



IAC-AH-SC-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/40454/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 31st July 2015**

**Decision & Reasons Promulgated
On 9th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR JEFFERGY NKEM BUAGU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W Evans, Legal Representative

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 23rd October 1970. The Appellant entered the UK illegally in 2002 but was granted discretionary leave until 3rd August 2014. An application was submitted on his behalf on 23rd July 2014 to vary his leave for leave to remain in the United Kingdom on the basis of his family and private life in the UK. The Appellant's application was considered under Appendix FM and paragraph 276ADE(1) of the Immigration Rules and was refused by reason for refusal letter dated 29th September 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Wyman on 7th January 2015. The appeal was dealt with on the papers and in a determination promulgated on 26th January 2015 the Appellant's appeal was allowed.
3. On 1st February 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The Grounds of Appeal acknowledged that the appeal was against the decision of the Respondent to refuse to vary the Appellant's discretionary leave to remain in line with her published policy and that it was accepted that what was said at paragraphs 19 to 22 of the determination was an accurate précis of the Secretary of State's policy. However it was submitted that the learned judge had erred in this consideration of change in circumstances and that it was submitted that in the absence of an assessment of the situation prevailing between the Appellant and his stepdaughter, the finding that circumstances had not changed was not sustainable. The Secretary of State averred that the Appellant's stepdaughters attaining majority had created a presumption that circumstances had changed. And that it was necessary to make what is described as a *Kugathas* assessment in order to rebut that presumption and that there was no such assessment in the determination.
4. On 9th March 2015 First-tier Tribunal Judge Baker granted permission to appeal. The reasons for permission are quite lengthy and they helpfully set out the accepted family history, namely that on 3rd August 2011 the Appellant had been granted discretionary leave on the basis of his family life with his wife and stepdaughter until 3rd August 2014. The Appellant and his wife had married on 22nd July 2006 and his wife and stepdaughter are British citizens. It was acknowledged that the Appellant and his wife continued to live together. The judge had noted at paragraph 11 of his decision that the Appellant's stepdaughter was now over 18 and was regarded as an adult and able to live independently and thus that there had been a change of circumstances such that the Appellant no longer met the requirements of paragraph 322(1) of the Immigration Rules. Further it was acknowledged by the Respondent that the Appellant had a genuine and subsisting relationship with his British partner but that there were no "insurmountable obstacles" to continuing their family life outside the United Kingdom.
5. Judge Baker noted that the grounds challenged the failure of the judge to address *Kugathas [2003] EWCA Civ 31* in assessing the circumstances and relationship of and between the Appellant and his stepdaughter. Judge Baker noted that the grounds at paragraph 4 asserted that the Appellant's stepdaughter, having attained majority created a presumption that circumstances had changed requiring a positive *Kugathas* assessment in order to rebut it and there was no such assessment in the decision. Judge Baker noted that the judge had concluded that whether she was a student at university or not he did not find that to be a significant factor "so that further discretionary leave should not be granted". Judge Baker thereafter at paragraphs 5 and 6 of the grant of permission set out the findings made by the First-tier Tribunal Judge but concludes that he may have materially erred in finding that there was family life despite the age and circumstances of the Appellant.

6. On 13th April 2015 the Appellant's solicitors by way of letter provided a Rule 24 response. It was on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. I note that this is an appeal by the Secretary of State but for the purpose of continuity throughout the appeal process Mr Buagu is referred to herein as the Appellant. Mr Buagu appears by his instructed legal representative Mr Evans. The Secretary of State appears by her Home Office Presenting Officer Ms Everett. In addition I am provided with a supplemental bundle by the Appellant's instructed solicitors which includes a supplementary witness statement of Darlene Gera, the Appellant's stepdaughter dated 28th July 2015. Whilst no evidence is taken in this appeal Ms Everett does not object to me having "read through consideration" of this document of the bundle generally.

Submission/Discussion

7. Ms Everett submits that this appeal turns on very narrow grounds and that is whether or not the judge has or has not applied the right test, i.e. is there any additional dependency. She submits that the determination is very sparse in consideration of the relationship albeit she acknowledges that the appeal was dealt with on the papers that were available before the First-tier Tribunal Judge. She stipulates that if I look at the first bundle that was before the First-tier Tribunal there are witness statements from the Appellant's wife and stepdaughter which do address the issue and that the wife does not stipulate that she would not be in a position to relocate. Ms Everett does not challenge the finding that the Appellant's stepdaughter is attending City University.
8. Mr Evans relies on his Rule 24 response submitting that the Immigration Judge was entitled to find that the Respondent's circumstances had not changed as he continued to share a family life with his wife and dependent stepdaughter. Mr Evans points out that the family all live together under one roof and as one household. He contends that the judge has properly addressed the issues and that there is no error of law.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law

for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

11. I am helped by the approach adopted Ms Everett in this matter. It seems clear that the judge has unfortunately failed to address the principles of *Kugathas* and as such has materially erred in law albeit that ultimately my finding in this matter is that the decision should be remade allowing the appeal. In many respects I do not criticise the judge. For some reason this appeal was dealt with on the papers rather than by way of oral submissions and he was clearly unaware of some of the issues that may well have been raised.

The Remaking of the Decision

12. The judge was aware that Miss Gera had reached the age of majority as is set out at paragraph 35 of his determination and it was open to him to reach a view that that change in her circumstances was not sufficient to warrant the enforced breakup of the family unit. However there are certain principles that he should have addressed and set out. The courts have stated that the family ties between adults and their parents and/or siblings attract less protection unless there is evidence of further elements of dependency involving more than the normal emotional ties. Domestic courts applied this test of family life to relationships between adults and their siblings and parents as well as to more extended family ties between adults. This principle reflects the fact-specificity of “family life” under Article 8. It should not be taken to mean that protected family life cannot exist between healthy adults and their siblings or parents or extended family members. The *Kugathas* principles were reviewed and reconsidered in *Singh v Secretary of State for the Home Department* [2015] EWCA 630. Some assistance in this matter is given as part of the judgment therein:

“A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.”

13. In this matter it is accepted that Miss Gera has attained 18 years of age and has gone to university. It is agreed by both legal representatives, and I endorse this view, that the fact in itself of attending university cannot be determinative. However Miss Gera has had the Appellant as her father figure for the last nine years and I accept, as did the First-tier Tribunal Judge, that she continues to rely on both her mother and the Appellant both materially and emotionally. She is not living a fully independent life

and she is dependent upon the Appellant and her mother for accommodation and subsistence and she continues to live at the family home.

14. In such circumstances I am satisfied that the finding of the First-tier Tribunal Judge was the correct one. The fact that he had failed to go through the appropriate test when considering the position as set out in case law is material. However he came up with the decision which was the right one. Ms Everett, as I stipulated earlier, was candid enough to indicate that the Secretary of State acknowledged that if the proper legal approach was adopted then the finding ultimately of the First-tier Tribunal Judge was sustainable and she effectively, without consenting, indicated that this was a course that would be perfectly open to me. I endorse that view and for all the above reasons I therefore remake the decision of the First-tier Tribunal and dismiss the appeal of the Secretary of State.

Notice of Decision

The appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is remade and consequently maintained allowing the Appellant's appeal.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge D N Harris