IAC-AH--V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08195/2014
IA/08196/2014
IA/08197/2014
IA/08198/2014
IA/08199/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th November 2014	**On 10th December 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
MS GA BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DA & CEO
(& 3 DEPENDENT CHILDREN)
(ANONYMITY DIRECTION MADE)

Claimants

Representation:
For the Appellant: Mr S Walker (Senior Home Office Presenting Officer)
For the Claimants: Ms Z Jacob (Counsel instructed by Jesuis solicitors)

DECISION AND REASONS

1. This is an appeal against a decision made by the First-Tier Tribunal (Judge Herbert OBE) promulgated on 23rd September 2014 in which he allowed the appeals under Article 8 ECHR.

2. 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".

3. The Claimants are all members of the same family and are citizens of Nigeria. "D" and "C" are the parents of J, G and a recently born child H. Their respective dates of birth are 16.8.2009, 15.4.2012 and 7.5.2014. D was previously involved in a relationship in Nigeria and Jan, the eldest child was born on 25.8.2007

4. The Secretary of State refused their applications for indefinite leave to remain and with reference to their claim outside of the Rules. The Claimants did not fulfil the requirements under Appendix FM either as a partner or as a parent. It was accepted that the main Claimants were in a relationship akin to marriage. Ex 1 was considered but did not apply. The children were all under the age of 7 years and 276ADE did not apply

5. The decision sets out findings of fact and credibility at paragraphs 14-18 and findings in relation to the Law at paragraphs 19-21. The Tribunal found that the Claimants could not meet the Rules, considered the "**Gulshan**" test and then went on to a second stage assessment following the 5 stages of **Razgar**. The Tribunal also considered where the best interests of the children lie and the question of whether the interference was proportionate. It found that the interests of the children, in particular the eldest child Jan, who had lived in the UK for 7 years at the date of hearing, together with the impact on the main Claimant's father and step mother outweighed the public interest in removal.

6. The Tribunal found that "D" was credible as to the fact that she was the victim of rape and child abuse in Nigeria, that she knew her partner C from Nigeria. They did not cohabit. Theirs was a subsisting relationship but was volatile and intermittent [14]. C had a role as father of the children. There are 4 children of whom 3 are children of C and D. [14] D's natural father, a UK citizen, was born on 10.5.1938. He is elderly, in poor health, has restricted sight and diabetes and requires some day to day care. His wife who is D's step mother is 71 years of age, registered disabled and requires help in the house [15]. D and her children share the home of her father and stepmother and he provides financial support for her, her partner and the children. D provides help for her father with cooking, going to the local community centre, medical and other appointments and attending to his toilet needs at night. Although the Tribunal acknowledged contradictory

evidence indicating that it was D who was dependent on her father for finance, accommodation and essentials for the children, this was in the context of her past struggle to make a proper home. The Tribunal found there to be "overwhelming" evidence of dependency by her father on D above and beyond the normal family ties. The Tribunal found evidence that the presence of 4 children in the home added to the quality of the family life which would be disturbed by removal of the Claimants [15 & 17]. There was no recourse to public funds by the family members. At [16] the Tribunal found that Jan was established at school where both Claimants were known to have a role [17]. It found that the children were integrated into the British Nigerian culture in the UK and that removal would be a significant disruption to their lives, having never travelled to or lived in Nigeria. The Tribunal observed that there were considerable difficulties faced by children in readjusting to life in Nigeria, particularly in rural areas and was in no doubt that if the views of the children were canvassed, it would be expressed in terms of remaining in the UK [17 & 19f].

7. In reaching these findings the Tribunal relied on the primary facts and its own view of the likely outcome for the children if returned to Nigeria.

8. The Tribunal found that the immigration history for both Claimants was poor and that C in particular had paid scant regard to immigration control and reporting conditions [18].

9. In considering the appeal under the immigration rules the Tribunal found that all Claimants failed to meet the rules. It found that although Jan lived in the UK for nearly 7 years, she did not meet the Rules but came within the spirit of the old seven year rule and found that it was not reasonable to expect her to leave the UK [19a & b]. [I have numbered the paragraphs 19 a,b,c, etc in the absence of numbering in the decision.]

10. The Tribunal went on to consider the 5 questions in **Razgar** [21]. It concluded that family and private life was established, the removal would have grave consequences for all four claimants in particular the children and the bond broken with grandparents. The decision was in accordance with the law. In terms of proportionality, the Tribunal found that the balance was in favour of the Claimants. The poor immigration history of the parents should not impact on the children and weight was placed on the spirit of the seven year rule enshrined in Article 8. C's immigration history was poor but he was pursuing education at the time he failed to report. He sought to regularise his stay and maintain a relationship with his children [21b]. The Tribunal found the facts

to be unusual and exceptional and that the removal would serve to penalise the vulnerable members of the family.

Ground of application

11. In grounds of appeal the Secretary of State argued that the Tribunal failed to follow **Nagre** as there was no consideration of "arguably good grounds" for granting leave outside of the Rules and/or compelling circumstances not sufficiently recognised by the rules. Secondly, that the Tribunal erred by finding there was a disproportionate interference with family life as the Claimants would return to Nigeria as a family unit. Thirdly, that the Tribunal failed to have regard to **Nasim & Others (Article 8) [UKUT] 00025 (IAC)** which emphasised the limited use of Article 8 for private life. Forthly, the Tribunal had no regard to the approach in **Zoumbas v. SSHD[2013] UKSC 74** as regards the rights of children who are not British citizens.

12. Permission was granted by First-tier Judge Parkes on 13th October 2014 on all grounds.

The hearing

Preliminary issue

13. Mr Walker sought permission to amend the grounds of appeal to include further grounds that a) the Tribunal erred in failing to take into account findings made in a previous first determination in accordance with **Devaseelan**, and b) the DNA evidence was incomplete as pages of the report were missing and it was unclear as it referred to Mr G. Ottitie not Mr O. Ottitie. The Tribunal failed to make a clear finding in respect of that evidence.

14. Ms Jacob opposed both applications.

Decision re preliminary issue

15. I refused leave to amend the grounds of appeal. In a previous decision the Tribunal dismissed D's appeal against refusal of asylum on the grounds that she failed to establish a Convention reason. Although reference was made in the decision to her claim that in 2008 she had been abused and mistreated in Nigeria, the Tribunal made no findings of fact or credibility findings in respect of the same. I found no arguable basis in those circumstances for why the first determination should be followed. As to the second application, I found that as the incomplete DNA report was not a matter that was drawn to the Tribunal's attention, it could not be expected to deal with such a specific issue. Furthermore, I am satisfied that the Tribunal considered the DNA evidence,

notwithstanding that it made no specific finding, and proceeded on the basis that the Claimant D was living with and caring for her recently discovered biological father.

Submissions

16. Mr Walker submitted that the main thrust of the appeal was the material misdirection by failing to identify compelling circumstances not recognised by the Rules and the failure to follow **Zoumbas** as to the limited scope of private life for foreign children. The response to the circumstances of D's father and step mother was proportionate given that none of the family had lawful leave in the UK.

17. Ms Jacob relied on her Rule 24 response which set out the main findings and conclusions in the decision. She further submitted that the Tribunal properly took into account the circumstances of the grandparents in assessing family life of the decision [60]. The care provided to D's father was relevant to economic issues as it reduced the burden on the public purse. The Tribunal made reasoned findings, as to interference to the children brought up in the UK, that were open to it on the evidence from the school. The Tribunal had regard to differences as between the cultures in Nigeria and the UK based on judicial experience. The Tribunal was entitled to find that the grandparents constituted part of family life. The Tribunal identified compelling circumstances as set out at paragraph 22 of the Rule 24 response. The Tribunal applied the two stage process for Article 8 following **Halemuddin**. The Tribunal was entitled to take into account that at the date of hearing the length of residence in the UK by eldest child met the 7 year period. The facts in **Zoumbas** were different and the Tribunal correctly relied on **ZH(Tanzania).**

18. At the end of the hearing I reserved my decision which I now give with my reasons.

Discussion and decision

19. I am satisfied that the Tribunal's approach to Article 8 disclosed no error of law (ground one). The position with regard to the "Gulshan & Nagre test" has now been clarified 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)** which confirms the view expressed in **MM(Lebanon)**. The headnote reads as follows*: There is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not*

already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

20. With regard to family life, I am satisfied that the Tribunal was entitled to find family life existed over and above the "normal" level of dependency as between D and her father. The Tribunal found that D provides some "additional" care for her father by cooking, attending to toilet needs at night and taking him to appointments. There was little independent evidence to support the care needs or medical conditions of the father, but it was open to the Tribunal to make this finding of family life and to take into account the impact of removal on the parties **(Beoku-Betts v SSHD [2009] AC 115)**. There was no medical or other evidence from D's stepmother as to her medical condition or any restrictions.

21. In dealing with the interests of the children the Tribunal considered **ZH (Tanzania)** [19d] and UNHCR guidelines. It concluded that removal of the family would not be in the interests of the children, or of the grandparents (to whom best interest principles were of importance) [19f]. The Tribunal accepted that the children were not British citizens, but placed weight on that fact that they had lived in the UK all of their lives [19e].

22. The Tribunal followed all the stages in **Razgar** and its assessment of proportionality was based on a balancing exercise. The question of weight to attach to the various factors is one for the Tribunal.

23. However, in my view the Tribunal did err in its approach to the private lives of the children and its assessment of their best interests (**Nasim & Others (Article 8) [UKUT] 00025 (IAC)**. There was insufficient evidence before the Tribunal to reach a decision that the best interest of the children lie in remaining in the UK, and that that was a factor capable of outweighing the public interest, either on its own or together with the dependency of D's father. Aside from oral evidence from the parents the Tribunal had a primary school report on Jan stating that she was doing well. There was no independent evidence of social, cultural or emotional factors to support the Tribunal's findings.

Furthermore, the Tribunal failed to give adequate reasons for the same in light of **Zoumbas** which focused on the importance of the rights of British children. The Tribunal failed to have regard to relevant case law including **Azimi-Moyaed & Others EWCA Civ 550**, **Zoumbas** (cited above), **EV(Phillipines) v SSHD 2014 EWCA Civ 874**, and **SS(Nigeria) 2013 EWCA Civ 550**.

24. The Tribunal failed in its Article 8 assessment to have regard to public interest factors under section 117B of the Nationality Immigration and Asylum Act 2002 (as amended).

25. I find that there was a material error of law such that the decision is set aside.

26. I now go on to remake the decision having regard to the findings made on the evidence before the Tribunal.

27. In considering the best interests of children a distinct enquiry of both subjective and objective evidence is necessary. The best interests of young children under the age of 7 years are generally regarded as remaining with both parents. The eldest is now 7 years of age. The family would be returning to Nigeria together as a unit. Their emotional and physical care and support comes from their parents at this young age and they are not regarded as having established peer relationships of significance at this age. Seven years residence carries more significance when children have spent that period of time in education and developing independent lives from their parents, generally a seven year period from the age of 4 year has greater significance (**Azimi-Moyaed**). The two elder children have just entered the education system and attend a nursery/infant school. Jan, the eldest has just started school and has not entered into any meaningful period of study nor social independence. Aside from the oral evidence of her parents there was a school report stating that she was doing well. There was no other evidence before the Tribunal. There was no evidence to indicate that she would be unable to continue her education successfully in Nigeria and/or that the younger children could enter into the education system in Nigeria. There was no evidence to show that a return to Nigeria would have significantly deleterious effects on the children's education. There was no strong or compelling evidence to show that the children established any independent private life. There was no evidence to indicate that the welfare of the children would be threatened by removal with their parents. I find that the best interests of the children lie in remaining with their parents.

28. Both parents were born and brought up in Nigeria. There was no evidence to indicate that they would not be able to adapt on return to Nigeria, together with their young dependent children

also Nigerian citizens and brought up in the British Nigerian culture. The judgment in **Zoumbas** is highly relevant on the facts in so far as there was poor immigration history, young children under the age of 7 who were not British citizens.

29. C would be in a similar position in Nigeria regarding employment as he presently is in the UK. He would be able to put to use the qualifications obtained whilst in the UK. There is no reason why he could not continue to live separately from the rest of the family as he presently does and maintain his role as father to the children. There was no detailed evidence as to how financial support was provided by the Claimant's father and/or how this could be maintained in the long term. There was no evidence that the Claimant's father could not continue to provide financial support to the family in Nigeria.

30. The Claimants entered the UK illegally and have for the majority of time been unlawfully resident in the UK. The children were born in the UK when both parents were aware of their precarious immigration status, and there was evidence that C failed to report to the immigration authorities even as recently as 2014, showing little regard. Whilst I fully endorse and accept that the children should not be punished for the actions of their parents, however, there is insufficient evidence even having regard to the interests of the children to outweigh the public interest in removal. There is a considerable economic burden in educating four children in the UK who do not have entitlement as British citizens. Rightly or wrongly this is a significant factor in relation to children emphasised in the case law cited above.

31. The Claimant's father can reasonably obtain the necessary care from other members of the family or seek professional care to which he may be entitled through the NHS. Economic considerations are not relevant to the public interest as he is a British citizen. I find that his ill health has developed more recently and there was no independent evidence detailing his care needs before the Tribunal. As grand parents contact can be maintained with the Claimants and their children through visits and other forms of communication. There was no strong evidence on which to support any family life between the children and their grandparents.

32. I find that the interference having regard to all the factors including the children and the care of grandparents is proportionate having regard to the public interest in the maintenance of a fair and coherent system of immigration control.

33. Section 117b(6) of the 2002 Act (as amended) defines a child who has resided in the UK for seven years as a "qualifying child". The

section provides that where it is not reasonable to expect that child to return to its country, there is no public interest in removal. This is a consideration to be taken into account when looking at Article 8 cases. There is no evidence to show that it would be unreasonable for the eldest child or family to return to Nigeria or that it would result in unjustifiably harsh consequences. I have had regard to this section, however it does not alter my decision that in this appeal the balance lies in favour of the public interest in removal for all of the reasons already given.

Decision

34. **There is a material error of law in the decision. The decision is set aside. I remake the decision by substituting a decision dismissing the Claimants appeals on Human Rights grounds.**

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the Claimants 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 Claimant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. There are children in these proceedings.

Signed Date **18th November 2014**

Judge GA Black
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

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

Signed Date **18th November 2014**

Judge GA BLACK
Deputy Judge of the Upper Tribunal