Upper Tribunal
(First Tier Tribunal and Asylum Chamber) Appeal Number: DA/00799/2013

THE FIRST TIER TRIBUNAL ACTS

Heard at Field House
On 1 May 2014

Determination Promulgated
On 13 May 2014
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Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GHA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms D Offei-Kwatia of Counsel (direct public representation)

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DETERMINATION AND REASONS

1. The respondent to this Appeal by the Secretary of State, to whom we shall refer as "GHA," is a citizen of Ghana born on 11 August 1980. She initially entered the UK on a student visa on 2 September 2000, and her leave as a student was extended on subsequent occasions until 30 January 2006. She then was given leave to remain as a work permit holder until 28 July 2011. She is a qualified nurse. On 14 September 2010 she made an application for Indefinite Leave to Remain ("ILR") having completed 10 years' lawful residence in the United Kingdom. But for the tragic events which unfolded before that application came to be considered by the Secretary of State, GHA would have had every reason to believe that it was likely to be successful.

2. However, on 11 November 2011 GHA was sentenced to a term of imprisonment for three years following her conviction of causing or allowing the death of a child in her care (her infant daughter) under Section 5 of the Domestic Violence Crime and Victims Act 2004, in circumstances which we shall go on to describe. On 9 April 2013 the Secretary of State made a deportation order against her by virtue of s.32(5) of the UK Borders Act 2007 ("the 2007 Act"). Her application for ILR was refused in the same decision.

3. GHA appealed against the decision to make a deportation order on the basis that she fell within the exception to s.32(5) of the 2007 Act by virtue of s.33(2)(a) and/or that any deportation would be a breach of her human rights. She also sought leave to remain in the UK. The substantive hearing of GHA's appeal was conducted at the FTT on 3 February 2014. By way of Determination promulgated on 11 February 2014 by First Tier Tribunal Judge Woodhouse and Mrs AJF Cross De Chavannes ("the Panel") the appeal was allowed. An anonymity direction was made in these proceedings by the Panel and in related appeals involving AFG and the children, in order to protect the children. We are satisfied that it is appropriate to maintain that direction.

4. The Secretary of State sought and obtained permission to appeal against that Determination on 4 March 2014. We heard the appeal on 1 May 2014 and indicated at the conclusion of oral submissions that we proposed to dismiss the appeal, but that we would reserve our reasons for a written determination. Those reasons are set out herein.

5. GHA has been in a relationship with her partner, "AFG", also a Ghanian citizen, since 2001. It is accepted by the Secretary of State that the relationship is a genuine and subsisting one. The couple had four children together, all of whom were born in the UK. The eldest child PAPA was born on 5 July 2002. The second child, DAA, was born on 14 July 2004 and the third, NANA, was born on 10 November 2005. GHA and AFG split up for a time in October 2004. AFG believed that NANA was the child of someone else, but following paternity tests it became clear that she was his child. The couple were later reconciled.

6. All three of the older children went back to Ghana to live with GHA's mother for periods during their infancy. PAPA returned to the UK on 19 December 2005, and he has remained in the UK ever since. DAA went to live with his maternal grandmother in Ghana on 21 December 2004, when he was five months old, and stayed there for a total of 22 months. NANA went to Ghana to live with her grandmother when she was six months old. Both DAA and NANA returned to the UK with their mother on 1 October 2006, but on that occasion they stayed for only six months and went back to Ghana on 20 February 2007. DAA returned to the UK on 28 December 2007 and remained here ever since. NANA returned on 22 March 2009. Their parents went on to have a further daughter, D, who was born on 1 April 2009. Immediately after the birth GHA underwent an operation which prevented her from having any more children.

7. All of the children had leave to remain as their mother's dependents until 28 July 2011. In November 2009 her partner, AFG, obtained discretionary leave to remain until the same date, in line with GHA's leave as a work permit holder.

8. Tragically, on 3 March 2010 GHA's youngest daughter D, then aged 10 months, died of respiratory pneumonia. It transpired that this was the result of force-feeding, which had caused her to breathe food into her lungs. The death of D gave rise to GHA's prosecution, conviction and sentence of three years' imprisonment. As a result of the conviction she was disqualified from working with children for life. She was also notified that she was liable to be deported on completion of her sentence.

9. The three surviving children became the subject of care proceedings and child in need plans in April 2010. A report to the Family Court from the children's senior social worker reported positively on the co-operation by both parents with social services in the period leading up to GHA's imprisonment. It stated that they had engaged well with Children Services and taken on board advice and guidance given by the School Nurse and other professionals. The children were given telephone contact with their mother in December 2011 and were able to visit her in prison.

10. In consequence of the social worker's recommendations, the children were placed under a supervision order issued on 18 April 2012, which expired on 7 April 2013. On 18 April 2012, with the full support of social services, they were also made the subject of a residence order in favour of their father. The residence order automatically gave AFG parental responsibility for the three children. The court order stipulates that unless it was revoked or the children were 16, they could not be removed from the jurisdiction for more than one month without the consent of the father or the leave of the court.

11. AFG's leave to remain was due to expire on 28 July 2011 along with that of the children. He made an application for further leave to remain in the United Kingdom on 22 July 2011. Unfortunately the children's CAFCASS guardian, who was responsible for extending their leave to remain in the United Kingdom, failed to discharge her obligations. When this was discovered, their father applied for the three children's leave to remain on 20 November 2012. Since, through no fault of

their own, the children's application was out of time under the Immigration Rules, the Respondent was only able to consider it under Article 8 ECHR.

12. GHA was released from prison on licence and granted immigration bail on 23 April 2013, and was reunited with her family. She, AFG and the children have been living together in a three bedroom property in London ever since. A report from social services dated 19 May 2013 was positive in all respects. It observed that the children had a close and positive bond with both parents and that there was no significant risk of harm, and described them as a "close, committed family unit with strong cultural and religious beliefs and a huge supportive network around them". The report stated:

"If [GHA] is deported, the whole family will feel the stress of the separation. This type of stress can have a detrimental effect on children, causing anxieties and affecting childhood development. Deporting [GHA] will have an impact on her children's future successes, including things such as their school achievements and earning as adults".

13. A report from GHA's probation officer dated 19 August 2013 stated that she had displayed "exemplary behaviour and commitment" whilst on licence.

14. Initially the applications made by AFG and the three children were refused by the Secretary of State. The refusal was based almost entirely on the decision to deport GHA. Following GHA's successful appeal, the appeals of the Appellant's partner and three children were heard by a different constitution of the FTT (First Tier Tribunal Judge Shamash) on 7 and 14 February 2014, and by a Determination promulgated on 7 March 2014 those appeals were allowed.

15. The First Tier Tribunal Judge considered the supervision order, the residence order, a letter from the local authority Children's Services, the GCID case record dealing with the grant of leave, and the children's school reports. She also heard oral evidence from AFG. In a cogently reasoned decision the Judge rightly started on the premise that removal of the appellants together would be an interference with the family life that they enjoy together in the United Kingdom. She then examined whether that interference was proportionate. Although the Secretary of State was fully aware of the fact that Social Services were involved and that AFG was caring for the children, the caseworker did not consider this fact or address it in the refusal letter. The Judge noted that the Secretary of State's decision was not in line with her own memos in the GCID case record, including a note from a senior caseworker to the effect that the argument for refusing leave was weak under ZH (Tanzania) and that in considering the best interests of the children the UKBA needed to consider their welfare and stability. The caseworker had stated:

"*Given the above consideration I think a judge would look at this very harshly if we were to refuse either the applicant or the children…*"

16. After carefully considering all the relevant authorities and statutory provisions First Tier Tribunal Judge Shamash concurred in the description by the Panel (in the decision under appeal to this Tribunal) of the failure of the Secretary of State to address the fact that the minor children were subject to a residence order as

"incomprehensible". She found that there had been a failure by the Secretary of State to make adequate enquiries in relation to the children before reaching the decision to refuse their applications. She pointed out that the decision under appeal in their case (just like the decision in GHA's case) failed to attach any weight to the residence order, and failed to have regard to s.55 of the UK Borders Act or to their best interests. On carrying out the appropriate balancing exercise under Article 8, the Judge concluded that the decision was disproportionate. She allowed AFG's appeal under the Immigration Rules on the basis that he has been in the UK for 12 ½ years, and in case that was wrong, allowed it in the alternative under Article 8 ECHR. He allowed the three children's appeals under Article 8.

17. It is of significance that the Secretary of State has not sought to appeal against that Determination. Therefore, GHA's partner and her three surviving children, with whom she has been living as part of a close-knit family unit before and after her imprisonment, will remain in the United Kingdom if she is deported to Ghana. It is perhaps a little surprising that the Secretary of State has not reconsidered her position in the light of the positive Determination in the case of GHA's partner and children. However, she has not done so and thus we proceed to determine the appeal on its merits. The Determination in the other appeals is of no relevance to the question whether there was an error of law in the Panel's Determination in GHA's case, and we disregard it completely in our consideration of that issue. The outcome of AFG's and the children's appeals is only of relevance in the event that we have to consider the matter afresh.

18. The grounds of appeal against the Determination in the present case are that the Panel failed to have regard to the Immigration Rules when making its assessment under Article 8 ECHR, and that the residence order in favour of AFG was wrongly treated as determinative. The judge granting permission took the view that it was unclear from the determination whether or not the Panel had adopted the approach outlined by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 or, indeed, whether proper consideration was ever given to the Immigration Rules. There was no adequate explanation in the Determination of why the Appellant came within paragraphs 399 or 399A of the Immigration Rules or failing that, what exceptional circumstances outweighed the public interest in her deportation.

19. The relationship between the 2012 Immigration Rules and the common law principles governing Article 8 claims has been considered by the courts and by this Tribunal in a number of recent cases. Although the new rules aim to reflect the jurisprudence on Article 8 both domestically and in Strasbourg, it is clear that they are not comprehensive. Indeed the new Guidance recognises the existence of a discretion to grant leave to remain outside the Rules.

20. In MF (Nigeria) the Court of Appeal held that where the case falls within Para 398(b) of the Immigration Rules, i.e. where a person has been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months:

(1) The first step under the new rules is to decide whether one or more of the conditions set out in Para 399(a) or (b) or Para 399A applies. If Para 399 or 399A applies then the new rules implicitly provide that deportation would be contrary to Article 8.

(2) The question whether Para 399 or 399A applies may involve a question of evaluation, such as whether it would be reasonable to expect the child to leave the UK, as well as questions of fact.

(3) If paras 399 and 399A do not apply the test is one of "exceptional circumstances". The new rules are not a perfect mirror of Strasbourg jurisprudence but they must be interpreted consistently with it. Thus in evaluating the public interest in deportation against other factors, all factors relevant to proportionality must be taken into account.

(4) The decision maker should normally undertake a two-stage process, unless satisfied that the requirements of paras 399 or 399A are met.

(5) Whether the proportionality test is undertaken inside or outside the rules, the end result should be the same.

21. In R (Nagre) v SSHD [2013] EWHC 720 (Admin) Sales J considered the meaning of "exceptional circumstances" and concluded that in order for the discretion to be exercised outside the rules, there needed to be particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh. In MF (Nigeria) the Court of Appeal endorsed his approach whilst stressing that this did not mean that a test of exceptionality was being applied, but rather, that in cases falling outside the rules, the scales are weighed very heavily in favour of deportation and something very compelling is required to outweigh the public interest in removal.

22. The Panel set out the approach that the Secretary of State took to the evaluation of whether GHA fell within Paragraph 399 or 399A in paragraphs 41 to 58 of the Determination. They briefly referred to the decision that there were no "exceptional circumstances" in paragraph 59, before making their decision that there would be a breach of Article 8 if GHA were to be removed, and setting out their reasons for holding that she fell within exception 1 of section 22 of the 2007 Act.

23. Although perhaps the matter could have been more clearly expressed in the Determination, it seems reasonably clear to us that the Panel were only considering the question whether the Secretary of State had correctly taken into account all relevant factors when concluding that there were no "exceptional circumstances" making GHA's removal disproportionate, and that they did not address the first stage of the two-stage analysis because they (rightly) accepted that she did not meet the requirements of Paragraphs 399 and 399A of the Immigration Rules.

24. This is not only because there is no specific criticism of the decision-maker's approach to Paragraphs 399 and 399A, but because the entire focus of the Panel's reasoning is upon factors relevant to proportionality which do not appear in

Paragraphs 399 or 399A and which the authorities on Article 8 make very clear that the decision maker is nevertheless required to take into account in evaluating whether deportation would be a disproportionate interference with GHA's Article 8 rights (and those of her partner and children). The factors which the Panel rightly criticised the Secretary of State for failing to take into account are not set out in Paragraph 399 or 399A.

25. The only one of those paragraphs that GHA arguably came close to fulfilling was Paragraph 399(a). This provides as follows:

> *"This paragraph applies where paragraph 398 (b) or (c) applies if –*
> *(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*
> *(i) the child is a British citizen; or*
> *(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the First Tier Tribunal decision; and in either case*
> *(a) it would not be reasonable to expect the child to leave the UK; and*
> *(b) there is no other family member who is able to care for the child in the UK."*

26. Since the eldest child had lived continuously in the UK for over 7 years prior to the date of the First Tier Tribunal decision, the original decision maker had proceeded on a factually incorrect premise in refuting the claim under paragraph 399(a) on that basis. It plainly would not be reasonable to expect that child to leave the UK. However, GHA could not fulfil requirement (ii)(b) of Paragraph 399(a) because there was another family member able to care for the child in the UK, namely, his father. Nevertheless, an applicant's failure to qualify under the Rules is the starting point for consideration of Article 8, not the end, as the Supreme Court made clear in Patel and Others [2013] UKSC 72 at [54].

27. In Ogundimu (Article 8) – New Rules, Nigeria [2013] UKUT 60, this Tribunal pointed out that the requirements of Paragraph 399(a) make no provision for a consideration of where the best interest of a child lies, and that this conflicts with the Secretary of State's duties under Article 3 of the UN Convention on the Rights of the Child 1989 and section 55 of the Borders, Citizenship and First Tier Tribunal Act 2009, both of which make the best interests of a child a primary, though not a paramount, consideration.

28. In LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (AC) Lord Kerr stated that:

> *"Although questions exist about the status of the UN Convention on the Rights of the Child in domestic law, we take the view that there can be little reason to doubt that the interests of the child should be a primary consideration in First Tier Tribunal cases. A failure to treat them as such will violate Article 8(2) as incorporated directly into domestic law.... [28]*

Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing considerations of considerable force displace them ... the primacy of this consideration needs to be made clear in emphatic terms." [34]

29. Moreover Article 9(1) of the UN Convention on the Rights of the Child stipulates that

"parties shall ensure that a child should not be separated from his or her parents against their will except where competent authority subject to judicial review determines in accordance with applicable law and procedures that such a separation is necessary for the best interests of the child."

30. Thus in Ogundimu it was held that if a parent fails to meet the requirements of Rule 399(a), little weight should be attached to this when consideration is being given to the assessment of proportionality of his or her removal under Article 8 ECHR. It was not in a child's best interests to lose contact and support with a caring and devoted parent because someone else could be found to care for them [93]-[96].

31. The Panel made the observation in paragraph 63(ii) of the Determination that it must be disproportionate to remove the Appellant in a case where her children have a right to remain in the UK and where the inference to be drawn from the Residence Order is that they want to express that right because none of these children wish to return to Ghana. That observation is consistent with the correct approach to the best interests of the children, as set out in Ogundimu.

32. In our judgment, there was no material error of law in the Panel's approach. There was no point in their making further reference to the question whether GHA met the requirements of s.399 or 399A of the Immigration Rules, when she plainly did not and the Secretary of State's decision in that regard was plainly correct, even though in one respect it was subject to factual error. We do not consider it to be an error of law, let alone a material one, for an appellate tribunal to omit to state that the decision maker has correctly applied the Rules, and to concentrate instead on the areas of his or her decision that are flawed.

33. The Immigration Rules do not address the situation where there is a Residence Order in place. When evaluating Article 8 considerations outside the Rules, the Panel's criticism of the Secretary of State for failing to take into account the Residence Order was sound. As the Panel pointed out, the omission of that highly relevant factor meant that the decision maker did not take into consideration the rights of the family members in accordance with Beoku-Betts [2008] UKHL 39. The Panel was also entitled to take into account the failure of the decision maker to follow the guidance given to criminal case workers which required a decision maker considering the removal or deportation of a child who is subject to a Residence Order to discuss the case with a senior case worker and the Officers of Children's Champion ("OCC") to find out what is appropriate on a case by case basis. That did not happen.

34. As to the criticism of the Panel for regarding the Residence Order as a decisive factor, it is highly relevant to bear in mind that counsel for GHA had submitted that it was UK policy that when a Residence Order was in force, leave should be granted, and that the Secretary of State failed to address her own policy (see paragraph 24 of the

Determination). The presenting officer does not appear to have challenged that description of the policy. In those circumstances the Panel's focus on the absence of any consideration of the Residence Order by the Secretary of State is entirely understandable.

35. The Panel plainly did address what exceptional circumstances outweighed the public interest in deportation of GHA, even though they did not use the phrase "exceptional circumstances". After carrying out the balancing exercise they concluded that it was disproportionate to remove GHA because the consequence of the Secretary of State's decision was to separate the family members who see themselves as a family unit.

36. It was contended in the Grounds of Appeal that the Panel failed to consider the option that the family could return to Ghana together, given that they had no lawful status to remain in the UK, and that there was no explanation in the Determination of why the Residence Order precluded this. We reject that criticism. Whilst it is true that there is no express reference to that "option" in the Determination, it is obvious from the terms of the Residence Order itself that the children could not be lawfully removed from the UK unless and until that Order was lifted or varied, as the Panel stated in paragraph 63(i). Thus before the children could be removed, the Family Court would have had to have been informed and given its approval. Moreover, as the Panel also pointed out in the same paragraph, even before any steps could be taken in that regard, the OCC would have to have been consulted, but no such consultation had taken place. It is obvious that any discussion of the matter with the OCC and with a Judge of the Family Court is likely to have taken into account the age of the children, the safety implications of their removal, the strength of their connections with the UK and the impact on them of further disruption by removal, as well as their own wishes.

37. The Panel very properly refused to speculate as to what might have happened had those steps been taken. The fact is that those steps were <u>not</u> taken. The Secretary of State was not entitled to the benefit of an assumption that if those steps had been taken, the OCC and the Family Court would have given their blessing to the lifting of the Residence Order, any more than GHA was entitled to an assumption to the contrary. The only thing the Panel could do was consider the position as it stood on the date on which the appeal fell for determination. The Residence Order was in force and nothing had been done to lift it. Therefore the Panel was entitled to take the view on the evidence before it that there was, at the very least, no immediate prospect of the family being removed as a unit to Ghana. That being so, there was no obligation on the Panel to do more than point out that the Residence Order precluded the children from leaving the UK without a further court order and that none of the appropriate steps had been taken by the Secretary of State towards achieving that goal, which is what they did in Paragraph 63(i).

38. Even if there was an error of law in the Panel's approach because they failed to expressly address the "option" of the whole family being removed to Ghana, it was not material, because consideration of that "option" on the evidence before them would have led to precisely the same result.

39. Even if we are wrong, and there was a material error of law in the Panel's approach, leading to the setting aside of the Determination under appeal this is plainly a case in which it would be appropriate for the Upper Tribunal to consider the matter on the evidence before it instead of remitting it to the First-Tier Tribunal. After taking into account all the relevant factors we would have reached exactly the same decision as the Panel did, particularly in the light of the fact that the related appeals have been allowed and the Secretary of State has not sought to challenge the Determination of First Tier Tribunal Judge Shamash. Whatever the position may have been at the time of the Panel's Determination, it is undeniable that GHA's partner and the children now have the right to remain in the UK and therefore there can be no question of the entire family unit being removed to Ghana. That being so, it would not be in the best interests of the children to be deprived of contact with and the support of a loving mother, especially as there is no danger that she would pose any threat to their wellbeing and there is no significant risk of her reoffending.

CONCLUSION

40. Although perhaps it might have been better had they given some explanation of why they were not considering whether the Immigration Rules applied, the Panel were entitled to go straight to the second stage of the two-stage process adverted to in MF (Nigeria) given that it was obvious that GHA did not meet the requirements of Rule 399 or 399A. In considering exceptional circumstances, the Panel did properly evaluate all the relevant factors in assessing whether the deportation of GHA would be a disproportionate interference with her rights and those of her partner and children under Article 8 ECHR, and correctly reached the conclusion that it would. This is an even stronger case on its facts than Ogundimu. Even if we are wrong and there was a material error of law, the application of the appropriate legal tests to the facts of this case inexorably leads to exactly the same result. We therefore dismiss the Secretary of State's appeal.

Direction regarding anonymity – rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

The Appellant, her partner and their children have been granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them or any other member of their family. Failure to comply with this direction could lead to proceedings for Contempt of Court.

Signed Date 7th May 2014

Mrs Justice **Andrews**