



IAC-AH-DH-V1

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

Appeal Number: IA/33464/2013

THE IMMIGRATION ACTS

Heard at Field House

On 7th October 2014

**Determination
Promulgated**

On 20th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR OLADIPUPO ANTHONY HAMILTON

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Ms F Shaw (Counsel)

For the Respondent: Ms S Vidyadharan (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant's appeal against decisions to refuse to vary his leave and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 was dismissed by First-tier Tribunal Judge Vaudin d'Imecourt ("the judge") in a determination promulgated on 17th June 2014. The appellant's case was advanced on the basis that his removal, together with his three children, was not in accordance with the law or the Immigration Rules ("the rules") and would breach the human rights of himself and his children.

2. The judge took into account the appellant's immigration history. He arrived in May 2009 as the dependant of his wife, present here with limited leave. The three children joined their parents in August 2009. The appellant and the children were included as dependants in his wife's application for further leave to remain as a Tier 1 Highly Skilled (General) Migrant. This application was refused by the Secretary of State in April 2011. An appeal was brought and it emerged at the hearing in June 2011 that the appellant's wife had returned to Nigeria. The appeal was allowed so that the family's circumstances might be considered. Discretionary leave was then given to the appellant and his children for a period of three months, until 11th July 2012, to enable them to make arrangements to leave the United Kingdom. Shortly before expiry of that leave, the appellant applied for indefinite leave, apparently under paragraph 317 of the rules.
3. The Secretary of State refused the application on the basis that the requirements of the rules were not met. The appellant's case was considered under Article 8 of the Human Rights Convention and in the light of section 55 of the Borders, Citizenship and Immigration Act 2009. The rules contained in Appendix FM and paragraph 276ADE formed part of the Secretary of State's consideration of the application.
4. The judge made findings of fact regarding the circumstances of the appellant and his family. He accepted that the three children were doing well at school here. He found that the appellant's wife remained in Nigeria and that the marriage continued and that there was communication between the appellant and his wife. The judge also accepted that the appellant was being financially supported by his brother in the United Kingdom.
5. The judge took into account submissions made on behalf of the appellant that the children's best interests required that they be allowed to remain in the United Kingdom, particularly to continue their education. The judge concluded that there were no compelling circumstances requiring consideration outside the rules and no evidence that the children would not be able to receive an education in Nigeria, on removal with their father. They would rejoin their mother who, on the evidence, missed her children. The judge concluded that the adverse decisions were in accordance with the law and dismissed the appeal.
6. An application for permission to appeal was made, on the basis that the judge failed to make clear findings and gave an inadequate explanation for his conclusion that the decisions did not amount to a disproportionate breach of the appellant's Article 8 rights. It was contended that the application for leave was made before "the new rule came to effect (sic)". Permission to appeal was granted on 11th August 2014, the judge granting permission finding that the judge's approach was arguably in error in the light of MM [2014] EWCA Civ 985. The same judge noted that there was

no merit in the argument that the appellant made his application before “the new rule” came into effect as it was made on 9th July 2012.

7. In a rule 24 response, the Secretary of State opposed the appeal. The grounds disclosed nothing to show a material error and the judge made sustainable findings. The determination showed that he fully considered the case, including in relation to any exceptional circumstances present.

Submissions on Error of Law

8. Ms Shaw handed up a short bundle, including part of the judgment in MM [2014] EWCA Civ 985, the judgment in ZH (Tanzania) [2011] UKSC 4 and section 55 of the 2009 Act. She said that the judge erred in law by adopting the wrong approach. Paragraph 33 of the determination showed that he had not taken into account or assessed the welfare of the children, in the light of the section 55 duty. It was clear from MM that it was not necessary to show “exceptional circumstances” before proceeding to make an Article 8 assessment. The ties established here by the appellant and his family and the best interests of the children fell to be considered. The judge’s failure to undertake this exercise amounted to an error of law. If the Upper Tribunal agreed, it would be appropriate to remit the case to the First-tier Tribunal for findings to be made.
9. Ms Vidyadharan said that the grounds revealed a disagreement with the outcome but the findings were open to the judge on the evidence. Paragraph 28 on showed that he carried out a thorough exercise in the Article 8 context. He was well aware of the factual matrix and accepted evidence showing that the children were doing well at school. He was entitled to observe that there was nothing to show that good schools were not available in Nigeria. The appellant and his three children had been present in the United Kingdom for only a limited period of time. The judge found that the appellant’s wife remained in Nigeria and the marriage continued. The appellant’s brother would be able to continue to offer support.
10. In any event, paragraphs 32 and 33 showed that the judge did consider the position fully, including outside the rules. He came to a clear conclusion that it was in the best interests of the children to return to Nigeria. The only factor raised of substance was their education here. Other than that, there appeared to be no circumstances justifying leave outside the rules and Article 8 was clearly not a freestanding right for a family to choose the location of their residence. The judge was entitled to conclude, at paragraph 34, that an assessment of proportionality outside the rules was unlikely to lead to any other result than the conclusion he reached in accordance with the authorities he identified in paragraph 33. There was no material error.
11. In a brief response, Ms Shaw said that although the mother was clearly a key member of the family, her circumstances were almost irrelevant to the

case. Critical were the best interests of the children and their welfare while in the United Kingdom. The three children were thriving and there was a risk that by removing them from their environment and their education, this would have a detrimental impact on them.

Conclusion on Error of Law

12. The determination is fully and clearly reasoned by a very experienced judge. It contains a succinct summary of the cases advanced by the parties. The judge had the appellant's immigration history clearly in mind, as he did the circumstances of the three children. He accepted that the children were doing well at school. They arrived here in August 2009.
13. I find that the findings of fact made by the judge were open to him in the light of the evidence. The appellant and his three children were found to be healthy and to benefit from financial support from the appellant's brother. The judge found that this financial support would continue if the appellant and his children returned to Nigeria. The judge was entitled to find that the marriage continued, the appellant's wife remaining in Nigeria, and that she missed her children, who missed her and, of course, the appellant missed his wife. So far as education is concerned, having accepted that the children were doing well here he was entitled to find that there was nothing to show that there were no good schools in Nigeria which they could not attend.
14. At paragraph 32, the judge took into account the limited leave given to the appellant and his children, as his wife's dependents. She left the United Kingdom, having been unable to meet the requirements of the rules in relation to Tier 1 of the points-based system.
15. The judge set out several of the recent authorities on the relationship between the rules in their post 9th July 2012 form and Article 8 of the Human Rights Convention. He did not expressly mention MM [2014] EWCA Civ 985 but as the judgment only appeared on 11th July 2014, nearly a month after promulgation of the determination, he cannot sensibly be criticised for that. Ms Shaw drew my attention to paragraph 128 of the judgment in that case, in which it was observed that there was not much utility in imposing a further, intermediary test, that if a person is outside an immigration rule, he has to demonstrate, as a preliminary to consideration outside the rules, that he has an arguable case that there may be good grounds for granting leave outside them. Ms Vidyadharan said that those remarks were obiter and that the best guidance was to be found in the judgment of the Court of Appeal in Haleemundeen [2014] EWCA Civ 558.
16. In making a primary finding that there were no compelling circumstances which would necessitate consideration outside the rules, the judge was certainly deploying phraseology found in Gulshan [2013] UKUT 00640 and Haleemundeen. On the other hand, even if paragraph 128 of the

judgment in MM is obiter, it followed a survey of recent cases by the Court of Appeal and clearly has weight. I conclude, however, that there is no fundamental difference between the two cases, in relation to the guidance they contain. What is clear from the recent authorities is that in any Article 8 assessment outside the rules, consideration of “compelling circumstances” amounts to nothing more and nothing less than an assessment of whether the decision under appeal produces a disproportionate outcome, as explained by Sir John Dyson in ME (Nigeria) [2013] EWCA Civ 1192.

17. In the present appeal, I accept Ms Vidyadharan’s submission that the judge did, in fact, consider whether the adverse immigration decisions amounted to a disproportionate response. This is clear from paragraph 34 of the determination, where he found that an assessment outside the rules would be “unlikely to lead to any other result” i.e., any result other than the conclusion that removal to Nigeria would not breach the human rights of the appellant or those of his children.
18. In reaching that conclusion, it is clear from the determination that the judge had all the salient features of the case clearly in mind and did not overlook any relevant factor. Emphasis was placed on the best interests of the children as requiring that they remain here to be educated in the schools they attend. The judge made a careful assessment of this case but found that it was not made out. He did not in terms mention section 55 of the 2009 Act but this does not of itself reveal a material error, in the light of his careful assessment. Overall, the judge’s approach was, I find, entirely consistent with guidance given in EV (Philippines) [2014] EWCA Civ 874.
19. I conclude that the judge made no material error of law. He cannot be faulted for failing to take into account the judgment in MM. In any event, he was entitled to find that an Article 8 assessment conducted outside the rules would not produce a result different from the application of the rules themselves. He made a careful assessment of the circumstances of the appellant and his children in the light of the evidence before him and his findings of fact are sustainable.
20. The decision of the First-tier Tribunal contains no material error of law and shall stand.

Decision

21. The decision of the First-tier Tribunal, containing no material error of law, shall stand.

Signed

Date **19th November 2014**

Deputy Upper Tribunal Judge R C Campbell