



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01546/2014

THE IMMIGRATION ACTS

Heard at Field House
On 6th January 2015

Decision & Reasons Promulgated
On 28th January 2015
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Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ADEDEKO ADESIYAN OGUNSOLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Frederico Singarajah (Counsel)
For the Respondent: Mr E Tufan (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Carroll, promulgated on 18th September 2014, following the hearing at Taylor House on 28th August 2014. In the determination, the judge dismissed the appeal of Adedeji

Adesiyan Ogunsola. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 28th February 1981. He appeals against the refusal of his application to remain in the UK as a Tier 1 (General) Migrant, the refusal letter being dated 10th December 2013.

The Appellant's Claim

3. The Appellant's Claim is that he had provided evidence such as to enable him to succeed in his application. He could show sufficient income. This is because he was the sole director and shareholder of his company. A dividend was declared to the required amount such as to enable him to satisfy the financial requirements under the Rules.

The Judge's Findings

4. The judge observed how the Appellant came to the UK in September 2008 as a student. He was granted various extensions of leave to remain as a Tier 1 (Post-Study) Migrant until 21st February 2012. On 28th August 2013, he submitted an application for leave to remain as a Tier 1 (General) Migrant. The application was refused by reference to paragraph 245CA(B) and (C) and Appendix A of HC 395 under the heading "previous earnings". The Respondent stated that the Appellant could not claim 30 points for earnings of £50,226. He was an employee and was entitled only to earnings paid to him by the company. The accountant's letter, invoices and HSBC Bank statements had been provided to support the "retained profit" for which he was seeking to claim points, but as a company director he was not entitled to claim for any company profit, only for money paid to him in the form of dividends or wages.
5. At the hearing, the Appellant argued that under the "evidential flexibility" policy enquiries could have been made of him so that he could show that he could indeed satisfy the Rules. At the hearing also there was additional evidence. The judge held that, the appellant could not blame his accountants for being negligent in the advice that they gave him, because it was incumbent upon every applicant to ensure that they had satisfied the Rules themselves. Secondly, although the Appellant now sought to rely upon a large amount of documentation which was not submitted in support of the application, this could not be considered under Section 85A(4), as it was postdecision.
6. Finally, the judge gave consideration to the Appellant's Article 8 rights. The judge held that the Appellant had only ever had limited leave to remain in the UK. There was no expectation of any more permanent grant of leave to remain. His wife had leave to remain in an independent capacity until 28th December 2015. At the time of the appeal before this Tribunal, that meant just under a period of twelve months' leave until the end of the year 2015. The judge observed that,

“it is claimed also that the Appellant and his wife are the parents of two small children. There is, however, no evidence to show any exceptional or compelling circumstances such as to require consideration of the application by reference to Article 8 of the 1950 Convention” (paragraph 8).

The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge did not consider the Appellant’s Article 8 rights and that paragraph 8 of the determination was inadequate in its analysis. In any event, the judge should have considered the Respondent’s failure to consider Article 8.
8. On 11th November 2014, permission to appeal was granted on the basis that it was arguable that full and proper consideration had not been given to the circumstances of the Appellant’s family or that of his wife and children.
9. On 19th November 2014, a Rule 24 response was entered by the Respondent Secretary of State to the effect that no adequate evidence was presented to demonstrate that there was a good arguable case for Article 8 and so the judge could not have erred in law.

Submissions

10. At the hearing before me on 6th January 2015, Mr Singarajah, appearing on the Appellant, made extensive legal submissions. He said that the nub of his challenge was with respect to what the judge had held at paragraphs 7 and 8 of the determination, because these dealt with a failure to give proper consideration to Article 8. A proper consideration in this regard was vital because if the Appellant could show that he qualified under Tier 1, then although this was not the present application that he was making, this would show that he had been in the UK lawfully, and this in turn would go to the “public interest” consideration under the Immigration Act 2014, such that the Appellant could then stand a chance of succeeding under Article 8. This was not a case of an applicant with a poor immigration record. He submitted that a “near-miss” under the Rules can provide substance to a human rights case which does have merit in and of itself. He relied on the case of **Zhang**, (at paragraph 77 and paragraph 78).
11. Second, Mr Singarajah submitted that Article 8 was engaged in any event. He relied on **JM (Liberia) [2006] EWCA Civ 1402**. Here Laws LJ considered the argument

“that Section 84(1)(c), ... suffices to allow a right of appeal on human rights grounds in every case where the immigration decision in question would give rise to an imminent threat of removal and thus an imminent potential violation of ECHR rights”. This is because “the reference to the Human Rights Act in Section 84(1)(g), if it is in truth to have independent application, must be held to

contemplate a broader or remote contingency. There is, I think, some force in that” (see paragraph 24).

Laws LJ also stated that,

“The short, but important, position is that once a human rights point is properly before the AIT, they are obliged to deal with it. That is consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act and seems to me to be the proper result of the construction of the relevant provisions”. (Paragraph 28).

On this basis, the judge should have, in the final paragraph at paragraph 8, applied the Razgar principles. The failure to do so meant that the judge did not consider the human rights point properly as she should have done.

12. Third, the jurisprudence on Article 8 had considerably developed in recent times. There was now even further clarification in the case of Ganesabalan [2014] EWHC 2712. The conventional position had been that where the Rules do not comprehensively cover a situation (such as in Beoku-Betts, where there are wider family rights, or in EB (Kosovo) or in VW (Uganda), where consideration has to be given to the reasonableness of return) it is necessary to consider the second limb, so that one enters freestanding Article 8 Strasbourg jurisprudence. This is explained by Mr Michael Fordham QC, sitting as Deputy High Court Judge, in Ganesabalan. He states that, “unlike other Rules which have built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a ‘complete code’ so far as Article 8 compatibility is concerned” (see paragraph 10). He states that this is established under MF (Nigeria) [2013] EWHC 720 (at paragraph 44) and it is established in Halleemudeen [2014] EWCA Civ 558, at paragraph 43. Mr Fordham explains that

“these Immigration Rules operate alongside important guidance which is itself a part of the relevant overall code and which guidance recognises the discretion outside the Rules and the duty of the Secretary of State to consider exercising that discretion in the individual case” (see paragraph 12(2)).

The judge in that case also explains that “the duty to consider exercising the discretion is recognised in the authorities” (see paragraph 16(iii)). He refers to Nagre [2013] EWHC 720, which reads (at paragraph 14),

“with reference to the relevant officials, that quote ... if they come across a case falling outside the new Rules ... nonetheless I have to consider whether it is a case where, on the material facts, there would be a breach of Article 8 rights if the application for leave to remain were refused”.

13. Furthermore, in the same case (at paragraph 34) it is made clear that “in cases where consideration of the new Rules does not fully dispose of a claim based on Article 8, the Secretary of State would be obliged to consider granting leave to remain outside the Rules”.

14. Mr Fordham QC then refers to the principle that

“the discretion described variously by reference to ‘exceptional circumstances’ or ‘unjustifiable hardship’ involves the Secretary of State applying a proportionality test and asking whether removal would be disproportionate by reference to Article 8 standards” (see paragraph 19(iv)).

15. In drawing my attention to this, Mr Singarajah submitted that the judge below in this case had failed to do this. The judge identifies that the Appellant’s wife has leave until the end of 2015, she identifies that the Appellant is a father with two small children, but she does not identify that this engages family life, and does not then go on to consider the implications of such a matter.
16. In Ganesabalan, Mr Michael Fordham QC had also stated that

“there is no prior threshold which dictates whether the exercise of discretion should be considered: rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations, those threshold circumstances include (a) whether an arguable basis for the exercise of the discretion has been put forward; (b) whether the relevant factors have already been assessed; (c) whether a repeat evaluation is unnecessary” (see paragraph 21(v)).

Mr Michael Fordham QC continues to state that

“features, aspects of features and combinations of features already addressed, whether in full or in part, by reference to the Immigration Rules do not in principle become irrelevant to the discretion and the evaluation of proportionality for Article 8 purposes” (see paragraph 30(vi)).

17. Ganesabalan finally concludes with the statement by Deputy High Court Judge Mr Michael Fordham QC, stating that,

“It follows from the factual premise in this case and the analysis of the law which I have set about above that there was, in my judgment, an error of law in the decision letter in this case. The decision letter and notice contained no indication or reasoning which demonstrates that the Secretary of State has considered the exercise of discretion or the question of exceptional circumstances or the question of proportionality. The Claimant does not submit, and I do not find, that the Secretary of State was required to undertake any particular review or assessment or parallel assessment. However, in order to be a lawful decision the Secretary of State was, in my judgment, required to address her mind to the question of the discretion and was required in her reasons to demonstrate that she had done so and what conclusions she had reached” (paragraph 36).

18. Mr Singarajah submitted that, just as with the Secretary of State, so also with a Tribunal Judge. The Tribunal Judge must also, in order for there to be lawful decision, address her mind to the question of the discretion and state in her reasons why she had reached the conclusions that she had done.
19. This had not occurred in this case. As a matter of a lawful decision, this decision could not, therefore, stand.
20. Fourth, Mr Singarajah directed my attention to the recent case of **Oludoyi**, where Upper Tribunal Judge Gill had also considered the latest position under Article 8, summarising all the previous cases, and taking them fully into account. He submitted that the judge had to consider the so-called “second limb” and was wrong to refer to the absence of any “exceptional or compelling circumstances” (at paragraph 8) before this could be done. This is because UTJ Gill in **Oludoyi** states that,

“There is nothing in **Nagre**, **Gulshan** or **Shahzad** that suggests that a threshold test was being suggested as opposed to making it clear that there is a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim ... these authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance must be read in context and not construed as if the judgments are pieces of legislation” (see paragraph 20).

21. UTJ Gill also went on to say, that, consistently with paragraph 128 of **MN (Lebanon)**, “that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion based Rule” (paragraph 22).
22. Mr Singarajah submitted that, what this meant accordingly was, that the “two limbs are a fallacy”, and should no longer be adopted. The judge’s adoption in this case of the structure made the decision unlawful.
23. Fifth, Mr Singarajah directed my attention to the case of **Azmi-Moayed [2013] UKUT 00197** when Blake J., as president of the Tribunal, set out the relevant principles as follows:
 - “(i) In any administrative action, including any immigration decision to remove a child or a carer of a child from the jurisdiction, the best interests of that child are a primary consideration, to which regard must be had.
 - (ii) The duty under the UN Convention on the Rights of the Child is a critical part of any Article 8 ECHR evaluation of a case where an immigration action is challenged on appeal.

- (iii) There is a parallel statutory duty that the discharge of any immigration function has regard to the need to safeguard and promote the welfare of children while in the United Kingdom (Section 55 BCIA 2009).
- (iv) These duties are so well-established that a judge should take the point for him or herself as an obvious point to be considered, wherever the issue arises on the evidence, irrespective of whether the Appellants or the advocates have done so."

Mr Singarajah submitted that the last point above meant, that regardless of how well the Article 8 position had been put before the Tribunal in terms of the position of the children, the judge had to give them a proper consideration "irrespective of whether the Appellants or the advocates have done so". The failure to do so meant that the Section 55 BCIA duty had not been properly complied with by the judge.

24. Fifth, in **Jo (Nigeria) [2014] UKUT 00517**, McCluskey J. more recently emphasised the importance of the Section 55 obligation upon decision makers. He stated that,

"Section 55 has been considered by the United Kingdom Supreme Court in two cases. These decisions demonstrate, inter alia, the interaction between Section 55 and Article 8 ECHR. While these provisions have separate juridical identities, they are clearly associative. Thus where the Article 8 family life equation involves children, Section 55 is immediately engaged. In **ZH (Tanzania) [2011] UKSC 4**, Baroness Hale emphasised that the best interests of the children must be considered first – see paragraph 26 – where Lord Kerr stated, 'primacy of importance must be accorded to his or her best interests'. This is not, it is agreed, a fact of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other".

25. McCloskey J. went on to refer to the second case before the UK Supreme Court, that of **Zumbas [2013] 1WLR 3690**, where Lord Hodge stated seven principles of application, the first of which was that, "the best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR" and the last of which were that, "it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of the child might be undervalued when other important considerations were in play".

26. Mr Singarajah submitted that this was a case where such undervaluation had taken place in the manner in which the judge at first instance had disposed of this appeal. McCloskey J. had ended the consideration in **JO (Nigeria)** with the statement that,

"properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly

have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise” (paragraph 11).

In the instant case, Mr Singarajah submitted, this had not been done.

27. Mr Singarajah ended his submissions by emphasising that this was a case where the Appellant was not an overstayer. He had a lawful Section 3(C) leave. He had always been lawfully in the UK. The cases above were couched in the language of “must have regard” and there was no room for avoiding such considerations. If these matters had properly been considered, they would then directly have come into operation with respect to Article 8 considered broadly. If the Appellant was not an overstayer, but was lawfully in this country, then the legitimate interest in removing him, in circumstances where his wife had another year’s leave, could not be demonstrated.
28. Mr Singarajah emphasised again what was said in **Zhang [2013] EWHC 891**, by Mr Justice Turner, namely, that,

“I, therefore, come to the clear view that saving in particular cases (such as those involving poor immigration record – as in **Akinci [2003] EWCA Civ 765** or where the engagement of Article 8 is very tenuous – in **R (Molvu) [2008] EWHC 2089**) it would be rare indeed that the immigration priorities of the state are such as to give rise to a proportionate answer to Article 8 rights to family life where requirement H(1) is engaged.” (See paragraph 77).

Mr Justice Turner continued that,

“It must follow from this that the application of the blanket requirement to leave the country imposed by paragraph 319C(H)1 of the Immigration Rules is unsustainable. It is simply not consistent with the ratio of the decision in **Chikwamba** that this paragraph, as presently worded, should continue to form part of the Rules” (paragraph 78).

29. Mr Singarajah submitted that given the failings of the Tribunal Judge below, the only proper course of action was to make a finding of an error of law, and to remit the matter back to a First-tier Tribunal for a de novo consideration.
30. For his part, Mr Tufan submitted that the Grounds of Appeal (at page 3) draw no attention to the best interests of the child. The references to matters raised today, are only made in passing in the grounds of appeal. Secondly, the Appellant’s witness statement and his wife’s witness statement add nothing more to the Article 8 matters that have today been raised. It was well-established that the best interests of a child are to be with their parents.
31. In this case the children were under 2 years of age. Their best interests would not suffer by returning with their parents to Nigeria. It was open to the Appellant to make another in-country application. He would not even have to return back to Nigeria to do this. Given that the change of the Rules on 8th July 2012, brought in the

language of “exceptional circumstances” or “compelling circumstances” some meaning and importance should be attached to these requirements. Finally, even Oludoyi sees the upholding of the two limbs of approach in Article 8 cases.

32. In his reply, Mr Singarajah submitted that one must not overlook the declaration by Blake J. in Azmi-Moayad, that, “these duties are so well-established that a judge should take the point for him or herself as an obvious point to be considered, wherever the issue arises on the evidence, irrespective of whether the Appellants or the advocates have done so.” There was a witness statement of the wife which referred to her children. If it arose as a matter of evidence, then it mattered not that the advocates had not emphasised it or the grounds of appeal did not expressly elaborate it.
33. Furthermore, the case of Ganesabalan, sees Mr Michael Fordham QC emphasise that, “in order to be a lawful decision” the proper steps must be followed (see paragraph 36). The two-pronged approach was wrongfully adopted here, as was made clear by UTJ Gill in Oludoyi, who had said that, “there is nothing in Nagre, Gulshan, or Shahzad that suggests that a threshold test was being suggested ...” (paragraph 20). Yet, this is how the judge below had approached the matter.

Error of Law

34. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCA 2007) such that I should set aside the decision. My reasons are as follows. This is a case where the judge has indeed approached the Article 8 assessment on the basis of a two-stage process. Her words that, “there is, however, no evidence to show any exceptional or compelling circumstances such as to require consideration of the application by reference to Article 8 of the 1950 Convention” (see paragraph 8) is evidence of this.
35. That approach, whilst it was good at one time, is now discredited, to the extent that where there is an arguable case, the judge is required to consider the matter as a whole under Article 8 freestanding jurisprudence, and that there is no threshold test being imposed by the established authorities. It is clear that in order for this to have been a lawful decision the judge was required to address her mind to the question of the discretion and to demonstrate that she had done so, which was available to her. It is significant that this was a case where the Appellant had lawful leave.
36. It did not automatically follow that the balance of considerations would be against him, especially given that his wife has another year’s leave to remain in the UK, such that she cannot herself return to Nigeria with him. If she stays, the children stay with her. This was a case where a Section 47 removal decision had been made. These are matters that needed proper consideration.
37. At the same time, the evidence requires a much fuller consideration before a decision can be made. In the circumstances, whilst I make a finding of an error of law, this matter cannot be substantially decided in this Tribunal, and must be remitted under

Practice Statement 7.2 to another judge at Taylor House for a First-tier Tribunal determination.

Notice of Decision

38. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to a judge, other than Judge Carroll, to be determined *de novo* at Taylor House.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

12th January 2015

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award of any fee which has been paid or may be payable (adjusted where full award not justified).

Signed

Date

Deputy Upper Tribunal Judge Juss

12th January 2015