



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01848/2014

THE IMMIGRATION ACTS

Heard at Glasgow
On 15 December 2014

Determination Promulgated
On 16 March 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA

(Anonymity order made)

Respondent

Representation:

For the Appellant: Mr M Matthews, Home Office Presenting Officer

For the Respondent: Mr G Dewar, Advocate, instructed by Stewart & Watson

DETERMINATION AND REASONS

- 1) This is an appeal by the Secretary of State for the Home Department against a decision by Judge of the First-tier Tribunal Morrison. An appeal by MA (hereinafter referred to as “the claimant”) was allowed by the First-tier Tribunal under Article 8 of the Human Rights Convention.
- 2) The origins of the appeal are somewhat unusual. The Secretary of State refused the claimant leave to remain as long ago as 10 November 2010, subject to a restricted right of appeal under s 88 of the 2002 Act. No appeal was made against the refusal

decision at that time but in March 2010 a human rights claim was made. By February 2013 the claimant had new solicitors. The new solicitors wrote to the Secretary of State indicating that the claimant had not been advised of her right of appeal and now wished to exercise this. The solicitors pointed out that the claimant's two children had both been residing in the UK for more than 7 years. The Secretary of State was requested to re-serve the decision together with a notice of appeal. The case of CHH [2011] UKUT 00121 was cited as authority for this course.

- 3) After some further correspondence it appears that the Secretary of State did re-serve the 2010 decision along with a letter of 24 May 2013 stating that reconsideration of the earlier decision was refused.
- 4) For some reason there was then a further delay until December 2013 when the claimant's solicitors lodged a notice of appeal. An extension of time was granted for the lodging of this appeal. When appeals were made on behalf of the children, however, extensions of time were refused by a different judge. It was agreed before the First-tier Tribunal that the children should be treated as the dependants of the claimant. The appeal has proceeded on this basis. No issue of jurisdiction has been raised and I consider the Tribunal was entitled to proceed to hear the appeal in terms of CHH. Furthermore, having regard to the analysis of jurisdiction given by Sedley LJ in Anwar & Adjo [2010] EWCA Civ 1275, at paragraphs 19 and 20, the Tribunal had both constitutive and adjudicative jurisdiction to hear the appeal.
- 5) The claimant's immigration history is set out in the determination of the First-tier Tribunal. She is a national of Nigeria and was born on 22 February 1976. She worked as a solicitor in Nigeria before coming to the UK. She was married in Nigeria but her two children were born in the UK in 2002 and 2004. They are citizens of Nigeria and have never had leave to enter or remain in the UK. The older child was born when the claimant and her husband were visiting her husband's parents in London. The claimant and her husband came back to the UK as family visitors in 2004, when the younger child was born. In 2005 the claimant returned to Nigeria leaving her children with her husband's parents. She came to visit them on several occasions until January 2007, when her husband was granted a student visa to study at Aberdeen University. The claimant has lived in Aberdeen with the children since April 2007. Her leave was extended from March 2008 until March 2010. The claimant's husband returned to Nigeria some time in 2009 and it seems the marriage was breaking down around that time. The claimant and her husband were divorced in March 2010 and the claimant was given custody of the children.
- 6) The Judge of the First-tier Tribunal was not impressed by the claimant as a witness and found her evasive. The judge did not accept the claimant's evidence about her wider family circumstances or her financial position. The judge accepted, however, that the claimant is in regular contact with her mother in Nigeria. The claimant lives with her sons in rented accommodation in Aberdeen. The rent was £600 per month but the judge was unable to make a finding as to how this was funded. Both boys attended a primary school in Aberdeen and the older boy was due to commence secondary school in August 2014.

- 7) The judge had before him a number of school reports and medical records. Reports for the older boy indicated that he was progressing well but the reports for the younger boy were not so positive. Medical reports for the older boy indicated that he had no ongoing health issues apart from asthma. The younger boy was assessed in March 2012 and recorded as “scoring significantly for inattention, hyperactivity and impulsivity and oppositional behaviour”. This pointed to a diagnosis of ADD.
- 8) The Judge of the First-tier Tribunal had regard to the best interests of the children, in accordance with Azimi-Moayed [2013] UKUT 00197. The judge was referred to Zoumbas [2013] UKSC 74 and MK (best interests of child) India [2011] UKUT 00475 (IAC) and to EV (Philippines) [2014] EWCA Civ 874. The judge accepted that the children had been in the UK for more than 7 years. They were now aged 12 and 7 respectively. Their mother was their primary carer and principal source of support. She made all the day-to-day decisions in relation to their lives. The older child was now at an age where he would have made a lot of friendships that would not depend upon his relationship with his mother but his mother would still be the primary influence on his life. It was in the best interests of both boys that they continued to live with their mother.
- 9) The judge accepted that the claimant had no entitlement to remain in the UK in her own right. There was no reason why she could not return to Nigeria, where she could live with her mother and find employment. She should be able to re-establish her private life with little difficulty. The judge was more concerned with the position of the two boys. Their best interests were to remain with their mother. It was also necessary to consider whether in all the circumstances it would be unreasonable for them to relocate to Nigeria. The older boy had spent almost all of his 12 years in the United Kingdom apart from one short period when he had returned to Nigeria with his mother. The younger boy had spent his entire life in the UK. Whatever contact the boys had with their father was at best sporadic and he appeared to take no real part in their lives. To remove the older boy from the only culture with which he was familiar would be an extremely serious step which would inevitably have serious effects on him. The younger boy had not been in the UK for so long but his difficulties from dyspraxia and ADD were well documented in the evidence. This would make it harder for him to settle in Nigeria. The judge concluded that it would not be reasonable to require the children to relocate to Nigeria. The appeal was allowed under Article 8 outside the Immigration Rules.
- 10) In the application for permission to appeal the Secretary of State argued, in essence, that the judge did not consider the case of Gulshan [2013] UKUT 640 as to whether there were arguably good grounds for granting leave to remain outside the Immigration Rules and whether there were compelling circumstances not sufficiently recognised under the Rules. Having omitted to follow the requirements of Gulshan, the judge erred in law.
- 11) At the hearing before me Mr Matthews relied on the grounds of the application for permission to appeal.
- 12) Mr Dewar sought to rely on a note of argument lodged for the purpose of the hearing before the Upper Tribunal. It was submitted in this that the Judge of the First-tier

Tribunal was entitled to rely upon comments made about the boys by the head teacher of their primary school. The judge did not err by saying that the boys fulfilled the requirements of paragraph 276 ADE(iv) of the Immigration Rules. The judge had properly identified the basis of the appeal before him which was on Article 8 only. He properly analysed the appeal on this basis. On the evidence the judge was entitled to conclude that the removal of the family would be a disproportionate interference in the children's private lives. The evidence before him was significant and compelling. There was a good arguable case for consideration of the appeal outwith the Immigration Rules. The threshold legal test expounded in MS (India) [2013] CSIH 52 was clearly and obviously met.

- 13) I was referred by Mr Dewar to the words of Lord Mackay of Drumadoon at paragraph 28 of MS (India), where he stated:

"As to the test that should be used, in *R (Nagre) v Home Secretary*, *supra*, Sales J indicated at paragraph 49 that he had concern about the use of the label "exceptional cases" in the guidance given by the Home Secretary to describe the area in which a residual discretion to grant leave outside the Rules operates. He thought that busy, hard-pressed officials might refer only to the label and not keep in mind the proper notion of exceptional cases." He continued

"Officials should take care to avoid a 'tick box' approach, genuinely bear the policy guidance in mind and seek to stand back after working through the analysis required under the new Rules so as to make an overall assessment of the facts to see whether there might be a good arguable case of disproportionality if leave to remain is not granted and, if there is, to examine that case with care to see whether removal would be justified. The reasoning in decision letters should seek to demonstrate that this reasoning process has indeed been gone through."

We agree entirely that officials charged with making immigration decisions should have regard to the substance of the policy guidance that is given in relation to leave outside the Rules; that is the guidance referred to in paragraph [7] above. It can be expected that the new Rules will cover most cases where an applicant seeks to rely on his or her convention right to private and family life. If an official or Tribunal or court is asked to consider leave outside the Rules, an applicant must put forward a reason for doing so. Such a reason will usually consist of circumstances "in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate" (in the words of paragraph 3.2.7d of the Home Secretary's guidance.) We are of the opinion that in considering whether such circumstances have been demonstrated by an applicant, the criterion that should be used is that of a "good arguable case", as suggested by Sales J in the passage quoted above. The decision maker should examine the circumstances put forward by the applicant and determine whether they disclose a good arguable case that the Rules would produce an unfair or disproportionate result such that the applicant's Article 8 rights would be infringed. It is only if that test is satisfied that there is any need to go on to consider the application of Article 8 in detail. Furthermore, as Sales J indicates, those writing decision letters should demonstrate that they have indeed addressed this test."

- 14) I see no difference in substance between this exposition and that of the Upper Tribunal in Oludoyi [2014] UKUT 00539, in which it was said that there was nothing in Nagre or Gulshan to suggest that a threshold test was being suggested as opposed

to making it clear that there was a need to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. This is also consistent with MM (Lebanon) [2014] EWCA Civ 985. at paragraph 128.

- 15) The position is that, as Mr Dewar submitted, the Judge of the First-tier Tribunal was entitled to reach the conclusions which he did upon the evidence before him and for the reasons which he gave. He was not required by the decision in Gulshan to apply a threshold test provided, as Lord Mackay of Drumadoon pointed out, that the circumstances of the claimant and her children disclosed a good arguable case that the Rules had produced an unfair or disproportionate result such that Article 8 rights would be infringed. It is clear from the consideration given by the judge to the circumstances of the children and, in particular, the length of time they have spent in the UK, that there was such a good arguable case which had not been adequately considered under the Immigration Rules. Indeed, as the judge pointed out at paragraph 41, the Secretary of State appeared to have made no attempt prior to the hearing before the First-tier Tribunal to take account of the best interests of the children or the application of paragraph 276ADE(iv).
- 16) I find that the Judge of the First-tier Tribunal did not err in law in allowing the appeals under Article 8 for the reasons which he gave.

Conclusions

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

Anonymity

- 19) The First-tier Tribunal did not make an order for anonymity. I was asked to make such an order on behalf of the claimant and do so in the following terms.
- 20) Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original claimant or her children. This direction applies to amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed

Date **13 March 2015**

Judge of the Upper Tribunal