



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

Appeal Number: VA/17489/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 19 September 2014**

**Determination
Promulgated
On 3 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

**MRS BUSAO BOLANLE ALADELE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Oke
For the Respondent: Mr Jarvis, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a 26 year old citizen of Nigeria who has been given permission to appeal a determination of First-tier Tribunal Judge Owens promulgated on 14 May 2014.

The Background to this Appeal

2. The appellant applied to come to the United Kingdom as a family visitor on 30 July 2013. Her application was refused and did not attract a full right of appeal. The appellant's right of appeal was limited to the grounds referred to in Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 and the appellant appealed to the First-tier Tribunal indicating that the decision contravened Article 8 of the Human Rights Act.
3. Her appeal came before First-tier Tribunal Judge Owens on 28 April 2014 and in a determination promulgated on 14 May 2014 he dismissed her appeal.
4. On 9 June 2014 First-tier Tribunal Judge PJM Hollingworth refused permission to appeal in the following terms:
 - “1. The Judge has pointed out in the determination at Paragraph 21 that it was expressly agreed by all parties at the outset of the appeal that the appeal could not succeed under the substantive Immigration Rules. At Paragraph 19 the Judge referred to Article 20 of TFEU conferring the right of residence. The Judge was dealing with the submissions made on behalf of the Appellant. It was argued that the refusal was preventing the Union citizen, in this case the child of the Sponsor, from exercising his right to live and work in the Union contravening EU law. It was argued that the mother by virtue of the fact that she is a primary carer has a right to live and work in the United Kingdom. The child lives with his mother. It was submitted on behalf of the Appellant that the Judge could consider this submission that the decision was not in accordance with the EEA Regulations as a ground of appeal. The Judge indicated that she did not agree. The grounds of appeal were limited to human rights and race discrimination grounds only. No error of law has arisen. The Judge was dealing with an appeal against the refusal to grant entry clearance as a visitor pursuant to an application under Paragraph 41 of the Immigration Rules. The Judge has pointed out at Paragraph 3 of the determination what the scope of such an appeal consists of. The Judge has made findings of fact open to her. The Judge has correctly analysed the application of Article 8. The Judge has reached conclusions entirely open to her. The Judge at Paragraph 44 states that she gave great weight to the fact that the appeal related to a visit visa application and not a settlement application. The analysis of proportionality entails no error of law. In relation to the decision in **Zambrano** the scope of the intention of the parent is a material factor. The Judge in the determination of the subject of this application has made findings of fact in relation to that intention entirely open to her. At Paragraph 25 the Judge states that she does not find that the Appellant would return to Nigeria to apply for settlement.
 2. In the application for permission reference is made to the Immigration (European Economic Area (Amendment (2)) Regulations 2012 (SI2012/2560). The argument has been put forward in the context of the conferring rights of entry and residence on the primary carer of a British citizen. This matter under these Regulations was not before the Judge. No error of law has arisen which would lead to a different outcome. The application for permission to appeal effectively rests upon the final submission referred to by the Judge at Paragraph 19 of the determination.”
5. The appellant applied for permission to appeal to the Upper Tribunal and on

7 August 2014 Upper Tribunal Judge McGeachy granted permission in the following terms:

- “1. The grounds of appeal allege that the Judge of the First-tier Tribunal erred in his consideration of the rights of the appellant’s child as an EEA national and had not taken into account the fact that the appellant is the permanent carer of the child.*
- 2. The Judge correctly applied the law: this appeal was limited to human rights and to race relations as the application was made after 25 June 2013. The Judge found that the appellant was not a genuine visitor and gave clear reasons for that, finding that the appellant had been untruthful in her assertion that she would return to Nigeria. Moreover, he was correct to find that the sponsor is not the primary carer of the child.*
- 3. However it is arguable that he had not properly considered the position of the appellant’s son who is an EEA national and that therefore the decision was not in accordance with the law.*
- 4. I therefore consider that the grounds of appeal are arguable.”*

The Evidence and Submissions

6. At the outset of the hearing I raised with the parties the EEA point of law that had been raised in the grounds of appeal. Mr Oke confirmed that he had not drafted the grounds and was not responsible for them. Both parties agreed before me that there was no EEA law point in the appeal before me and that the issue concerned Article 8 and the best interests of the child.
7. Mr Oke for the appellant submitted that the mother’s application was for a family visit and the child’s interests were treated as a secondary matter in the context of Article 8. The best interests of the child were the only issue being pursued in relation to Section 55 of the Borders Act 2007 and how that affected proportionality under Article 8. The determination dealt with Article 8 from the mother’s perspective but has not given any consideration to the child. The child is now 1 year and 7 months old and there should have been far greater weight given to the interests of the child at such an early age being able to bond with his father who resides in the United Kingdom and to have his mother with him to be in a family unit. Those factors should have been given weight in order to allow the mother to obtain a visitor visa.
8. Mr Jarvis for the respondent submitted that the EEA grounds of appeal had no merit because of statutory restriction on the right of appeal. The new issue before me, the best interests of the child was not raised in writing by way of application for permission to appeal and this is a new point. Mr Jarvis went on to say the judge did make lawful findings about the intention of the application albeit on the basis of a visit. The judge spent considerable time looking at Article 8 and he does make proper regard to the child’s best interests and was plainly aware of the circumstances, the position of the mother and her attempts to gain settlement and his decision is completely compliant with the interests of the child in

accordance with Supreme Court case law **ZH (Tanzania) [2011] UKSC 4**. The remedy for the appellant is to work on her English language skills, pass the English language test and be able to travel to the United Kingdom as a spouse for settlement. In reply Mr Oke repeated his earlier submissions that the determination omitted any consideration of the family units and the benefit of the child being able to bond with the father at this important stage in his young life. The determination focused entirely on the age of the child being young and focused on the mother whereas he should have looked at the family unit as a whole.

Discussion and Decision

9. I find that the judge did not err in law in his determination in his consideration of Article 8 and the rights of the child. As the judge makes clear at paragraph 41 he had considered the best interests of the child and he fully understood the fundamental principle that the best interests of a child are served by being brought up by both of his or her parents. But as the judge correctly observed the child is young and has not been able to form any strong attachments outside of his immediate family and has little awareness outside of his immediate surroundings indeed the child would be focused predominantly on the mother with whom he had lived since birth.
10. The judge correctly pointed out that Article 8 is not a mechanism for circumventing the requirements of the Immigration Rules. The judge correctly observed that the refusal of the visit visa does not strike at the heart of the family life and would not result in a permanent separation because the appellant can work on her English language skills from Nigeria and make a further application for settlement when she meets the requirements of the Immigration Rules.
11. The judge properly took into account all of the competing factors before him and balanced the rights of the appellant and her child against the respondent's legitimate aim of a fair and consistent immigration system and found the balance of proportionality fell in favour of the respondent. This was a decision properly open to the judge on the evidence before him and the grounds before me do not establish any error of law.

Summary of Decisions

12. The appeal in respect of the immigration decision is dismissed.

Anonymity

13. No anonymity direction is made.

Signed

2 October 2014

Judge E B Grant

Deputy Judge of the Upper Tribunal