



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

Appeal Number: AA/00377/2011

**THE IMMIGRATION ACTS**

**Heard in Manchester**

**On 14 May 2013**

**Determination**

**Promulgated**

**On 30 July 2013**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**M R L  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Nicholson, instructed by Jackson & Canter Solicitors

For the Respondent: Mr McVeety, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This determination incorporates (with appropriate amendment) an error of law decision and direction sent to the parties on 31 May 2013. The parties have responded to my direction with further argument on a ground on

which permission to appeal was sought but not granted. I have also made an anonymity order as this appeal involves a child's interests.

2. The appellant, a national of Guinea born 25 September 1979, appeals with permission the decision of First-tier Tribunal Judge Heynes who dismissed her appeal on asylum, humanitarian protection and human rights grounds against a decision refusing to vary the appellant's leave to remain for reasons given in a determination dated 9 March 2011.
3. The appellant had arrived in the United Kingdom on 26 November 2009. She gave birth to a daughter on 10 June 2010. The appellant has HIV. At the time of the hearing of the appeal it was unclear whether her daughter had acquired this infection. The basis of her asylum claim was that she would face mistreatment in Guinea due to imputed political opinion.
4. The grounds of application argue:

“(iv) The judge erred in law in his approach to the best interests of the child with reference to *ZH (Tanzania)* [2011] UKSC 4 and further erred in failing to take proper account of all aspects of the appellant's private life both as to her mental health and a failure to take into account all the evidence in reaching adverse credibility findings in respect of the asylum claim. There was a failure to consider the situation of a single woman with HIV returning to Guinea and a failure to bring her HIV status in the private life equation.

(v) The judge erred in failing to take account of the Secretary of State's failure to exercise discretion in favour of the appellant under Rule 395C in the light of the clear compassionate circumstances. The Secretary of State's representative had taken instruction to inform the judge that her policy was not issue a removal decision until all appeal rights were exhausted which was clear wrong with reference to the decision in *Mirza* [2011] EWCA Civ 159. Removal would be way of Section 10 in the light of the previous grant of dictionary leave to the appellant both of which qualified for consideration of paragraph 395C factors and the Secretary of State was therefore required to give this consideration. There were clearly compassionate factors in the case which cried out for clear demonstration of their proper application and no reasonable judge could fail to see that these could justify the exercise of discretion in the appellant's favour with the threshold being lower than that for Article 8. It is argued the judge should have allowed the appeal insofar as the respondent should have exercised her discretion differently.

5. Permission to appeal was refused by First-tier Tribunal Judge Peart on 30 March 2011 after observing that much of the grounds of application were taken up with extracts from established case law and otherwise in substance no more than a series of disagreements. He went on to observe:

- “3. In a very detailed and thorough determination, the Immigration Judge addressed and made findings on the significant issues before him. The grounds claim that the Immigration Judge erred in failing to apply the law as set out in *ZH (Tanzania)* [2011] UKSC 4 and erred in failing to take account of the respondent's failure to exercise her discretion in favour of the appellant under Rule 395(c).
  4. The grounds fail to explain how or in what circumstances the respondent was obligated to consider paragraph 395(c) bearing in mind the application that had been made and the respondent's assessment of the appellant's circumstances as set out in the refusal letter. *Mirza* [2011] EWCA Civ 159. Nor do the grounds explain how or in what circumstances the Immigration Judge arguably erred in taking into account the appellant's circumstances bearing in mind the findings at paragraphs 29 to 53 of the determination.
  5. As regards *ZH*, the Immigration Judge carried out a careful assessment reminding himself of the criteria of ‘best interests’ at paragraphs 32 to 325 of the determination.
  6. The evidential basis of the findings of the Immigration Judge was sufficient. The Immigration Judge gave sufficient reasons for conclusions that were open to him on the evidence and disclosed no arguable error of law.”
6. The application was renewed to the Upper Tribunal in which it is argued that First-tier Tribunal Judge Peart had totally failed to engage with the grounds., it is argued that no reasonable reading of *ZH* would entitle a judge to take (such an) approach to such to the “primary consideration” of the best interests. The decision of First-tier Tribunal Judge Peart is also challenged with reference to *EO (Turkey)* [2007] UKAIT 00062 and *TE (Eritrea)* EWCA Civ 174.
  7. In granting permission to appeal Senior Immigration Judge Storey had this to say:

“Save on one matter, I concur with the judge who refused the first application for permission to appeal in finding that the grounds are in substance no more than a series of disagreements with the IJ's findings of fact. I agree in particular that the determination demonstrates a proper assessment of the *ZH* issues. As regards *ZH* the grounds fail to note the important fact that in this case there was no British citizen or settled parent affording a connection with the UK. The para 395C issue raised in the grounds is however a different kettle of fish. The IJ did not deal with this at all save to note that it had been raised by the appellant (see para 5) and further, did not indicate why he thought that paragraph 395C considerations could not lead to a different result from those considered under Article 8. That failure was arguably an error of law.”

8. Mr Nicholson also drew my attention to a letter from his instructing solicitors dated 16 June 2011 addressed to the Upper Tribunal. In this it is stated that they would like to renew the grounds submitted regarding *ZH* (Tanzania) and Section 55 and it is respectively submitted that IJ Peart and SIJ Storey had both erred in stating that the findings could only be attributed to children in the UK who are British citizens. It is also argued that SIJ Storey erred in stating that the grounds failed to note that there no British citizen children or settled parents in the case and it is argued that the obligations of Section 55 of the Borders, Citizenship and Immigration Act 2009 apply to both British citizen children and non-British citizen children who are resident in the UK. The hearing began with a consideration of the jurisprudential landscape regarding the segregation of variation and removal decisions and the role of the now superseded paragraph 395C in that context.
9. I observed to the parties that SIJ Storey may have misunderstood the reference in [5] of the determination which was to paragraph 339C of the Immigration Rules in the context of humanitarian protection. The determination did not make any reference at all to paragraph 359C considerations and it was not at all clear to me whether the parties themselves were aware that such considerations *had* been addressed by the Secretary of State in the refusal letter at [29] even though the decision was a variation one. Mr Nicholson submitted that what Dr Storey had said was that paragraph 395C should have been considered. He also submitted at the outset of the hearing that all grounds remain arguable having regard to Upper Tribunal Judge Storey's decision in *Ferrer* [2012] UKUT 00304 (IAC) and the decision of the Court of Appeal in *Kizhakudan* [2012] EWCA Civ 566.
10. Remaining with the issues surrounding paragraph 395C Mr Nicholson argued that there had been a challenge before the judge to the validity of the immigration decision based on the current case law. He contended that the observations of the judge at [8] of the determination did not accurately reflect what he had argued. The judge had stated at [8]

“Mr Nicholson raised the issue of whether there was a valid appeal before me on the basis that no IS151A or B had been issued since those that had been produced after the appellant's unsuccessful asylum claim. There is no merit in this argument. The appellant had applied for a variation of leave. An immigration decision was made refusing that application. The appellant lodged an appeal against that decision. The appeal before me is plainly valid.”
11. According to a note he had sent his instructing solicitors after the hearing he had argued before the judge that it was wrong to have a two step process. This was an academic point as the appellant was entitled to have her circumstances considered under 395C. What the judge had recorded was not the point made regarding the need to consider whether there should have been a combined decision.

12. Candidly however Mr Nicholson accepted that subsequent decisions had demonstrated that the judge was correct to proceed as he had in deciding that the immigration decision was validly made. He agreed that there remains a removal decision outstanding for the appellant although maintained that to that extent his application had been successful.
13. It has to be said there is some confusion in Mr Nicholson's approach. The ground of his application to the First-tier Tribunal argued that there had been an invalid decision on the basis that the judge had failed to take account of the Secretary of State's failure to exercise her discretion in favour of the appellant under Rule 395C. As I reminded the parties, that exercise had been exercised. The renewed application to the Upper Tribunal also appears to have been predicated on the basis that there had been no such exercise by the Secretary of State. If this was the basis on which the paragraph 395C issue had been raised, it appears to have been based on a misconception.
14. If it is the case as Mr Nicholson now submits, the judge misunderstood the submission made which was that the decision was invalid because it was a segregated one, as he himself has acknowledged, there is no longer any merit in that argument. See *Patel v SSHD* [2012] EWCA Civ 741.
15. Whether it is possible to rescue from Mr Nicholson's renewed application the argument that paragraph 395C as raised by the respondent should have been exercised differently is one which he did not consider necessary to pursue. He accepted that the appellant was still entitled to consideration of her circumstances under Article 8 before a further decision is made. Such a decision will need to take into account as indicated by Mr Nicholson of a further change in the appellant's circumstances which includes the birth of an additional child.
16. Accordingly I am satisfied that no error of law has been made out on the basis on which permission was granted in the light of matters now conceded.
17. This leaves the issue whether it was open to Mr Nicholson to renew the grounds of application on which the appellant had been unsuccessful as reflected in the letter from Jackson & Canter of 16 June 2011 regarding the application of ZH (Tanzania) and s.55.
18. I reminded Mr Nicholson that *Ferrer* was concerned with the consequence of a judge of the First-tier Tribunal Immigration and Asylum Chamber granting permission only on limited grounds. I refer in particular to [2] of the head note.
  - "2. Where the First-tier Tribunal Judge nevertheless intends to grant permission not only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision under Rule 25(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and by ensuring that the Tribunal's administrative staff send out the proper notice,

informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal.”

19. The guidance continues:

“3. If an applicant who has been granted permission to appeal to the Upper Tribunal on limited grounds only applies to the Upper Tribunal on grounds in respect of which permission has been refused, the Upper Tribunal Judge considering that application should not regard his or her task as merely some form of review of the First-tier Tribunal’s decision on the application.”

20. In the case of the appeal before me the situation is different. The appellant was refused permission to appeal by a Judge of the First-tier Tribunal but granted permission only on a limited ground by a Judge of the Upper Tribunal. It is Mr Nicholson’s case that his instructing solicitors gave notice to the Upper Tribunal in the letter that I have referred to above of 16 June 2011. This letter states this in the second paragraph :

“In addition to the enclosed IA102 form we would like to renew the grounds we submitted regarding *ZH* (Tanzania) and s.55. It is respectfully submitted that IJ Peart and SIJ Storey both erred in stating that findings in *ZH* can only be attributed to children in the UK who are British citizens. I have attached our previous grounds which clearly show that this is not the case.”

21. The letter goes to amplify those points.

22. Two questions arise. Does the Upper Tribunal have jurisdiction to consider applications to enlarge grounds or reply on grounds for which permission has not been granted where permission has been granted on a limited ground and if so what is the correct procedure?

23. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides in terms that a party to a case has a right of appeal to the Upper Tribunal and any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision. With permission to appeal having been granted even on a limited ground, I am satisfied that it is open to the Upper Tribunal to consider grounds that were not raised in the grounds of application and this would not exclude grounds for which permission had not been granted. Accordingly, my view has changed from that expressed to Mr Nicholson at the hearing particularly in the light of my further consideration of the decision in *Ferrer*. That decision refers to *DL-H v Devon Partnership SH Trust* [2010] UKUT 102 (AAC) where Upper Tribunal Judge Jacobs in an appeal from the Health, Education and Social Care Chamber of the First-tier Tribunal, rejected “the argument that an appeal is necessarily limited to the grounds in the application on which permission was given and that further permission is ruled to raise other grounds”.

24. As observed by the Tribunal in *Ferrer*, having regard to the overriding objective in Rule 2 of the Upper Tribunal Rules, Upper Tribunal Judge Jacobs found that “as a matter of interpretation, it would not be fair and just to restrict the scope of appeal to grounds in the application on which permission was given”.
25. The Tribunal in *Ferrer* went on to observe at [27]
- “In the immigration and asylum jurisdiction we do not consider that the Tribunals, Courts and Enforcement Act 2007, read with the Upper Tribunal Rules, is such as to excuse a party from a requirement to be seen and obtain the permission of the Upper Tribunal in order to raise grounds which are not already before the Upper Tribunal. Proceedings in immigration and asylum appeals are considerably more adversarial in nature than in many, at least of the jurisdictions covered by the Administrative Appeals Chamber. We do not consider that the overriding objective is, in general, likely to be advanced by adopting a procedure in which new grounds can be advanced without permission of the Tribunal. It should also be noted that, in immigration and asylum appeals, the Upper Tribunal does not have power to strike out whole or part of a party’s case, other than for want of jurisdiction (Rule 8(1A) and 2(A) of the Upper Tribunal Rules). Further, in [30] the Tribunal made the point which appears on the head note quoted above. The first step appears to be therefore a need for the appellant who has been unsuccessful on certain grounds to seek permission to appeal on those grounds.”
26. The letter from Jackson and Cantor is not on the court file. It postdates the grant of permission by SIJ Storey dated 5 May 2011 by some six weeks. However there is an indication from the Tribunal's computerised file management system that the grant of permission to appeal had been repromulgated on 8 June 2011 and a faxed copy of IA102A had been received from the representatives on 28 June. I am therefore satisfied that the letter was received.
27. In the light of my revised view on the jurisdiction of the Tribunal to consider an enlargement of the grounds I considered the parties should be given the opportunity to make further submissions if desired. The parties were reminded in my decision giving them the opportunity for making further submissions that it is simply not the case that Judge Storey stated that the findings in *ZH* could only be attributed to children in the UK who are British citizens. It is also not the case also that the First-tier Tribunal Judge did not consider the case on the basis that the absence of British nationality of the parent was determinative of the application of the principles in *ZH*. In particular the parties were informed of the need to consider paragraph [47] of the determination.
28. I expressed the preliminary view, subject to argument, that the points made in the letter of 16 June did not on the face of it identify arguable error. In the interests of fairness however the parties were given the opportunity to make such further submissions on this point in writing to be

received by the Upper Tribunal no later than 4 pm 10 June 2013. Unless I considered that points raised require a resumed hearing, I would thereafter make my decision on whether to grant leave for the grounds to be extended as sought by Jackson and Cantor and decide whether the First-tier Tribunal erred in law.

29. Responses have been received from the parties. For the appellant, to the extent that Mr Nicholson has sought to re-open argument on the matters on which I have already decided there was no error of law relating to the exercise of discretion by the SSHD, it was not apt for him to do so. He makes the further points that: (i) the letter of 16 June 2011 was not solely concerned with the apparent emphasis given my SIJ Storey to the issue of British Citizenship, (ii) the shortcomings of the parents should not be held against the child with IJ Heynes not seeking to conduct an assessment of the best interests and then seeing whether there were factors outweighing them and (iii) the judge had not sought to establish the conditions the child would encounter if removed to Guinea.
30. The SSHD has responded in terms referring to *Azimi-Moayed and others (decisions affecting children; onwards appeals)* [2013] UKUT 00197(IAC). She submits that the judge has properly considered s.55 in the context of Art 8.
31. The focus is on the letter of 16 June 2011. The first paragraph is at [20] *supra*. The second states this: " SIJ Storey errs in stating that our grounds fail to note that there is no British Citizen child or settled parent in this case however our grounds went to lengths to explain why the principles in *ZH* (Tanzania) and indeed the obligations under s.55 Borders Citizenship and Immigration Act 2009 apply to both British Citizen children and non-British Citizen children who are resident in the UK". This is followed by further reference to *ZH*.
32. That is the extent of the additional ground on which I have invited submissions. I do not consider there is any arguable basis for asserting such a misconception to SIJ Storey having regard to the language of the refusal to grant permission on this ground. Turning to the substance of the ground on which permission was sought, it is argued that there were no countervailing considerations of any substantial moment and that the factors taken into account by the judge were irrelevant. The judge had erred in holding matters against the child and in summary that he had not considered the situation of a single woman with HIV returning with an illegitimate child.
33. A careful reading of the determination leads me to the view that the grounds are no more than a disagreement and that they do not identify material error by the judge. It is clear that the judge after directing himself as to the law, took into account all the relevant factors including the appellant's HIV status and her child's illegitimacy before concluding what he considered the best interests were at [44]: to remain here with the appellant on the basis that if she turned out to be positive she and her mother would receive better treatment. The judge also directed himself at



[36] as to the non-culpability of children for their parent's failings. He then made findings what the appellant would encounter on return as part of the proportionality exercise. It is correct that the judge did not focus on the specific circumstances that the child would face but this is not material having regard to the positive findings regarding re-integration of the appellant and the consequent absence of any material hardship for the child. The conclusion reached by the judge was legally correct and a permissible one open to him on the facts.

34. I am satisfied therefore that the First-tier Tribunal did not err in law with regard either the renewed ground or the ground on which permission was granted. The appeal is dismissed and the decision of the FtT judge stands.

Signed

Date 26 July 2013.

A handwritten signature in blue ink, appearing to read 'Dawson', is written below the 'Signed' label.

Upper Tribunal Judge Dawson