied with before the provisions of EX.1 were available to the Appellant (see **Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC)**). Having the Judge, having correctly identified the provisions, and realising the possibility that the particular circumstances of the Appellant's case may not be sufficiently recognised under the Immigration Rules, he went on to consider proportionality. This ground therefore cannot succeed.
10. The findings of the Judge were that the Appellant was not honest about her circumstances in Nigeria; she had not been trafficked into the UK, and had failed to establish that she was at risk on return. He found that she has a daughter there, that it is likely that she is touch with her mother there and that in view of her failure to be honest about her situation in Nigeria, he was not prepared to accept that she was not in contact with her daughter in Nigeria [28]. The Sponsor has a child in Nigeria also and although he claimed not to be in touch with her, the Judge found that he had visited Nigeria a number of times since 2011 and that it was likely that he was in

touch with her [29]. Again, he found that the Sponsor was not honest about his circumstances and contacts in Nigeria. This was the backdrop to the Judge's assessment of the Appellant's claim.

11. With regard to the Judge's treatment of the evidence relating to how long the couple and her Sponsor had been living together, it is clear that the date that the Respondent used was that which was stated in the letter from the Appellant's representatives. The Judge noted that the Appellant claimed to have met the Sponsor in Mid 2011 [12 (i)]; there was inconsistency in the evidence of the Appellant as to when they were in a committed relationship [30]; and there was no evidence as to where she was living [14]. Given the credibility findings made against the Appellant, it was open to the Judge to rely on the information provided by her representatives regarding the date on which she and the Sponsor started living together. I find that this ground lacks merit.
12. As to the assessment under the Rules, **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)** provided that a freestanding assessment outside the rules under Article 8 directly applied would only be necessary if it was not possible to assess all the circumstance of an Appellant's claim within the Rules, that is, that there were arguably good grounds for an assessment outside the Rules. A decision to refuse an application would only be disproportionate if the outcome of the decision was unjustifiably harsh. The Judge was well aware of this guidance [36]. He was also aware that if it was possible to consider all circumstances within the ambit of the Rules, then it was not possible to circumvent the Rules by the assessment of proportionality by applying Article 8 directly [39 - 42, 45]. Further, the Judge was aware of the need to take into account the best interests of the children [23 - 25, 47].
13. He then went through the provisions of the Rules and his findings under the Rules do not reveal any arguable material errors of law. Rather than 'getting lost in the Article 8 case law' I find that the Judge has been through the jurisprudence carefully and examined the Immigration Rules to establish whether the Appellant's circumstances were adequately considered under the Rules, with a view to establishing whether he would need to undertake a free standing Article 8 assessment [19 - 25, 37 - 38]. He cannot be faulted for saying that the principle of **Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC)** appears to be incorporated into the Rules in EX.1 [45]. British nationality is not a trump card as stated in **ZH (Tanzania) [2011] UKSC 4** and applied in **AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88**. He has made findings of fact which were open to him on the evidence before him, considered the case law and applied the law to the facts.
14. The further stumbling block to the success of this application is that whilst the Judge has navigated his way through the provisions of the Rules, he has also considered the case in the alternative at [47]. Having reminded himself of the guidance on Article 8 at [20 and 22] he has dealt with the assessment of proportionality at [47 - 53]. He has weighed in the balance

the loss of the benefits attached to British citizenship [49] and the position of the Sponsor at [50]. Nationality is not a trump card (see **ZH (Tanzania) UKSC 4**, paragraph 30) He was fully aware of the consequences of a decision to remove the Appellant if the Sponsor chose to remain in the United Kingdom, particularly where an application for entry clearance may not be successful; and decisions of this nature are always difficult to make. Whilst the Judge should not have factored into the assessment of proportionality the likely outcome of a future application for entry clearance (see **SB (Bangladesh) v SSHD [2007] EWCA Civ 28** and **HC (Jamaica) v SSHD [2008] EWCA Civ 371**) I am satisfied that this did not materially affect his assessment under Article 8 ECHR. Judge Osborne, in granting permission, stated that it is arguably disproportionate to remove the Appellant from her baby girls, the reality, which the Judge faced, was that they have a choice as to whether or not they remained together. The Appellant and the Sponsor chose not to be truthful about their circumstances in Nigeria, they commenced their relationship when the Appellant had no right to remain in the UK, and they can have had no expectation that she would be granted leave to remain. He considered the provisions of s 55 of the Borders, Citizenship and Immigration Act 2009 [47]. Read as a whole, the determination discloses no material errors of law.

Decision

15. The determination of Judge Hamilton contains no material errors of law and his decision therefore must stand.
16. The Appellant's appeal is dismissed.
17. There was no application for an anonymity order before the First-tier Tribunal or before me. In the circumstances of this case, I see no reason to direct anonymity.

Signed

Date **14 November 2014**

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

In light of my decision, I have considered whether to make a fee award under Rule 9(1)(a)(costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Appellant's appeal has been dismissed, I confirm the fee award of Judge Hamilton.

Signed

Dated **14 November 2014**

M Robertson
Sitting as Deputy Judge of the Upper Tribunal