



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/00021/2014
IA/03239/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15th July 2014

Determination Promulgated
On 25th July 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR M C N
MASTER G M N
(Anonymity Direction Made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: the first appellant attended but was not legally represented
For the Respondent: Ms J Isherwood a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of Zambia who was born on 3 July 1969. I will refer to him as the father. The second appellant is his son, born in the UK on 26 March 2012, who has no passport but may be a citizen of Zambia. I will refer to him as the son and to both of them as the appellants.

2. The appellants have been given permission to appeal the determination of First-Tier Tribunal Judge Rhys-Davies (“the FTTJ”) who dismissed their appeals against the respondent’s decisions of 13 December 2013 to refuse to grant the appellants leave to remain in the UK under the provisions of Appendix FM of the Immigration Rules or, alternatively, outside the Rules on Article 8 human rights grounds. The appellants had claimed on the basis of their close family ties with the father’s wife (Ms TL) and their other two children (Miss NN born on 18 December 2001 and Master CN born on 4 May 2005). The three children are full siblings. I will refer to the father, the son, Ms TL, Miss NN and Master CN as the family.
3. There are two reasons for refusal letters for the father. The respondent originally refused his application with no right of appeal on 13 June 2013. The father sought to judicially review that decision and the proceedings were compromised on 6 November 2013 when the respondent agreed to reconsider his appeal and to make a new decision with a right of appeal. There is no separate reasons for refusal letter for the son.
4. In the second reasons for refusal letter dated 16 December 2013 the respondent concluded that the father neither satisfied the partner nor the parent route under Appendix FM of the Immigration Rules. He could not benefit from paragraph EX1 because he did not meet the eligibility requirements as either a partner or a parent. The application was also refused under paragraph 276ADE because the father did not meet the required criteria. The respondent then considered Article 8 outside the Immigration Rules concluding that there were no exceptional circumstances which would make the decision unjustifiably harsh for the father or his family. The respondent also considered her duty under Section 55 of the 2009 Act to promote the welfare of the children. There was a functioning education system in Zambia which the children could enter. The respondent did not consider that Ms TL and the children would not be able to enter Zambia and whilst the move there might be disruptive to their private lives they could continue to enjoy family life in Zambia.
5. Ms TL claimed to have an outstanding legacy application but the respondent did not accept this.
6. Both parties were represented at the hearing before the FTTJ. The appellants were represented by counsel instructed by the solicitors then acting for the appellants. The FTTJ heard evidence from the father and Ms TL.
7. The appellants’ counsel conceded that they could not satisfy the requirements of the Immigration Rules as set out in Appendix FM and paragraph 276ADE. The FTTJ went on to consider the principles set out in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC).

The summary of the provisions of Gulshan, prepared by the author of that determination, Cranston J, states;

“On the current state of the authorities:

(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;

(b) 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: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

(c) the term “insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

The Secretary of State addressed the Article 8 family aspects of the respondent’s position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State’s conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.”

8. The FTTJ found that the family enjoyed a family life with each other. The father and Ms TL were the parents of all three children and they lived together at the same address. The father was a citizen of Zambia and Ms TL a citizen of Ghana. The father arrived in the UK in July 1997 with entry clearance as a visitor. He had lived in the UK without any leave except for the first five months. Ms TL claimed to have been in the UK since various dates between 1982 and, latterly, 1998. The FTTJ gave detailed reasons for not believing these dates and for his conclusion that she had nevertheless been in the UK since at least 2001. He found that she was not a credible witness.

9. The FTTJ found that neither Ms TL nor any other member of the family had any application for leave awaiting a decision by the respondent. The father and Ms TL had established private lives in this country but these had been acquired when neither of them had any lawful right to be here. The two elder children were at school and doing well. The eldest child was in contact with relatives here and was beginning to develop a private life of her own. None of the children had any particular health concerns. The claim that the youngest suffered from asthma was not corroborated by any medical evidence.
10. The FTTJ found that the father had made no effort to contact the Zambian High Commission about obtaining a passport for himself or any of the children. No evidence had been produced to substantiate claimed difficulties about the children being recognised as Zambian citizens. There was no evidence that Ms TL or the children would not be admitted to Zambia. The father had a large family in Zambia. They had not, as he claimed, disowned him.
11. The FTTJ made it clear that whilst only the appeals of the father and the son were before him he considered the effects of their proposed removal on the family as a whole. In doing so he treated the best interests of the children as a primary consideration. He found that it would be in the best interests of all three children to go to Zambia with the father and Ms TL. Whilst Ms TL was not currently subject to a decision to remove her she had no leave to remain. There was no current decision to remove Miss NN or Master CN.
12. The FTTJ did not believe Ms TL's evidence that if the father and the son were removed to Zambia neither she nor the other two children would go with them voluntarily. He found that all of them would be admitted to Zambia, that if they went together the family would remain together and it would be in all their best interests to do so. If Ms TL and the other two children did not go with the father and the son then it would be in the knowledge that they had no right to remain and could be subject to a decision to remove at any time.
13. The FTTJ concluded that "the proposed removal of the appellants would not be unjustifiably harsh and that the public interest in favour of their removal in order to maintain an effective system of immigration control, as permitted within the terms of Article 8 (2) of the 1950 Convention (Shahzad (Art 8: legitimate aim) [2014] UKUT 85 (IAC) outweighs any arguments in favour of allowing them to remain". The appellants' appeals were dismissed both under the Immigration Rules and on human rights grounds.
14. The appellants applied for and were granted permission to appeal. The grounds of appeal, prepared by counsel who represented the appellants at the hearing, submit that the FTTJ erred in law. Firstly, by placing undue emphasis on Ms TL's immigration history; any assessment of her credibility or her immigration history was not a relevant consideration. Secondly, by failing to have regard to relevant evidence in concluding that there was no outstanding legacy application for Ms TL. Thirdly, in assessing proportionality by failing

to have regard to the express wishes of the two elder children or the length of time they had lived in this country. Fourthly, although referring to Gulshan, failing properly to apply its principles. Fifthly, failing to take into account the son's relationship with his grandmother and other relatives. The First-Tier Tribunal Judge who granted permission to appeal thought that there was arguable merit in the third ground but less in the others. Nevertheless, permission was granted to argue all of them.

15. The father told me that the appellants were no longer legally represented because they could no longer afford it. I explained the purpose of the hearing and the procedure to the father and said that I would do the best I could to assist him within the bounds of impartiality. I explained to him that there were detailed grounds of appeal prepared by counsel who had represented him at the hearing before the FTTJ and he said that he wished to rely on these. He submitted that the FTTJ had failed to consider Miss NN's and Master CN's long residence in this country. Both had lived here all their lives and knew only life in this country. He believed that she was entitled to be recognised as a British citizen. An application had been submitted about a month ago and the decision was awaited Master CN was asthmatic and used an inhaler pump. Ghana and Zambia were very different countries. Ms TL's mother lived here and was a British citizen as were his sister and brother.
16. Ms Isherwood relied on the respondent's Rule 24 response. She submitted that there was no error of law. The appeals were by two members of the family but the other three had no leave to remain in the UK. She argued that Ms TL's credibility and immigration history were relevant and important. Ms TL accepted that she had given false information. It was clear that the FTTJ had taken into account the position of every member of the family and the family unit as a whole. None of them had leave to be here. Both the father and Ms TL had avoided immigration control. The FTTJ had not rejected their evidence as a whole; there were a number of important positive credibility findings. Proper regard had been had to their coming from separate countries and the length of time that all the members of the family had been here. It was open to the FTTJ to find that Ms TL had not come here as long ago as she claimed.
17. Ms Isherwood submitted that the FTTJ reached conclusions fully open to him on all the evidence. There were proper findings in relation to all the children. There was no longer a seven-year policy. She relied on Zoumbas v SSHD [2013] UKSC74 and EV (Philippines) v SSHD [2014] EWCA Civ 874. The FTTJ had fully and properly recognised the position of Miss NN. There was no material error of law and no other proper conclusion open to the FTTJ. The grounds disclosed no more than disagreement with conclusions properly reached.
18. In his reply, the father said that he had wanted to regularise his position by making a 14 year residence application but could not afford to do so. By the time he could the qualifying period had increased to 20 years. He argued that the FTTJ placed too much emphasis on the evidence of Ms TL and did not

sufficiently consider the children, their grandmother or other relatives and friends in this country. The UK was their home. He was 45 years of age and would not find it easy to get a job in Zambia where he had no home. Ms TL had said that she would not go with him. He had never committed any criminal offence and just wanted a family life here. The whole family considered themselves to be British or English. They had used up all their savings fighting the case. Ms TL was a good wife and a good Christian. They had three lovely children. Ms TL told me that she wished she could undo the untruths she had told earlier. She was telling the truth now. I was asked to allow the appeals.

19. I reserved my determination.
20. In relation to the first ground of appeal I find that the FTTJ did not place undue emphasis on Ms TL's immigration history. The FTTJ properly looked at the position of each member of the family as well as the family unit as a whole. It would have been an error of law not to do so. The credibility of Ms TL was important and the FTTJ did not spend a disproportionate part of the determination dealing with it. It was necessary to give it this much attention in order to provide a full explanation for the conclusions that Ms TL was not a credible witness and that she had claimed to have been in the UK for far longer than was the case. Ms TL admitted to making false claims as to the length of time she had been here.
21. As to the second ground of appeal, there was conflicting evidence as to whether Ms TL had an outstanding legacy application. The adverse finding as to her credibility was a relevant factor. There was documentary evidence pointing both ways, as the FTTJ recognised. However, I find that the FTTJ made a proper assessment of all the evidence and it was open to him to come to the conclusion that there was no outstanding application.
22. In relation to the third ground I note that in paragraph 17 the FTTJ noted that he had a witness statement from Miss NN which set out her perspective on her family and school life and her hopes for the future. In paragraph 53 he found that she was doing well at school, enjoyed school and her friends and participated in extracurricular activities. She had contact with her grandmother and her aunt and her cousins. She had begun to develop elements of her own private life outside her home. The FTTJ did not hear oral evidence from her. Her evidence was contained in the witness statement dated 2 February 2014 and a handwritten letter. The FTTJ referred to her evidence and it is clear that he took this into account. It was not necessary for him to set out everything that was said in the statement letter and I find that the length of time she had lived here and her wish to remain were properly taken into account. The grounds did not refer to any witness statement from Master CN and I cannot find one or any indication that the FTTJ failed to take into account the length of time he has lived here. The FTTJ dealt with the question of his asthma concluding that if he did have asthma it was a common condition which could be treated in Zambia.

23. As to the fourth ground, the FTTJ referred to Gulshan in paragraph 35 and I can find nothing in the determination to indicate that having set out the principles in this case he failed to apply them. It is clear that he did consider the Article 8 grounds outside the Immigration Rules.
24. As to the sixth ground, the FTTJ dealt with Miss NN's relationship with her grandmother her aunt and her cousins in paragraph 53. I can find no statement from Master CN dealing with similar relationships, although there is no indication that the FTTJ thought that these were any different from the relationships enjoyed by his sister.
25. I find that the FTTJ did consider the best interests of the children in the Article 8 proportionality exercise including the periods of time during which they have lived here. There is no irrationality in the conclusions that it was in their best interests to go with their parents to Zambia (Zoumbas) and, taking into account the need to maintain immigration control, that it was a reasonable to expect the children to live in that country (EV Philippines).
26. I find that this is a clear and comprehensive determination in which the FTTJ reached conclusions open to him on all the evidence.
27. The FTTJ made an anonymity direction and I consider it necessary to continue this in order to protect the interests of the children and this family.
28. I make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellants or any members of their family.
29. I find that the FTTJ did not err in law and I uphold his determination.

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Signed
Upper Tribunal Judge Moulden

Date 18 July 2014