Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07217/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 July 2014	**On 31st July 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OBIAGELI STELLA NGOESINA

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr I Palmer, Counsel instructed by Visa Legal

DETERMINATION AND REASONS

1. This is an appeal by the Appellant (hereinafter called the Secretary of State) against the decision of the First-tier Tribunal, who in a determination promulgated on 10 April 2014 allowed the appeal of the Respondent (hereinafter called the claimant) a citizen of Nigeria born on 10 March 1979 on Article 8 ECHR grounds.

2. It would be as well to mention that also before the First-tier Tribunal was the appeal of the claimant's son born on 19 August 2009 against the decision of the Secretary of State dated 20 February 2013 refusing his application for leave to remain as the child of a Tier 1 Migrant. His appeal under the EEA 2006 Regulations was allowed under Regulation 7 and on human rights grounds. That decision is not challenged by the Secretary of State.

3. The claimant appealed the decision of the Secretary of State dated 21 February 2013 refusing her application for leave to remain as a Tier 1 (General) Migrant under paragraph 245CA(c) and (f) and Appendix A of the Immigration Rules as well as under Article 8.

4. The brief immigration history of the claimant is that on 4 October 2007 she was given leave to enter the United Kingdom as a student until 31 January 2009. On 8 May 2009 she was granted leave to remain as a student until 30 April 2010. On 1 June 2010 she was granted leave to remain as a Tier 4 (General) Student until 30 September 2011 and on 4 November 2010 she was granted leave to remain as a Tier 1 (Post-Study) Migrant until 4 November 2012.

5. The Secretary of State noted that in the claimant's latter application, she had implied that she also wished to rely on her family and/or private life established in the United Kingdom pursuant to Article 8.

6. As recorded by the Judge at paragraph 5 of his determination:

> "On 9 July 2012 the Immigration Rules were amended and now include provisions for applicants wishing to remain in the United Kingdom on the basis of their family or private life. These Rules are located at Appendix FM and paragraph 276ADE respectively."

7. The Judge noted that the claimant contended that her removal to Nigeria would breach her Article 8 rights to a private and family life and that of her son. Further, the fact that the claimant's son's relationship with his father, who was married to an EU national and therefore had roots in the UK, meant that consideration had to be given to the breach of her son's right to family life with his father in addition to his family life with the claimant.

8. In that latter regard, it was noted that the claimant's son's father was married to a Dutch national and indeed at the time of his relationship with the claimant.

9. The Sponsor stated in a statement dated 14 March 2014 that his son was conceived during an extra-marital affair with the claimant and although he was still married, divorce proceedings had been initiated but not finalised.

10. The Judge considered that this did not affect the position of the claimant's son under the 2006 Regulations (see paragraph 12 of the determination) and that the claimant's

son was a direct descendant of the spouse of an EEA national and so a family member of an EEA national within Regulation 7.

11. The claimant was regarded as her son's primary carer and it was the view of the Judge at paragraph 14 of his determination that:

> "On the basis that (the claimant's son) cannot be removed from the United Kingdom, (the claimant) cannot be removed from the United Kingdom without separating her from (him). In these circumstances, her removal cannot be characterised as proportionate under Article 8 of the 1950 Convention particularly having regard to the obligations under Section 55 of the 2002 Act and the dicta in ZH (Tanzania) v SSHD [2011] UKSC 4."

12. The Judge having made reference to the provisions of Section 55; the observations of Lady Hale at paragraph 33 of ZH (Tanzania) and; paragraph 2.7 of the Guidance "Every Child Matters – Change for Children: Statutory Guidance to the UKBA on Making Arrangements to Safeguard and Promote the Welfare of Children", continued as follows:

> "18. (The claimant's) immigration history is without blemish (her application as a Tier 1 (General) Migrant failed because she was not aware of the removal of the Tier 1 (General) category. She conceived (her son) when she had permission to stay in the United Kingdom and indeed went on to obtain three further extensions of her leave."

13. The Judge continued by referring to aspects of the guidance in Sanade and Others (British Children – Zambrano – Dereci) [2012] UKUT 000487 (IAC) and continued:

> "19. In any event the (Secretary of State) has accepted (and the Tribunal has endorsed) the proposition that 'where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so'."

14. The Judge continued that even if he was wrong in that regard, the case for the claimant under Article 8 was compelling. The claimant had a flawless immigration history and was entirely self-sufficient in the United Kingdom. She was a youth leader at her church and in the church choir. The Judge continued:

> "After obtaining an MA in International Business from Greenwich University in July 2010, she has been successful in employment and then in business. She worked as a Health Care Assistant with the Reed Nursing Agency and in 2011 she started her own business Christellvic Idea Limited, which initially operated as an internet café, hair salon and money transfer facility. Latterly, the business has moved to estate agency trading as 'Impression Idea Services'. Her gross and net profit from October 2011 to September 2012 was £52,003 and £26,016 respectively (letter dated 29 October 2012 from Fradalit Associates at page C1 (Secretary of State's) bundle refers). For part of her

> time in the United Kingdom she also continued working on a consultancy basis for LA Zones Oil and Gas who are based in Nigeria, although she no longer does so."

15. The grounds in support of the Secretary of State's successful application to appeal that decision were based on the contention that the First-tier Judge erred in law in failing to consider the claimant's claim under Appendix FM and paragraph 276ADE of the Rules. It was pointed out that:

> "The Judge turned immediately to consider the first Appellant's Article 8 claim outside the Rules (paragraph 14). This approach is wrong in law. The Judge should have instead, first determined the Appellant's Article 8 claim under the Rules with reference to Appendix FM and paragraph 276ADE of the Rules.
>
> Further, only if there is an arguable case that there are good grounds for granting leave to remain outside the Rules, is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave (Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 00640 (IAC))."

16. In granting permission to appeal, Upper Tribunal Judge Renton, in noting that the Judge had found the Secretary of State's decision to be disproportionate mainly on the basis that the claimant's removal would not be in the best interests of her son, agreed that the Judge's failure to consider whether the claimant met the requirements of Appendix FM and paragraph 276ADE did amount to an arguable error of law.

17. Thus the appeal came before me on 16 July 2014 when my first task was to determine whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

18. Mr Kandola helpfully pointed out that the Secretary of State did not challenge the Judge's factual findings. He had carefully considered the Judge's reasoning but had no instructions to withdraw the Secretary of State's challenge to his findings and his position was therefore to continue to rely on the grounds. Mr Kandola pointed out that there were parts of the Judge's determination that were not satisfactory but he accepted that such concerns "might not be material to the outcome".

19. Mr Kandola had in mind the Judge's reference to the Guidance in Sanade that on the particular facts of this case was not arguably applicable.

20. Nonetheless Mr Kandola continued that he acknowledged that at paragraph 21 of the Judge's determination, he was clear that even if he was wrong in that regard the claimant's case under Article 8 was "compelling". And in that light given that the Judge had specifically stated that the claimant failed to meet the requirements of the Rules, it could not be said that on the judge's findings that it was not open to him to conclude that there were no compelling grounds. In those circumstances whilst Mr

Kandola accepted he might struggle to make his case in such circumstances, his formal position remained that he relied on the Secretary of State's grounds.

21. In the light of Mr Kandola's helpful clarification, I did not trouble Mr Palmer to address me.

Assessment

22. It is apparent upon my reading of the determination, that the First-tier Judge erred in law in applying Article 8 in a free-standing manner and not by reference to the materially more constrained test laid down in case law, which requires compelling circumstances or exceptional circumstances within a proportionality test, where the facts relating to the individual application are assessed in their own light and then weighed against the important public interest objectives which underpin the immigration regime.

23. In relation to the policy objectives of an individual's personal circumstances to be weighed against the important public interest objectives, these are referred to in many cases. So for example in ZH (above) the Supreme Court held that the interests of the children particularly in regard to their nationality were very important though not trump cards over other policy considerations including "the need to maintain firm and fair immigration control" (see paragraph 33). In other cases, for instance, involving the deportation of foreign nationals found guilty of criminal acts, there is a public interest of considerable power in deporting criminals in protecting society from criminality (see for example SS (Nigeria) v SSHD [2013] EWCA Civ 550).

24. In the present case it is not the claimant's case that she met the requirements of the Immigration Rules.

25. The question which therefore arises is whether the particular facts of the claim as found by the Judge gave rise to some compelling or exceptional circumstances which when measured within a proportionality test gave rise to an Article 8 right which must be recognised.

26. I note in that regard that the Judge heard oral evidence from the claimant and from her son's father and that such evidence was not challenged by way of cross-examination.

27. The Judge proceeded to set out what he described as the claimant's "flawless immigration history", that was "without blemish". Her son was conceived when the claimant had permission to stay in the UK "and indeed she had gone on to obtain three further extensions of her leave". The claimant was her son's primary carer and her son could not be removed from the United Kingdom, and it followed the claimant could not be removed without separating her from her son.

28. The Judge concluded that the claimant's removal could not be characterised as proportionate under Article 8 having regard to the obligations under Section 55 and the guidance of the Supreme Court in ZH (Tanzania).

29. Those facts have been found and it is not for me to seek to make findings afresh and indeed Mr Kandola most helpfully clarified that the Judge's actual findings were not in any event challenged by the Secretary of State.

30. I have come to the conclusion that I should therefore not disturb the ultimate conclusion arrived at by the First-tier Judge below. In this respect I would emphasise that this is a finding on specific facts that is in my view a marginal decision. I have come to this conclusion because when in relation to the usual factors which go into a proportionality balancing exercise, I consider the facts of this case are towards the extreme end of the spectrum of facts and matters which characterise these sorts of applications. They may be properly categorised as exceptional or compelling, albeit I do not consider this to be other than the marginal conclusion. For these very reasons I do not view this as a precedent having residence outside of its particular facts.

31. This is not a case where the family life was at all times precarious and because as recognised by the Judge in terms of the best interests of the claimant's child, she was residing legally in the UK when her son was conceived.

32. Her son's position in terms of the basis on which the Judge allowed his appeal under the EEA Regulations was important albeit not a decisive consideration.

33. Further the claimant was found to be her son's primary carer.

34. This is not a case of criminality. It is not a case where to permit the claimant to remain would set a dangerous precedent about precarious family life. This in my view is simply a case on the particular facts, where the family rights of the claimant and son as found by the Judge had unusually been at a level where they might properly be said to be exceptional or compelling and whilst the Judge was clearly in error for the reasons rightly submitted by the Secretary of State in her grounds of appeal, it is apparent to me on my consideration of the Judge's factual reasoning, that if he had reminded himself as to the correct route to follow, it would still have resulted in the harm to the policy objectives of maintaining an effective and fair immigration system, having been found to be outweighed.

35. I find that since the Judge got the right answer albeit by the wrong route, it is therefore not appropriate to allow the Secretary of State's appeal as the errors that I have identified were I find not material, and it leaves the claimant in the position she ought to be on the findings of fact and reasoning that led the Judge to conclude that this was a claim which ought to succeed under Article 8 of the ECHR. Those findings are unassailable. The fact that the Judge has erred in law did not amount to a material error of law and for those reasons I have decided not to set aside the First-tier Judge's decision and I dismiss the Secretary of State's appeal.

Conclusion

36. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law material to its outcome and I therefore order that it shall stand.

Signed Date 31 July 2014

Upper Tribunal Judge Goldstein