Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/40820/2013
IA/40826/2013
IA/40832/2013
IA/40838/2013
IA/40856/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 8th May 2014	**On 12th June 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ESE OVIE TANURERI
JOSEPHINE OVIE
JAYDEN OVIE
JOSEPH OVIE
TOVIA OVIE

Respondents/Claimants

Representation:

For the Appellant: Mr Mullen, Home Office Presenting officer
For the Respondents: Mr Price, solicitor of Latta and Co, Solicitors

DECISION AND DIRECTIONS

1. The first and second claimants are spouses and the third, fourth and fifth claimants are their children. All are Nigerian citizens.

2. All sought leave to remain in the United Kingdom but by the notices dated 18th September 2013 the Secretary of State for the Home Department

refused all five applications and issued directions for the removal of all five appellants in terms of Section 47 of the Immigration, Asylum and Nationality Act 2006. She did not consider that any of the appellants qualified under the Immigration Rules nor that there were circumstances such as to justify the grant of leave to remain outside the Rules.

3. The appellants sought to appeal against that decision, which appeal came before First-tier Tribunal Judge McGrade on 27th January 2014.

4. It was accepted that none of the claimants fell within the Rules, although it would seem that the third claimant may well have done so but for the fact he had not lived in the United Kingdom for seven years at the time of the application.

5. The Judge expressed concern as to the quality of the evidence given by the first and second claimants but nevertheless allowed the appeal under Article 8 of the ECHR on the basis that return to Nigeria would be likely to hamper their development and educational progress.

6. The appeal was therefore allowed.

7. The Secretary of State for the Home Department contends, however, that an incorrect approach was taken by the Judge in the analysis of the evidence with little regard being paid to the jurisprudence as to how Article 8 should relate to the Immigration Rules. In particular the case of **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 721 (Admin)** were relied upon.

8. Permission to appeal was granted and thus the matter comes before me in pursuance of that grant.

9. Mr Mullen relies on the grounds, although apologises that they perhaps were a little bit obscure. He makes two main points. The first point being that as none of the appellants satisfy the Immigration Rules, Article 8 should only be embarked upon if there could be demonstrated a good arguable case that leave should be granted outside the Rules.

10. The second matter was essentially a lack of reasons for the finding that it was likely to hamper development and educational process. No basis for that finding had been given. That was particularly relevant given the criticisms that were made of the evidence of the parents concerning the educational system in Nigeria as can be seen in paragraphs 27 to 29 of the determination.

11. Mr Price, who represents the claimants, invited my attention to a bundle of documents which helpfully contain a number of authorities.

12. He submits that as the third claimant in particular met the requirements of EX1 at the time of the hearing such constituted a good arguable case that he should remain. Clearly if he should remain then it followed that it would be disproportionate to remove other members of the family. He

invited me to find there was no illogicality to the position adopted by the Judge in that connection.

13. Further it is submitted that adequate reasons were given for the findings by the Judge, reliance being placed upon **MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)** and **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)**. In any event my attention was drawn to certain of the documents as were set out in the bundle of witness statements which were before the First-tier Tribunal Judge.

14. There was for example a letter at page 27 of that bundle from the Multicultural Family Base dated 7th January 2014 confirming that the children Tovia, Joseph and Jayden have all attended groups run at the Multicultural Family Base and have taken part in successive programmes. This has involved summer outings and groups. At page 38 is a child young person's plan particularly for Tovia designed to make her happy and feel less isolated giving her the opportunity of making more friends and becoming more confident in herself. It is part of the plan to increase her network of friends and to increase her community involvement.

15. Mr Price stresses that what was clearly evidenced before the Judge was the importance of developing such community links and to develop the three children within the aspect of the Multicultural Family Base. Thus he submits there was ample material on which the Judge could have found that to remove the children, particularly to remove the third claimant, from the jurisdiction would be a serious disadvantage to them.

16. My attention was invited to **EA (Article 8 – best interests of child) Nigeria [2011] UKUT 315 (IAC)**.

17. That stresses the importance of **ZH (Tanzania)** the need for a decision maker to have uppermost in the mind the wellbeing of the children.

18. In particular my attention was drawn to paragraph 39 of the judgment which reads as follows:-

> "Absent other factors, the reason why a period of substantial residence of the child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case".

19. Also paragraph 41 was relied upon which read as follows:-

> "There is no evidence to show that the second and third appellants have as yet formed any deep, strong friendships outside the family

and given their young ages it is not to be expected that this would be the case. During the period of residence from birth to the age of about 4, the child would be primarily focused on self and the caring parents or guardian. Long residence after this age is likely to have greater impact on the wellbeing of the child."

20. It seems to me that those principles have been borne in mind in the Immigration Rules and particularly in terms of a child's residence in the United Kingdom for seven years. Such principles do not seem to be external to those which have been encompassed within the Rules. Clearly, as a matter of common sense, the longer a child is in the United Kingdom the greater he or she will have adapted to its cultural programme.

21. Those matters were well-recognised by the Judge at paragraph 11 of the determination concerning the children attending school and making good progress and making friends and attending the Multicultural Family Base in Edinburgh.

22. That having been said, however, the Judge is obliged to consider the factual matrix of the case and as is noted in paragraph 12 of the determination the second claimant is currently unemployed and has applied for jobs in technical safety in the oil and gas field. Most of these posts are based in Aberdeen and he intends to move his family to Aberdeen if he is offered employment there.

23. Thus on any reading of the matter there is to be a degree of disruption to the children's education and community involvement whether or not the appellants stay in the United Kingdom. What has not been analysed with particular care, as I so find, is what impact a move to Nigeria would have upon the wellbeing and development of the children. In coming to the findings that it is likely to hamper their development education process there has been no clear evidential basis for that conclusion as identified by the Judge in the determination.

24. Indeed the submissions of the respondent in that matter were noted at paragraph 21, namely that no evidence had been provided that the first claimant would be unable to maintain his children in Nigeria or that he would be unable to provide for their safety and welfare. The family would be returning as a family unit and enjoy family life there. Although that might involve a degree of disruption it was considered to be proportionate to the legitimate aim of maintaining effective immigration control.

25. The Judge recognised in paragraph 27 of the determination that a journey to Aberdeen to obtain employment would inevitably involve uprooting the children from the schools that they attend and from the friendships that they have established. In paragraph 28 the Judge found the first and second claimants' evidence as to why they do not wish their children to return to Nigeria to be unsatisfactory and the Judge comments, "while I accept that the education system in Nigeria may not enjoy the same level of resources as the educational system in the United Kingdom, I note both the first and second appellants completed their primary and secondary

education in Nigeria and both thereafter attended university and obtained degrees".

26. The Judge went on in paragraph 29 of the determination to find that the first and second claimants also relied upon the danger to the children from instability and considered that that had been overplayed in order to bolster the appeal.

27. Given those findings it is as I so find important for the Judge to make clear and reasoned findings why it would not be proper to return the children to Nigeria. The Rules themselves recognise that a child who has been in the United Kingdom for seven years may acquire protection, particularly if it is not reasonable to expect that child to leave the United Kingdom. It is ,however, incumbent upon a decision maker to explain clearly why it would be unreasonable or not in the interests of the child to remove. I find in the circumstances of this case that no adequate reasons have been given.

28. Perhaps of more concern however is the fundamental point made in the grounds of appeal that the proper relationship between the Rules and Article 8 have not been recognised by the Judge.

29. Whatever may be the position or near position of the third claimant in terms of meeting the requirements under paragraph 276ADE it was the conclusion of the Judge at paragraph 15 that the third claimant's appeal could not succeed under the Immigration Rules.

30. In those circumstances it was not open to the judge simply to embark upon a freewheeling examination of Article 8 without the overt recognition of the importance of the Immigration Rules. It was made clear by the Tribunal in **Gulshan** in particular at paragraph 27 that a freewheeling Article 8 analysis unencumbered by the Rules was not the correct approach. Only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

31. I was referred to **MS v Secretary of State for the Home Department for Judicial Review [2013] CSIH 52** This is a decision of the Scottish Court of Session which recognised that the new Rules may not adequately cover an appellant's Article 8 right to private and family life in every case. There may be factors which are particular to an individual which would found a good arguable case.

32. It stressed, however, particularly in paragraph 30 that before embarking upon the second stage exercise, the application for leave to enter or remain must demonstrate a good arguable case that leave should be granted outside the Rules before a distinct assessment of proportionality should be made to determine whether removal would infringe the appellant's Article 8 rights.

33. Mr Price argues that paragraph 22 of the determination reflects that jurisprudence in that reliance was placed on Section 55 of the Borders, Citizenship and Immigration Act 2009. I find, however, that is a danger of a circularity of argument because, as I have already indicated, the welfare of the children although not expressly set out in the Rules is reflected to some extent in the seven year residence. Even if it were legitimate to embark upon an analysis of Section 55 outside the Rules to detect special circumstances that would apply to the appellants in this case, I do not find that that has been done properly or at all nor that adequate reasons have been given to justify a departure from the Rules.

34. In the circumstances therefore I find there to be an error of law such that the decision should be set aside and be remade.

35. Given that fact-finding may be required it seems to me the appropriate course, having regard to paragraph 7 of the Senior President's Practice Direction, that the matter be remitted to the First-tier Tribunal for such fact-finding to be instituted.

36. In particular it is of course important to focus upon the issue of education in Nigeria, not simply as a matter of inconvenience or disruption, but for there to be shown to be real concerns as to the proper education and development of the three children in Nigeria. I would expect there to be evidence produced to that effect for that matter to be fairly and properly considered. Such evidence should be served no later than ten days prior to the hearing.

37. On a practical note, the respondent should be invited to consider the position of the third claimant to the extent to which he effectively meets the Rules subject to his having not reached the required period of residence before application. I am not advocating any consideration of a near-miss principle, but it seems to me that if in reality the third claimant will satisfy the Immigration Rules then certainly the first and second claimants may obtain the benefit of EX1. Even if that does not fall to their protection because it is not free-standing Mr Mullen has most fairly indicated that it is not his intention that the family should be split up. If one child has the right to remain in the United Kingdom then clearly that should influence the decision whether the other family members should be granted leave in line.

38. I have not embarked upon a detailed discussion or study as to what extent the third claimant is or is not capable of benefiting from the Rules. Clearly it would be an unreasonable waste of time and resources if at the end of the day he does qualify and so do his family.

39. No doubt that matter can be pursued with particularity between the legal advisors and the respondents.

Signed Date

Upper Tribunal Judge King TD