



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

Appeal Number: IA/46396/2013

THE IMMIGRATION ACTS

Heard at Field House, London

Determination

On 27 October 2014

Promulgated

On 26 November 2014

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RITA OPOKU-AGYEMANG

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Ms G Thomas (of Counsel), instructed by Tower Hamlets
Law Centre

APPROVED EX TEMPORE DETERMINATION

1. The framework of this appeal maybe summarised in the following way. It is the Secretary of State's appeal and arises out of a refusal decision made on behalf of the Secretary of State dated 26 October 2013. The decision refused the application of the Respondent to this appeal Rita Opoku-Agyemang, who is a national of Ghana, now aged 38 years, for a derivative residence card.
2. The core of the decision appears in the following passage:

“You have not provided evidence as to why the child’s father is not in a position to care for the British Citizen child if you were required to leave the United Kingdom and there is insufficient evidence to show that the British Citizen child, (who will not be identified), would be unable to remain in the United Kingdom or the EEA if you were required to leave”.

This is repeated in the penultimate paragraph on page 2 of the letter, with the following addition:

“What is more there is no evidence that you are financially responsible for the child.”

This gave rise to the conclusion that the Respondent did not satisfy the requirements of the statutory criteria for derivative rights of residence with reference to the various provisions of the EEA Regulations 2006.

3. The decision letter then gave some brief consideration to Article 8 of the Human Rights Convention. The key passage here is contained in the following sentence

“Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR”.

This part of the letter obliquely refers to the possibility that the Respondent might make a quite separate Article 8 application and if she were to choose to do so this would be considered and determined.

4. The third issue considered in the letter is Section 55 of the Borders, Citizenship and Immigration Act 2009. This is addressed in the following passage:

“The Home Office discharges its duty of care by acting on any concerns it identifies regarding the welfare of children with whom they come into contact and by conducting checks that are consistent with the impact of its decision making. To this extent the position of your children ... has been considered in light of the requirements incumbent on the Home Office as defined under Section 55 of the 2009 Act and Section 11 of the Children Act 2004 and also in the light of the Supreme Court ruling in the case of ZH (Tanzania) [2011] UKSC 4”.

The decision letter contains nothing else of relevance.

5. The Respondent appealed to the First-tier Tribunal (the “FtT”) which made two main conclusions. In making these conclusions it articulated two specific findings. First, in [20] of the determination, that the Respondent is the primary carer of the child concerned. Second, in [22] of the determination:

“ ... that the evidence points to the child being able to live with the father in the UK, is not unsuitable and so she would not be required to leave the country if the Appellant were removed”.

These two specific findings were followed by the first conclusion in the judgment, namely, that as a matter of law the Appellant is not entitled to a derivative right of residence under the EEA Regulations as there is another parent who could look after the child concerned.

6. The Judge then gave specific and separate consideration to Article 8 of the Human Rights Convention. In doing so she referred to the decision of the Court of Appeal in the case of MF Nigeria. The Judge reasoned in paragraph [29] as follows:

“Lillian is a British child and cannot be compelled to leave the UK. Removal of the Appellant would mean the removal of her primary carer. There are two younger siblings who live with the child and the Appellant and their father is violent If the Appellant were removed and the affected child stayed with her father then she would be separated from her younger half siblings. Family life as she knows it would necessarily be disrupted. She would be living with the father who she does not see on a regular basis. His history does not show him to be the most dependable of parents. The Appellant is recognised as having gone through great strides to raise and care for her children as a single mother on very limited means. The Appellant has suffered domestic violence, financial hardship, been at risk of losing her home, overcome behavioural problems with her children, safety concerned for the children’s well being and has managed to overcome many of her problems with the extensive support she has required. There is a “Child in Need” plan in place of the Protection Plan that existed before. The Appellant has done tremendously well. The intervention of social services has resulted in a more stable environment for the Appellant and all three of her children. All that work would go to waste if the Appellant is now required to leave the UK. She would face a return to Nigeria, a country she has not been in since 1999, with two young children or three, if it is decided the affected child should go with her, and would not have the support she requires to provide herself and them with the stability she has achieved here. It would not be in the best interest of the affected child or indeed the other two children if the family were separated or if they all went to Nigeria”

In [30] of the determination, the Judge continued:

“When I consider all these matters, I do find that there are exceptional circumstances in this case that warrant further assessment under Article 8. The first four tests in Razgar have been met. However, I do not find that the decision made is proportionate

to the need to maintain a fair, but firm policy of immigration control. The balance in this case falls in favour of the Appellant”.

7. Against this background the Secretary of State sought permission to appeal. This resulted in the grant of permission to appeal in the following terms:

“There is no obvious assessment and findings under the Razgar approach while the analysis of the facts contained at paragraph 29 may arguably support the finding of disproportionality and it is recognised that the child as a British Citizen cannot be compelled to leave the United Kingdom. There is nevertheless a lack of reasoning for the Judge’s apparent conclusion that it would not be in this seven year old child’s best interests for her mother to choose to keep the family together and take the child with her siblings to Nigeria”.

This was considered to give rise to an arguable error of law. In response to the grant of permission to appeal there is a Rule 24 Notice on behalf of the Respondent. This seeks to uphold, first of all, the correctness in law of the FtT’s approach to Article 8 of the Human Rights Convention and, secondly, the adequacy of the Judge’s reasoning in concluding that there were exceptional circumstances rendering the impugned decision disproportionate. That is the framework of the appeal to the Upper Tribunal.

8. The helpful arguments of both parties’ representatives make clear that this appeal has two limbs. The first is whether the FtT misdirected itself in law. This could also be rephrased as whether the FtT applied the correct test. The test to be applied is that determined by the Court of Appeal in the case of MF Nigeria. I am satisfied that, in substance, the Judge was applying the correct test, namely, she was conducting an exercise designed to establish whether there were very compelling circumstances, sufficient to outweigh the public interest engaged. Accordingly the first ground of appeal has no merit.
9. The second ground of appeal raises the question of whether the Judge’s conclusion in [30] of the determination is sufficiently reasoned. Here the Judge concluded that there were exceptional circumstances and that the decision under challenge was not proportionate to the need to maintain fair but firm policy of immigration control. The Judge went on to say that the balance of the case was in the Appellant’s favour.. Paragraph [29] of the determination contains a series of findings. I have already adverted to these. The findings are extensive, relevant and clearly articulated. As Ms Thomas has emphasised there is no challenge to any of them. The question is whether, as a matter of law, the reasoning is adequate to support the conclusion. The principles relating to whether a court or tribunal’s reasons are adequate are well established and were rehearsed by this Tribunal recently in the reported judgment of MK. In determining the second ground of appeal, I must remind myself that this is not a rehearing. This is, rather, an error of law appellate court. Applying this

approach I conclude that [29] contains a series of findings which, cumulatively, are sufficient to support the conclusion framed in [30].

10. It follows from this that the determination of the FtT is not erroneous in law in either of the respects advanced and, accordingly, I uphold it.
11. I would add that, in my view, FtT should have found the Secretary of State's decision to be not in accordance with the law on the further and free standing ground that it was not harmonious with the primary duty enshrined in Section 55 of the Borders, Citizenship and Immigration Act 2009. Related to this, there was no evidence, direct or inferential, that the secondary, but nonetheless, important, duty, namely to have regard to the statutory guidance has been performed either. In my view it is abundantly clear that both of these duties were breached in this case with the result that the Secretary of State's decision was unlawful on those two further, separate grounds.
12. The decision of the First-tier Tribunal is, accordingly, upheld. I dismiss the Secretary of State's appeal.

Bernard McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 31 October 2014