



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42449/2013

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 21 October 2014

Determination Promulgated
On 5 December 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

and

K I O

[Anonymity direction made]

Appellant

Claimant

Representation:

For the claimant: Ms T Murtaz, instructed by Crown Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, KIO, date of birth 29.1.78, is a citizen of Nigeria.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Lowe promulgated 10.6.14, allowing the claimant's appeal against the decision of the Secretary of State, dated 10.9.13, to refuse the claimant's application made on 23.7.13 for leave to remain in the UK on the basis of article 8 ECHR, and the decision of 12.9.13 to remove him from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 21.5.14.
3. First-tier Tribunal Judge Plumptre granted permission to appeal on 28.7.14.

4. Thus the matter came before me on 21.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Lowe should be set aside.
6. The relevant background can be summarised as follows. The claimant's wife is Zimbabwean and their two children were born in the UK. She has discretionary leave to remain in the UK and has been here for some 11 years. They 'married' in a traditional ceremony in the UK in 2006. The claimant is settled in Nigeria, where he has a business, but makes business visa visits to the UK for up to 180 days at a time. He had apparently lived in the UK previously for some 8 years.
7. The application was considered under Appendix FM and paragraph 276ADE of the Immigration Rules. Because of both his and his wife's status he could not qualify under the FM eligibility requirements as a partner. Similarly, because of the status of his children, he does not qualify as the parent of a child. In relation to 276ADE he could not show he had lost all ties to Nigeria. The Secretary of State found no exceptional or compelling circumstances in his case. Thus the application was refused.
8. In the First-tier Tribunal Judge Lowe concluded at §32 that there are exceptional circumstances justifying a grant of discretionary leave to the claimant and that returning him to Nigeria would be unreasonably harsh and disproportionate.
9. The grounds of application for permission to appeal submit that the First-tier Tribunal erred in the approach taken to article 8 ECHR by failing to apply the Gulshan [2013] UKUT 00640 (IAC) approach and did not identify any compelling circumstances to justify considering article 8 outside the Immigration Rules. It is also submitted that the judge failed to identify insurmountable obstacles to continuing family life outside the UK and failed to take into account in the article 8 proportionality balancing exercise factors in favour of the public interest in removal.
10. In granting permission to appeal, Judge Plumptre considered it arguable that the First-tier Tribunal Judge erred in her application of article 8 case law and failed to give sufficient weight to the claimant's continuing ties to Nigeria. "Further it may be arguable that the judge erred by giving insufficient weight to the fact that the appellant is not legally married, and that his wife from Zimbabwe and two children born in the UK are not British citizens and have discretionary limited leave only, and hence erred in her assessment of compelling and compassionate circumstances. Whilst in my judgement the outcome may not be any different on the facts of this appeal, permission to appeal is granted on all grounds."
11. At the hearing the claimant's representative conceded that the claimant could not meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules.

12. There is little merit in the first part of the grounds in relation to Gulshan compelling circumstances. The judge referenced Gulshan at §23 and set out what she considered to be compelling circumstances. At §24 the judge stated, "I consider that there are reasons why it is important to assess whether there are arguably good grounds for a grant of discretionary leave outside the Immigration Rules," followed by the reasons, which included a lengthy assessment of the best interests of the children and related case law.
13. The First-tier Tribunal Judge is required in accordance with section 86 of the Nationality Immigration and Asylum Act 2002 to determine the appeal on the grounds advanced. To do otherwise would be a breach of a statutory requirement. A failure to consider the article 8 claim would be likely to render the decision non-compliant with section 6 of the Human Rights Act 1998. However, the judge did not in fact go on to make an article 8 assessment but seems to have concluded that because there were in her view exceptional circumstances, the appeal should be allowed, and stopped short at §32, without undertaking a proportionality balancing exercise. The decision reads as though incomplete.
14. In particular, there was no assessment of the five Razgar steps, and it is difficult to see how the judge reached the conclusion that the decision was disproportionate and unreasonably harsh. More importantly, even if an article 8 assessment can be divined from the determination, it is clear that several factors in favour of removal of the claimant were left out of the balancing exercise and ignored.
15. For example, there was little consideration to the fact that the claimant's wife and children have only temporary status in the UK and thus no guarantee that they will be able to remain. There was no consideration that there is a route for entry under the Immigration Rules but the claimant has been unable to meet those requirements. When entering into their relationship and in having children in the UK, they must be taken to have realised that their status was precarious and they had no legitimate expectation of being able to remain. The claimant came to the UK on a business visa, which does not entitle him to settle in the UK. Given his history of shuttling between his business in Nigeria and family in the UK, there is no reason why he should not return to Nigeria and make application for entry from there, maintaining contact with his family as he has done in the past, through modern means of communication.
16. There was no adequate assessment as to whether there were insurmountable obstacles to the spouse and children joining the claimant in Nigeria and continuing family life there. There was no evidence that had even been considered by the husband and wife or any enquiries made of the authorities as to that possibility, or of residence in either Nigeria or Zimbabwe. In essence, their desire to remain in the UK is by choice and not of necessity. However, she was not required to leave as a result of this decision by the Secretary of State and there was no evidence that she could not adequately continue to care for the children in his absence, as she has been doing. There was inadequate consideration of the fact that the parties are not legally married and that neither the claimant's wife or children are British citizens or settled in the UK. Neither was there sufficient consideration of the extent of the claimant's ties to Nigeria, where he has lived most of his life and where he operates his business. The weight given to the best interests of the children when they had only

temporary status was misplaced. The judge failed to take into account that they were not British citizens and had Zimbabwean passports. The judge appears to have drawn analogy with refugees, which is not the situation of the claimant, his wife, or children. Further, just because the claimant is not a criminal or has complied with Immigration Rules hitherto does not provide any basis to outweigh the need for immigration control. Little regard was given to the legitimate aim of protecting the economic well-being of the UK through Immigration Control in any balancing exercise. None of the above appears to have taken into consideration and the result was thus a rather a one-sided and unduly sympathetic assessment. If these other factors had been weighed in the balance, it was necessary to demonstrate that in the determination; a party should be able to see from the determination why they have lost the appeal.

17. In all the circumstances, for the reasons stated, I find that the assessment of the First-tier Tribunal Judge was inadequate and flawed, such that the determination cannot stand and must be set aside and remade.

Conclusions:

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be reheard in the First-tier Tribunal.



Signed:

Date: 3 November 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

19. The appeal will be reheard in the First-tier Tribunal at Stoke on Trent on 17.2.15, with an estimate of 2 hours.
20. I preserve the evidential summary set out between §7 and §18 of the determination of Judge Lowe, but give leave to the parties to adduce further evidence to bring private and family life circumstances up to date for the rehearing of the appeal.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I continue the anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (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).

I make no fee award.

Reasons: The outcome of the appeal remains to be determined.



Signed:

Date: 3 November 2014

Deputy Upper Tribunal Judge Pickup