



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

Appeal Number: IA/33641/2013

THE IMMIGRATION ACTS

Heard at Field House

On 3rd September, 2014

**Determination
Promulgated**

On 11th September, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR ERNEST CHUKA NWANOLUE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Pipi, Counsel instructed by Templeton Legal Services
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria, who arrived in the United Kingdom on 25th July 2004 with a student visa. He applied for leave to remain as a visitor which was refused and he was found undertaking employment without permission. By 22nd June 2010 all appeal rights were exhausted

and on 29th October 2010 he made an application to be considered outside the Rules on human rights grounds. That application was refused but his appeal before First-tier Tribunal Judge Iqbal was allowed in a determination promulgated on 26th June 2014.

2. The judge concluded that the Appellant could not meet the Immigration Rules and therefore considered Article 8 ECHR taking into account a number of factors in undertaking the balancing exercise between the competing rights. She considered the best interests of the children and in all of the circumstances found that the decision to remove the Appellant and his family and in particular his daughter Deborah not to be a proportionate one.
3. Grounds of application were lodged referring to well-known case law including **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 721 (Admin)**. It was said that the Tribunal had failed to provide adequate reasons why the Appellant's circumstances were either compelling or exceptional. While the child was aged 7 years it was submitted that she was young enough to adapt to life in Nigeria and it was also in her best interests to enjoy the benefits of being a Nigerian citizen there.
4. Permission to appeal was granted. First-tier Tribunal Judge Parkes found that it was arguable that the judge erred in finding that, by implication, it was not reasonable to expect the child to relocate to Nigeria. There was also no reference to the case of **Zoumbas [2013] UKSC 74**. A Rule 24 response was lodged stating that some of the grounds were misconceived and the judge had followed the authority of **Nagre**.
5. Thus the matter came before me on the above date.
6. For the Home Office Mr Wilding relied on his grounds. At no stage had the judge referred herself back to the Immigration Rules in the course of her determination. In particular there was no proper assessment towards what was the Secretary of State's side in the balancing exercise. There was an incomplete proportionality assessment. I was referred to well-known case law including **Zoumbas** and what was said there in paragraph 24 namely that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. However it was noteworthy that other things were not equal and that the family were not British citizens.
7. In addition I was reminded of what was stated in **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874** and to paragraphs 58 to 66 where it was said "we cannot educate the world". It was also useful to look at what was said in **FK & OK (Botswana) v SSHD [2013] EWCA Civ 238**, paragraph 11, where Sir Stanley Burnton gave reasons for attaching considerable importance to immigration control. I was asked to set the decision aside, re-make it and dismiss the appeal.

8. For the Home Office Mr Pipi relied on his written submissions. It was quite clear that the judge had regard to the Rules and I was referred to various paragraphs in the determination which showed that. In paragraph 30 the judge had rejected the Respondent's case under the Rules.
9. Contrary to what was said by the Home Office the judge had meticulously followed and applied the principles as recommended by **Gulshan**. I was asked to uphold the decision.
10. I reserved my decision.

Conclusions

11. The judge set out, in considerable detail, the reasons for refusal of the application by the Secretary of State. The judge noted the change of Immigration Rules post 9th July 2012 which set out the Secretary of State's position on Article 8 ECHR. She noted that at the date of the hearing the Appellant's daughter had acquired over seven years' continuous residence here. She considered Immigration Rule 276ADE(vi). For reasons she gave she found that the Appellant was unable to succeed with reference to that ground. She therefore concluded that the Appellant could not meet the Immigration Rules.
12. The judge then recognised that she should consider Article 8 outside of the Rules and referred to **MF (Nigeria) v SSHD [2013] EWCA Civ 1129**. She also referred to **Gulshan** and **Nagre**. After that the judge referred to further well-known case law in terms of **Huang (described as UKHL 11)** as well as **R (Razgar) v SSHD [2004] UKHL 27**.
13. She found Article 8 was engaged because there was a family life between the Appellant and his family who are Nigerian citizens as well the private life that the family had established here. Furthermore their first child was born on 28th October 2006 in the United Kingdom and their second child was also born here on 13th February 2013. Their first child was aged 7 and attending school. She considered the House of Lords decision in **Beoku-Betts [2008] UKHL 39**.
14. She took account of a number of factors in considering the balancing exercise as required under Article 8. It seems to me that, contrary to the submissions made on behalf of the Home Office, the judge was aware and commented on the fact that the Appellant and his partner had remained here unlawfully from at least 2005.
15. The judge had regard to the best interests of Deborah and that the welfare of a child was a primary consideration going on to consider what was said in **ZH (Tanzania) v SSHD [2011] UKSC 4**.
16. It seems to me that the critical point in the argument on whether the judge erred in law is that the judge recognised that neither of the Appellant's children was British nationals unlike the children in **ZH** (paragraph 45). While the judge did not refer in specific terms to

Zoumbas she was clearly aware of the significant distinction to be made between those children who are British citizens and those who are not. She went on to say that despite the fact that they were non-British nationals it would be unfair for them to be uprooted from their life in the United Kingdom and in particular Deborah who he found was well-established in her life here as opposed to an uncertain future in Nigeria. She was performing well and was integrated in all activities of the school. As such she had become “an innocent victim” of her parents’ choices. The judge then referred to further case law in **MK (best interests of child) India [2011] UKUT 475 (IAC)** and **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** setting out the Tribunal conclusions in that regard.

17. In paragraph 49 the judge referred to the “totality” of the circumstances that she had highlighted and acknowledged this was a finely balanced case. She then turned to the fact that there was no redeeming quality in relation to the Appellant and his partner’s actions and, as such, she was plainly attaching considerable weight to the public interest. Nevertheless she found on balance that the Appellant had demonstrated that the decision to remove him was a disproportionate one. In my view, contrary to what is said in the grounds of application, the judge had referred to **Gulshan** and **Nagre** and appreciated that there had to be exceptional circumstances to consider the case outwith the Rules. She did have regard to the actions of the parents. As stated she made it quite clear that there was “no redeeming quality” in relation to the Appellant and his partner’s actions. She acknowledged that the two children were not British nationals and therefore did not follow the route set out in **ZH**. She was entitled to conclude that it would be unfair for particularly Deborah to be uprooted, given that she was integrated in all her activities in school and that she had become an innocent victim of her parents’ decision.
18. As the judge put it this was a finely balanced case. Of course it might well be that having regard to the actions of the parents that other judges would have placed more weight on the public interest and that a decision would have been made to dismiss the appeal. Such a decision may not have been challengeable. However it seems to me that the decision of the judge cannot be categorised as perverse or unreasonable or that she did not consider the appeal within the appropriate legal framework or did not give proper weight to the public interest.
19. It follows that, in my view, there is no material error of law in this determination which must stand.

Decision

20. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
21. I do not set aside the decision.

Signed

Date

Deputy Upper Tribunal Judge J G Macdonald