



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
AA/00219/2014

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> April 2014**

**Determination Sent  
On 01<sup>st</sup> August 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HARRIS**

**Between**

**MR GODSPower ALAO  
(NO ANONYMITY ORDER MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: In person

For the Respondent: Mr P Deller, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of Nigeria, born on 25<sup>th</sup> May 1975. The Appellant applied through his Solicitors on 11<sup>th</sup> October 2013 for an extension of his discretionary leave to remain in the United Kingdom on the basis of his family life. Discretionary leave had been granted originally on 28<sup>th</sup> October 2010 until 28<sup>th</sup>

October 2013 on the basis of the Appellant's family life with his partner, Blessing Ehimen and children. The Appellant stated in his application for extension, that his relationship with Miss Ehimen was no longer subsisting and that he did not currently have contact with the children. He stated that he was attempting to establish contact with the children and intended to take court action to pursue contact rights, but no evidence had been provided. As a result the Appellant had failed to show the circumstances upon which he had previously been granted leave had not changed, and his application for an extension for discretionary leave was refused by Notice of Refusal dated 19<sup>th</sup> December 2013.

2. The Appellant appealed and the appeal came before First Tier Tribunal Judge Birk sitting at Birmingham on 10<sup>th</sup> February 2014. In a determination promulgated on 15<sup>th</sup> February 2014, the Appellant's appeal was dismissed under the Immigration Rules and pursuant to the application for discretionary leave but was allowed under the Human Rights Convention.
3. The Secretary of State lodged grounds of appeal to the Upper Tribunal dated 2<sup>nd</sup> March 2014. Those grounds contended that the Tribunal in finding that the best interests of the child made removal of the Appellant disproportionate, that in making that assessment it was respectively submitted that the Tribunal misdirected itself in law and that the Immigration Rules made clear that children who spent less than 7 years in the United Kingdom would not have developed a strong enough private life in the United Kingdom to outweigh the public interests in immigration control outside of exceptional circumstances.
4. Further, the grounds contended that it was made clear in *Gulshan [2013] UKUT 00640(IAC)* that the Article 8 assessment should only be carried out where there are compelling circumstances not recognised by the Rules, and in this case, the Tribunal did not identify such compelling circumstances and its findings were therefore unsustainable.
5. On 14<sup>th</sup> March 2014, Designated Judge McClure granted permission to appeal. In granting permission, Judge McClure noted that the First Tier Tribunal Judge had made reference to the case law, but that the Judge did not identify what the exceptional factors were or what the compelling circumstances were to justify the decision to allow the appeal.
6. For the sake of continuity throughout all proceedings, Mr Alao is referred to herein as the Appellant, and the Secretary of State as the Respondent, albeit that the Secretary of State is the Appellant to this appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Deller. The Appellant appears, as he did before the First Tier Tribunal, in person.
7. I explained to Mr Alao as he was acting in person, the procedure in the Upper Tribunal and he indicated that he understood. I indicated that as the appeal was by the Secretary of State, Mr Deller would make the initial submissions and I would invite him to comment on anything he wished to add at the end of those submissions.

## **Submissions**

8. Mr Deller starts by indicating that this appeal revolves around the 2012 Amendments to the Immigration Rules and the Secretary of State's complaint thereafter that the appeal was allowed under Article 8. Mr Deller acknowledges

that the tasks are set out at paragraph 16 of the First Tier Tribunal Judge's determination, and that he has set out the relevant case law to be considered. He submits that the complaint of the Secretary of State is to be found in paragraph 22 of the determination and that whilst the Judge has accepted the relationship between the Appellant and his wife and children subsists, and that the family are British citizens, he has not in the Secretary of State's view gone on to say why it succeeds. He submits that there is a difference between naming cases and applying the case law.

9. He further considers that paragraph 5 of the determination may not be right in that the family were separated at the date of decision and if the case law is properly considered, it is necessary to look at the Rules and he submits that the First Tier Tribunal Judge has not carried out that exercise properly. He submits that there is an argument for saying that the case should be worthy of consideration under the Rules because the family have been reunited and the question to be asked is whether it would be reasonable to expect the children or the mother to move to Nigeria and would there be insurmountable objects in their doing so. He submits that the points raised to be addressed at paragraph 16 are not addressed in paragraph 22 and therefore there is a material error of law.
10. Mr Alao merely reiterates the scenario to be found in the First Tier Tribunal Judge's determination. He acknowledges the factual scenario set out at paragraph 9 of the determination and agrees that there was a short period of time at the end of last year when he moved out from the matrimonial home, but even then exercised contact with his children and was allowed to sleep in the house for a couple of days. Further, he points out that the evidence taken by the First Tier Tribunal Judge was not merely from himself, but also from his wife as she attended Court to give evidence and I note that her evidence is recited at paragraph 11 of the Judge's determination.

## **The Law**

11. Errors of legislative interpretation, failure to following binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## Findings

12. It is true that there is a considerable developing body of case law as to the approach to Article 8 in the event that an Appellant cannot satisfy the conditions set out in the new Immigration Rules. Paragraph 16 of the First Tier Tribunal Judge's determination recites those authorities that were prevalent at the time that the learned Judge heard the appeal. Since then there have been subsequent decisions including decisions of the Court of Appeal.
13. The law is still best succinctly set out at paragraph 31 of *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)*.

“Where an area of the rules does not have such an express mechanism, the approach in *R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) (29-31)* in particular and *Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)* should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them”.

The question is does paragraph 22 of the determination meet that criteria. I am satisfied that it does. The determination has been addressed with the consideration of reasoned care to the facts of the case. The basis upon which Mr Deller poses his submissions are to his credit restricted very much to the analysis of the Judge and to the grounds of appeal, rather than trying to make capital of the fact that at the time of application the Appellant was briefly separated from his spouse, albeit that he was maintaining regular contact with his children.

14. The fact remains that the Appellant has a wife and children who are British citizens with whom he lives. The issues were looked at and considered by the First Tier Tribunal Judge who also went on to consider the principles set out in *ZH (Tanzania)* and in particular *Zoumbas v SSHD [2013] UKSC 74*.
15. In all the circumstances paragraphs 22 and 23 show a balanced reasoned approach setting out grounds for granting leave outside the Rules and consequently the determination does not disclose any material error of law and the appeal of the Secretary of State is dismissed.

## Decision

16. The decision of the First Tier Tribunal does not disclose a material error of law and the appeal of the Secretary of State is dismissed.
17. The First Tier Tribunal Judge did not make an Order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that Order and none is made.

Signed: D N Harris

Dated: 22 July 2014

D N Harris  
Deputy Upper Tribunal Judge