IAC-AH-SAR/KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/05529/2014
IA/05541/2014
IA/05535/2014
IA/05546/2014
IA/05553/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 December 2014	**On 15 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SL (FIRST APPELLANT)
GL (SECOND APPELLANT)
OL (THIRD APPELLANT)
AL (FOURTH APPELLANT)
KL (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Claimants

Representation:
For the Appellant: Mr P Duffy (Senior Home Office Presenting Officer)
For the Claimants: Miss R Akhter (Counsel instructed by Owens Solicitors)

DECISION AND REASONS

1. The appellants are citizens of Nigeria and are all members of the same family. Their dates of birth are as follows: 22 November 1971, 14 November 1972, 22 November 2003, 19 February 2007 and 12 June 2012. (For ease of reference I shall refer to the parties as the Secretary of State, who is the appellant in this matter, and to the Claimants.)

Background

2. The main Claimant, SL, entered the UK on 23 August 2004 as a visitor. She returned to Nigeria and made a second visit to the UK from July 2005 to January 2006. Thereafter she returned to the UK in September 2006 as a student and was granted extensions of stay in that capacity until January 2009 and subsequently until 31 December 2013. Her leave was curtailed on 30 November 2013. She (and her family as dependents) made an application for leave to remain on the grounds of private and family life as two of her children had been resident in the UK for nearly seven years. GL, the Claimant's husband, and OL entered the UK in 2005 as visitors and were granted leave to remain in line with the main claimant until 31 December 2013. The fourth and fifth Claimants were born in the UK.

3. The Secretary of State refused the applications under Appendix FM, as neither the claimant nor her husband met the requirements as either a partner or a parent. The exceptions in paragraph EX.1 did not apply because they did not meet the eligibility requirements. Paragraph 276ADE did not apply as the claimants had not lived for long enough in the UK. The applications for the children were refused on the grounds that they failed to establish continuous residence in the UK for a period of seven years as at the date of application and it was not unreasonable to expect the children to leave the UK with their parents. The Reasons for Refusal Letter did not address the best interests of the children or Section 55 of the UK Borders Act 2009.

4. The Tribunal allowed the appeals on human rights grounds having considered Article 8 ECHR. The Tribunal took into account the eight years' residence, good immigration history and ability to make a contribution through employment to the economic wellbeing of the country. The Tribunal followed **AG (Eritrea) v SSHD [2007] INLR 407**, **R (on the application of MM and Others) v SSHD [2014] EWCA Civ 985.** It had regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) dealing with public interest. The best interests of the children were considered having regard to **MM and Others** and **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** and Section 117B(6) of the 2002 Act. The Tribunal found that the best interests, particularly for the two older children, lie in remaining in the UK where they established strong ties and were progressing well at school. The Tribunal found that it would not be reasonable to expect them to return to Nigeria given that they were integrated into life in the UK. Further the Tribunal found there were no matters that might outweigh the child's best interests [31].

Grounds of Application

5. Ground 1

The Tribunal erred in its approach to Article 8 as it failed to consider the **Gulshan** and **Nagre** tests (**Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**) in terms of compelling circumstances not recognised by the Rules and the issue of unjustifiably harsh outcome.

6. Ground 2

The Tribunal failed to provide adequate reasons why the claimants' circumstances were either compelling or exceptional and why it was unreasonable to expect the children to leave the UK. Reliance was placed on **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874**. The children would be able to continue their education in Nigeria and it would not be unduly harsh or unreasonable for them to do so. The Tribunal erred by failing to consider the education available in Nigeria and that to provide education in the UK would amount to a drain on public resources. The decision to remove them was proportionate in order to maintain a fair and effective immigration system.

Permission to appeal

7. Permission to appeal was granted by First-tier Tribunal Judge Osborne on 30 October 2014.

8. Judge Osborne stated:

> "In an otherwise focused determination in which the judge manifestly engaged with the evidence, it is nonetheless at least arguable that the judge failed to adequately consider the cost of the public purse in providing education to these three young children. To that extent it is arguable that the judge conducted an inadequate balancing exercise upon the issue of proportionality.
>
> As this arguable error of law has been identified all the issues raised in the grounds are arguable".

Rule 24 Response

9. On behalf of the claimants a response was submitted dated 19 November 2014.

10. In considering the "**Gulshan/Nagre** test", the Tribunal had regard to **MM and Others** (cited above) which considered all recent case law including **Gulshan** and **Nagre** and at paragraph 128 stated:

> "**Nagre** does not add anything to the debate, save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to consideration outside of the Rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further **Article 8** claim. That will have to be determined by the relevant decision-maker".

11. It is submitted that the Tribunal undertook a comprehensive assessment of the evidence including having specific regard to the public interest at [22] and [26]. The Tribunal also had regard to Section 117B(6) and the best interests of the children. The Tribunal made a specific finding that the parents were likely to contribute to the economic wellbeing of the country.

The Hearing

Submissions

12. Mr Duffy relied on the grounds and confirmed the Secretary of State's current position was that there remained a two stage test for Article 8; the first was the **Gulshan** test, which the Tribunal arguably had failed to deal with, and then if applicable Article 8 ECHR.

13. Miss Akhter relied on the Rule 24 response and submitted that the Tribunal's approach was entirely in keeping with the decision in **MM and Others**. In any event the Tribunal rightly considered the claims outside the Rules as the children had not reached the required seven years' residence at the time of application, although at the date of hearing they qualified under Section 117B(6) of the 2002 Act.

14. As to the second ground of appeal, Miss Akhter submitted that the Tribunal fully considered the public interest and directly made reference to the public purse. It went through factors highlighted under Section 117 and it could not therefore be said that it had not taken the public interest into account. The case was different factually from **EV (Philippines**). Here there was evidence of employment and that the parents would not be a burden on the State. The oldest child came to the UK when she was 3 years old and had now spent the majority of her time in the UK. Two of the children were born in the UK and the second child was now over 7 years of age. The Tribunal found that there were few matters weighing in favour of the public interest.

15. Mr Duffy responded that the comments made in **MM and Others** were obiter and ought not therefore to be relied on. Section 117B(6) of the 2002 Act was a part of the overall assessment to be carried out. The Tribunal failed to conduct a full analysis of the best interests of the children following guidance in **EV (Philippines)** and **MK**

(India). The Tribunal failed to identify why it was unreasonable to relocate to Nigeria. The Tribunal needed to have considered the circumstances in Nigeria.

16. At the end of the hearing I found that there was no error of law in the decision which shall stand. I now give my reasons.

Decision and Reasons

17. I find no material error of law disclosed in the decision of the First-tier Tribunal. I am satisfied that the Tribunal followed a legally correct approach following the Court of Appeal judgment (albeit obiter) in **MM and Others** which is quoted above in paragraph 10. It stated that the so called **Gulshan** test does not add anything to the assessment in Article 8 cases. It was therefore open to the Tribunal to adopt this approach. Indeed such an approach has since been confirmed by the Upper Tribunal in immigration judicial review in **R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC).** I find that the first ground of appeal has not been made out.

18. Turning to the second ground, the public interest, I am satisfied that the Tribunal engaged in a detailed consideration of public interest factors separately from and including factors outlined in Section 117 of the 2002 Act, said to reflect the Secretary of State's views on how and what weight is to be attached to public interest. Whilst I acknowledge that the Tribunal made no specific reference to the cost of education, it is clear that it took into account any potential burden on the State insofar as the main claimants are concerned and found none (26). Furthermore, given that the Tribunal placed considerable weight on the interests of the children and the fact that two children meet the criteria under Section 117B(6) as "qualifying children", it can be assumed that the issue of cost of education has implicitly been taken into account. There is no specific requirement in paragraph 117 that highlights the issue of the cost of education. The Article 8 assessment was fully and comprehensively carried out by the Tribunal and with reference to relevant case law. I accept the submission by Ms Akhter that **EV Philippines** is distinguished on the facts in this case, in particular having regard to the positive immigration history of the main claimants, their employment in and economic contribution in the UK, the length of residence and degree of integration of the children in the UK. I find no basis whatsoever for any argument that the Tribunal's balancing exercise on the issue of proportionality was inadequate. In short this ground amount to a disagreement with the decision made by the Tribunal. It is hard to see that there could have been any other outcome.

19. Finally, I turn to the point made concerning the reasonableness of returning to Nigeria. The Tribunal clearly considered this issue and the ample evidence before it, in particular letters from the children in support of their private lives and integration in the UK [5 & 6].

20. The Tribunal specifically considered [29 onwards] the issue of how the assessment is to be made having regard to the public interest. She placed weight on the interests of the children for whom it was found there would be considerable distress at the prospect of leaving their friends and family in the UK and the fact of their integration into life in the UK. Furthermore, the Tribunal placed weight on the statutory scheme incorporated in Section 117B(6) of the 2002 Act which provides that where the children have lived in the UK for seven years and where it is found that it would be unreasonable for them to live in another country, the public interest does not require removal. I am satisfied that the Tribunal engaged in making an overall assessment of the children's lives and having regard to likely their circumstances if returned to Nigeria, which is an entirely sensible and proper approach.

Decision

21. **There is no material error of law in the decision, which shall stand**.

22. **The appeals are allowed on human rights grounds**.

Anonymity order

Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated 14.12.2014

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee award is made because the claimants did not meet the strict requirements of the Immigration Rules and it was necessary for them to appeal and produce further evidence for their appeal to succeed.

Signed Dated 14.12.2014

Deputy Upper Tribunal Judge G A Black