



IAC-FH-NL-V1

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

Appeal Numbers: IA/26378/2014
IA/26377/2014
IA/26379/2014
IA/26380/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22 September 2015**

**Decision & Reasons Promulgated
On 5 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

**FOA (FIRST APPELLANT)
BMO (SECOND APPELLANT)
KO (THIRD APPELLANT)
ROO (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms K Joshi, Legal Representative, instructed by A Bajwa & Co Solicitors

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by four appellants, although it is common ground that the lead appellant is the first, namely the wife of the second

appellant and the mother of the two infant third and fourth appellants who are respectively 6 and 4 years of age. Application was made that the identity of all the appellants be anonymised in part because appellants 3 and 4 are minors but also due to the fact that the first appellant has a medical condition. No objection was taken to that order being made and accordingly I make a direction for anonymity in this case.

2. The determination with which I am concerned was promulgated on 25 February 2015 following a hearing before First-tier Tribunal Judge Kainth. The appellants are citizens of Nigeria. The history in relation to a number of prior applications is as set out in the determination and I do not need to rehearse it in this judgment. The appeal was from a decision of the Secretary of State communicated by letter dated 6 June 2014. I note that in paragraph 2 of the determination that date is wrongly stated as being 2004 but nothing turns on that typographical error.
3. The first appellant apparently entered the United Kingdom unlawfully in May 2002. Much of the decision letter issued by the Secretary of State dealt with whether under the Immigration Rules she had achieved the twenty year residence which would entitle her to remain. The Secretary of State concluded from the chronology that was clearly not the case and those matters were not pursued in the First-tier Tribunal. On the contrary the substance of the appeal related to whether the removal of any or all of the appellants would amount to a violation of their rights under Article 8 of the European Convention on Human Rights which relate to family life and to private life.
4. The matter pursued with greatest vigour before me this morning was the first ground, as amplified in a written skeleton argument. Criticism is made of the judge in stating relatively early in the course of the determination that the removal of the first and second appellants was “plainly lawful” because they had entered the United Kingdom illegally. This argument was developed by Ms Joshi in front of me this morning and the way she puts her case is that this amounted to a pre-determination on the judge’s part and that having taken the view that the entry being illegal therefore removal was plainly lawful coloured the judge’s overall determination and there were no adequate reasons for coming to that conclusion. She developed that argument in a way which had not been heralded by the grounds of appeal by pointing to subsequent paragraphs and suggesting that the judge gave no adequate reasons for his expressed scepticism about what was said by the first and second appellant in relation to their ties with Nigeria. The judge concluded at paragraph 14 “both were reluctant to admit their continuing familial and cultural links to Nigeria”. The judge in reciting the evidence which he both read and heard from the first appellant (in paragraph 10) and from the second appellant (in paragraph 11) sets out their assertions that they had lost contact with friends and family and that close relatives had died. The judge heard that evidence as it was being delivered and formed an assessment of its

credibility and cogency. He was perfectly entitled to have doubts as to what was being asserted and it is not for the Upper Tribunal in the exercise of its appellate jurisdiction to go behind the First-tier Tribunal's adjudication in relation to the strength, credibility and weight of evidence. I do not think the criticism made by Ms Joshi of the judge's finding has any substance.

5. What is further said by Ms Joshi is that the subsequent paragraphs are no more than a justification for the primary statement that removal would be lawful. As I indicated during the course of argument, judges have two styles in giving determinations. One is to start with a conclusion and then to give the reasons for coming to it; and the other is to work through the reasons before declaring the conclusion which has been reached. Both styles are legitimate and it is not for this court to criticise the style adopted by the judge. It is correct that the judge did not in this instance adopt the formulaic numerical approach as set out in paragraph 17 of **Regina v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27**. The approach commended by the House of Lords involves five distinct stages. They are as follows:

- “(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”

6. It seems clear to me reading the determination that the judge properly turned his mind to all of the five stages of the **Razgar** test. He dealt properly with whether there might have been an interference with the family and/or private life both of the adult appellants and of their minor children. He reached proper and appropriate conclusions based upon the evidence which he had heard. He took into account issues in relation to the first appellant's health and he gave those discrete issues the weight which they deserved. I have been taken to a decision of the Court of Appeal in **GS (India) & Others v Secretary of State for the Home Department [2015] EWCA Civ 40** and in particular to paragraph 111 of the judgment delivered by Lord Justice Laws, which reads as follows:

“First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the ‘no obligation to treat’ principle.”

7. In this case there was evidence of the first appellant’s condition but no specific evidence as to the quality and extent of the treatment which might be available were the first appellant to return to Nigeria. In my opinion the approach taken by the First-tier Tribunal Judge cannot be faulted. He rightly had regard to the health issues which were raised albeit they were not pursued in relation to Article 3. He came to the conclusions which he did both in relation to whether Article 8 was engaged (which clearly it was not) and in relation to the question of proportionality. Equally, in relation to public interest considerations and to whether any possible interference was in accordance with the law, the First-tier Tribunal Judge properly had regard to Section 117B of the Immigration Act, in particular that little weight should be given to a private life established by a person at a time when the person’s immigration right is precarious. In those circumstances, there is no substance in the criticism made of the First-tier Tribunal Judge under ground 1.
8. Moving then to the second ground which talks about the relevance of the first appellant’s medical condition, I have adequately covered those issues insofar as they overlap with the points raised under the first ground of appeal. There is no doubt that the judge considered such limited material as was available to him in relation to the first appellant’s medical condition, and accorded it proper weight in coming to the conclusion which he did.
9. A slightly more finessed argument pursued by Ms Joshi today is to the effect that the judge may not have differentiated between the private and family life claim of the adult appellants and that of the two minor appellants. In particular it was suggested that were the first appellant to die prematurely, as might be the case having regard to the nature of her condition, this would impact upon the wellbeing of the children. Again, I do not consider that that argument as raised today is indicative of any error of law on the part of the First-tier Tribunal Judge in coming to the conclusion which he did and I therefore reject that argument.
10. The third ground of appeal is not pursued. It related to a concession which may or may not have been made in the court below. The reason why that ground was rightly abandoned by Ms Joshi, as is apparent from paragraph 16 of the determination, is that even in the absence of an express

concession, the First-tier Tribunal Judge expressly found as a fact the matters to which the concession related.

11. That then leads me to the fourth ground of appeal which is slightly re-crafted in the light of an error in chronology as to the age of one of the children. The ground originally relied upon Appendix FM-EX.1 and the suggestion that a 7 year old child might have a right to remain. As is now conceded, the child in question, namely the third appellant is yet to reach its seventh birthday and therefore that provision of the Appendix to the Immigration Rules is not engaged. The argument was put on the basis that this was a near-miss under the Immigration Rules and should be considered as such but I do not consider that this adds anything to the criticisms made of this determination which I have otherwise rejected.
12. Finally, and encompassing several of the grounds which I have dealt with already, a broader argument was raised namely that the First-tier Tribunal Judge should have found some level of exceptionality in this case and in particular should have come to the conclusion that there were exceptional circumstances outside the Rules which would allow the appellants to stay. I questioned Ms Joshi as to what she said would constitute exceptional circumstance and she come back with merely with the severe illness, arguably life-shortening, of the first appellant. This, though tragic, is not exceptional. Issues such as these are for the judge to determine in accordance with the evidence heard and the view which he takes on it. The delicate assessment of proportionality is a matter which this appellate jurisdiction should not lightly interfere with. It may well have been unfortunate that the judge expressed himself in the way he did at paragraph 13 and made a statement regarding lawfulness prior to his consideration of other arguments but reading the determination in its entirety, the law has been properly applied and it is a proper exercise of judicial discretion on the judge's part.
13. In all those circumstances this appeal must be dismissed.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Mark Hill QC*

Date 5 October 2015

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Deputy Upper Tribunal Judge Hill QC

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed *Mark Hill QC*
Deputy Upper Tribunal Judge Hill QC

Date 5 October 2015