



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

APPEAL NUMBER: IA/04926/2014

THE IMMIGRATION ACTS

**Heard at: Field House
On: 20 January 2015**

**Decisions and Reasons Promulgated
On: 27 January 2015**

Before

Deputy Upper Tribunal Judge Maller

Between

**MR OBINNA UZOUCHUKWU AGWUNCHA
NO ANONYMITY DIRECTION MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr G Franco, counsel (instructed by Caulker & Co)

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria, born on 22 October 1987. His appeal against the decision of the respondent refusing his application for limited leave to remain in the UK on the basis of his private life in accordance with paragraph 276ADE of the Immigration Rules was dismissed by First-tier Tribunal Judge LK Gibbs in a determination promulgated on 14 October 2014. Having considered the appellant's appeal under paragraph 276ADE (vi) she found that the appellant had spent the majority of his life in Nigeria and that his mother and siblings continued to live there. It could not be said that in the light of the family members there that the appellant only

has remote or abstract links to Nigeria. In fact he has very real, flesh and blood links there. She thus dismissed the appeal under the Immigration Rules [16].

2. Judge Gibbs stated that she was sympathetic to the appellant's situation. She also considered that there was not an overwhelming public interest in his removal, having regard to s.117 of the Nationality, Immigration and Asylum Act 2002 [17].
3. Judge Gibbs was also "asked" to consider the appeal on the basis of Article 8 of the Human Rights Convention. She accepted that the appellant had ties in the UK and that he provides practical help through childcare as well as emotional and physical support which he offers his brother when he is unwell. His removal would not lead to unjustifiably harsh consequences. His brother has hypertension. Although his heart is being investigated, there is no diagnosis of any problem. He is able to go to work.
4. Further, Judge Gibbs found that the appellant wants to start a PhD in Staffordshire which would have entailed moving out of the brother's home; this she found constituted evidence that all parties could manage on a day to day basis without the appellant's presence. Accordingly, although the appellant's removal would cause upset and inconvenience to the parties involved, she was not satisfied that it would lead to unjustifiably harsh consequences.
5. In the circumstances, she was not satisfied that there are any factors which call for ".....what I find would be a repeat assessment." There were no arguably good grounds for granting leave to remain outside the rules by reference to Article 8 [20].
6. On 3 December 2014, First-tier Tribunal Judge V A Osborne granted the appellant permission to appeal. He noted that evidence was adduced before the Judge relating to the appellant's brother's medical problems which were not, apparently, before the respondent's representative. The undisputed evidence was that the appellant had provided significant care for his brother at times when he required personal care at home and also when he was hospitalised, leaving the appellant with even more caring responsibilities for his niece, for whom he accepted a high level of responsibility.
7. It was also contended in the grounds of application that the Judge made an arguable error by failing to assess the medical evidence and its consequences. That would have put the Judge in the position of primary decision maker in that regard as the evidence had not been before the respondent.
8. It was also argued that the Judge failed to have regard to the interests of the child in accordance with s.55 of the Borders, Citizenship and Immigration Act 2009. That should have been considered as a discrete issue relevant to the issue of proportionality which the Judge did not consider as she decided that it was not necessary to undertake an assessment outside the rules.
9. It was not disputed that the child in question is cared for by her mother who is estranged from the appellant's brother, but lives in the same house - a multi-let property - as her father and uncle, the appellant. The three adults have divided the care of the child between them to enable them to work. Those issues should also have been taken into account.

10. Mr Franco submitted that the Judge had made positive findings as to the credibility of the appellant and his brother. Moreover, she found that the appellant was close to his brother and his niece. He had only returned to Nigeria once in nine years for his father's funeral which was indicative of the level of ties he perceived he had with the UK. She did not consider that there was an overwhelming public interest in his removal.
11. He submitted that the 'primary issue' in the case related to his brother's dependency on the appellant. He had helped his brother a lot, particularly since his medical crisis began two years ago. He has often needed to bathe and have personal care for his brother - particularly after his surgery. He had also regularly summoned ambulances for him.
12. The level of care amounted to more than the "normal emotional ties between adults." However, the Judge failed to make a finding on this crucial aspect. Moreover, he had acted as a 'third carer' for his niece. That was accepted by the Judge. The Home Office Presenting Officer had submitted that the required threshold from Kugathas had not been reached.
13. Mr Franco pointed out that the Judge 'garbled' the submission by the presenting officer at paragraph 11 in which the following is set out ..." although there may be a level of practical dependency between the brothers, their emotional ties of the gnome emotional ties of adult siblings who live together..," rendering the sentence unintelligible.
14. The Judge therefore failed to determine the issue of the dependency claimed which amounted to more than normal emotional ties between adults. She had not set out properly what the issue was, having regard to the "garbled" sentence in the determination - [11].
15. He also submitted that the Judge had erred in the circumstances when considering Article 8. She found that there were no factors which called for "a repeat assessment under Article 8." She had however noted at paragraph 5 that specific and important medical evidence relating to the appellant's brother had only been adduced and received at the hearing. Accordingly, this had not been considered by the respondent and accordingly ".....was not a repeat assessment (within Ganeshabalan)". This would amount to primary decision making. Accordingly, an assessment should have been undertaken once the Judge consented to admit the evidence adduced.
16. Further, the Judge failed to have regard to the interests of the child within s.55 of the 2009 Act.
17. Mr Duffy during the course of his submissions initially submitted that the Judge properly dismissed the appeal under the rules. However, in due course it was pointed out to him by Mr Franco, who represented the appellant before the First-tier Tribunal that the evidence adduced before the Judge was that the appellant had in fact decided to undertake a PhD in close geographical proximity to where his brother lived. From the record of proceedings it is evident that the Judge had in fact considered that evidence when the appellant gave evidence.

18. In the circumstances Mr Duffy accepted that this constituted a material misdirection which affected the Judge's finding at paragraph 19 that the appellant's presence in Staffordshire would have entailed his moving out of his brother's home. That provided the basis for the finding that the parties could all manage on a day to day basis without the appellant's presence. Although that had been specifically dealt with in his evidence it was not referred to by the Judge as part of her ultimate assessment.
19. Both parties accordingly agreed that the determination should be set aside and that would have to be re-made. Mr Franco, after conferring with the appellant, submitted that in the circumstances this was a proper case to be remitted to the First-tier Tribunal as the appellant's claim, particularly with regard to Article 8, had not been considered.
20. Mr Duffy did not oppose the submission that the appeal should be remitted.

Assessment

21. Apart from the material misdirection relating to the appellant's intention to continue living close to his brother – by undertaking a PhD at a closer and geographically more suitable university - it appears in any event that the so-called test of emotional dependency is not a pre-requisite to the existence of family life between adults. Kugathas has been interpreted too restrictively in the past. There can be a family life that exists without dependence. I have had regard to AA v UK [2011] ECHR 800/08. Neither voluntary separation of the family nor the attainment of the age of majority are themselves sufficient to displace the presumption that there is family life, an approach that has been followed in domestic authorities. The important factors in assessing the existence of family life are the continued presence in the family home and whether the appellants have established a family of their own.
22. In the circumstances, I find that the decision of the First-tier Tribunal Judge contained material errors of law and accordingly set aside it aside.
23. I have had regard to the Senior President's Practice Statement regarding the issue of remitting the appeal to the First-tier Tribunal for a fresh decision. In giving effect to such an approach, I am satisfied that the effect of the error has been to deprive the appellant before the First-tier Tribunal of a proper opportunity for his case to be put and considered. Moreover, there will be a substantial amount of fact finding and evidence that will be required to be led.

Notice of Decision

The appeal is allowed. The case is remitted to Hatton Cross for a re-hearing. The positive findings of First-tier Tribunal Judge Gibbs, including those at paragraphs 13, 14 and 17, are preserved. The agreed hearing date is 15 June 2015.

No anonymity direction is made.

Signed

Date 27/1/2015

Deputy Upper Tribunal Judge Mailer