IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33725/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 June 2015	**On 31 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M A B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms N Nnamani, instructed by ILAS Solicitors (LLP)
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is the Secretary of State as the respondent and Mr Balogun as the appellant.

The Appellant

2. The appellant is a national of Nigeria born on 17 August 1966. He came to the United Kingdom in 1999 and at the date of the First-tier Tribunal decision was working for King' College Hospital as a Health Care Support Worker. He entered the UK legally in 1999 as a visitor. He states that he made concerted efforts to bring his family into the UK and his son H was born in the UK in 2004. The appellant and his wife separated in 2008. He kept contact with his children until his wife recently objected to that contact. He maintained that he had always financially supported his children. His application dated 13 May 2014 for leave to remain on the basis of family life was refused by the Secretary of State on 18 August 2014. The appellant could not meet the Immigration Rules by virtue of the "parent route", in particular the Immigration Rules E-LTRPT 2.3 and E-LTRPT 2.4 as he did not have access rights to see his children. As he had failed to meet the eligibility requirements he could not benefit from the criteria set out in EX.1.

3. The application was also considered under paragraph 276ADE and whilst the appellant had lived for fourteen years in the UK it was not accepted he had lived in the UK for twenty years contrary to paragraph 276ADE(3) and further it was not accepted that there would be very significant obstacles to his integration into Nigeria contrary to paragraph 276ADE(vi).

4. His application on the basis of his family and private life was refused under paragraph D-LTRP.1.3, D-LTRPT.1.3 and 276CE with reference to R-LTRP1.1(d) and Re-examination-LTRPT.1.1(d) and 276ADE(1)(vi) of the Immigration Rules.

5. The matter was further considered in relation to exceptional circumstances outside the Immigration Rules but it was considered that the appellant only had indirect contact with his children and this contact could continue from overseas by other methods of communication. He could apply for appropriate entry clearance should he wish to return to the UK to visit his family.

6. This was considered proportionate to the legitimate aim of maintaining effective immigration control in accordance with the Section 55 duty.

7. The appeal came before Judge of the First-tier Tribunal Samimi on 6 January 2015 and she promulgated the decision on 26 February 2015 allowing the appellant's appeal under Article 8 of the ECHR grounds.

Application for Permission to Appeal

8. An application for permission to appeal was made by the Secretary of State on the basis that the judge erred in allowing the appeal in finding that there were exceptional circumstances that would have unduly harsh consequences were the appellant to be removed.

9. The circumstances at the date of the hearing that the access to the children was limited to indirect contact through sending cards and letters every two months on

their birthdays and Christmas and this had not changed. The removal would not change this and there was no credible reason why this form of contact could not take place from Nigeria. The fact it was submitted that in allowing the appeal the judge speculated as to a possible change in circumstances and possible future outcomes at paragraph 11 of her decision.

10. There was no evidence to suggest that the appellant could not retain the services of the solicitor from Nigeria to make any relevant applications to the Family Court.

11. At the hearing before me Mr Jarvis attempted to amend his grounds of appeal. Not only did he argue that the judge had not set out any compelling circumstances but he argued that there was adequate coverage in terms of Article 8 given by EX.1 and he relied on **SS (Congo) [2015] EWCA Civ 387**. The Secretary of State submitted that there was no evidence the appellant could not instruct solicitors from abroad. The appellant could make an application from abroad to enter on the basis of access rights if he did manage to establish the situation for contact.

12. The judge had not acknowledged the full coverage of the Rules. The reason why there was no contact was because of the appellant's own actions.

13. At paragraph 11 the judge missed the point that there had been a court order precisely because of the psychological effect on the children and indeed paragraph 11 bordered on the rationality whereby the judge stated:

> "I also note that whilst the children have been described as having been affected by having witnessed domestic violence there has been no suggestion in the CAFCASS Report of the children having been directly physically or psychologically harmed by their father".

If there had been no harm to the children it begged the question as to why there had been a court order restricting contact.

14. At this point Mr Jarvis also took issue with the judge's approach to Section 117. The judge had ignored the fact that the appellant had unlawful status and had only received discretionary leave in 2011. Between 1998 and 2011 the appellant was in the UK unlawfully and certainly latterly precariously. To this the judge should have added no weight. At this point Mr Jarvis accepted that the issue regarding the weight to be attributed to factor would not apply to the appellant's family life.

15. He argued, however, that it was not lawful for a judge not to apply the Act in respect of the private life and the case of **Dube** (ss.117A-117D) [2015] UKUT 00090 (IAC) confirmed that Section 117 was not an a la carte menu and all of it should be applied. The appellant had a bad immigration history and this had not been addressed.

16. Ms Nnamani submitted that any aspects relating to the appellant's private life had not been challenged in the grounds of appeal. The only issue was with the family life and a relationship with the minor children.

17. The challenge amount to disagreement with the judge's findings and even if she were generous that would be insufficient to unseat the decision.

18. The judge was obliged to consider the matter inside and outside the Rules and the two stage process. She considered whether there were exceptional circumstances at paragraphs 14 and 16.

19. The judge noted that the appellant had enjoyed direct contact previously with the children until 2013 and that he wished to resume contact. It was also noted that he provided financial support.

20. In the event that he would be removed to Nigeria he would have great difficulty in resuming contact because of the need for meetings with CAFCASS. Ms Nnamani submitted that this was implicit in the judge's findings at paragraph 14 as the judge clearly had those matters in mind and took on aboard findings of CAFCASS.

21. Ms Nnamani dealt briefly with the submissions of Mr Jarvis under Section 117 and directed her mind at paragraph 17 to the public interest. The judge had assessed the private and public life and engaged Section 117 of the Nationality, Immigration and Asylum Act 2002.

22. Mr Jarvis at this point added to his submissions and stated that EX.1 could not avail the appellant, that he could not meet paragraphs 2.3 to 2.4. He had no leave to remain as a parent and could not access EX.1.

23. At this point he confirmed that the matter could only be considered outside the Immigration Rules. However, the judge ignored the immigration history of the appellant. He could not meet paragraph 276ADE and she misplaced the weight to be accorded to his private life. **SS (Congo)** was retrospective and it was obvious that the Act should be applied. This was not merely a disagreement with the judge's decision.

Conclusions

24. The application for permission to appeal was not extended to a challenge of the findings in respect of the private life with regards to Section 117 and was confined to a consideration of the judge's consideration of the appeal under Article 8 in relation to his children and in effect his family life. The Secretary of State has had ample time to formulate grounds with respect to Section 117 and did not do so and I am not inclined to allow any amendment to the grounds of appeal. A key challenge was in relation to whether there were exceptional circumstances. The 'exceptional circumstances' approach as set out in the application for permission to appeal was specifically disapproved of by the House of Lords in **Huang v Secretary of State for the Home Department [2007] UKHL 11** and further in **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41**.

26. As **MF (Nigeria) v Secretary of State for the Home Department** sets out at paragraph 42 as follows:

> "41. We accept this submission. In view of the strictures contained at para 20 of Huang, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase "in exceptional circumstances" might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect in all cases where a state wishes to remove a foreign national who relies on family life which he established at a time when he knew it to be "precarious" (because he had no right to remain in the UK). The cases were helpfully reviewed by Sales J in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin). The fact that Nagre was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the ECtHR of the phrase "exceptional circumstances".
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> 42. At para 40, Sales J referred to a statement in the case law that, in "precarious" cases, "it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8". This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals."

27. Mr Jarvis appeared to be arguing that the Rules which in this case included an application of EX.1 moved towards achieving a comprehensive scheme for the consideration of Article 8 cases concerning this type of case and that even if the consideration of Article 8 within the framework of the Rules fell to be dismissed, in effect there was little legitimate basis for a further and separate consideration of Article 8 to succeed outside the Rules because the Rules in this case reflected the position of Article 8. I do not accept this for the following reasons.

28. The letter of refusal from the Secretary of State herself considered the matter outside the rules and in relation to exceptional circumstances. As stated in **SS (Congo)** what does matter is for the purposes of application of Article 8 is the degree of weight to be attached to the expression of public policy in the substantive part of the rules in the particular context in question (which will not always be the same) as well as the other factors relevant to the Article 8 balancing exercise in the particular case "which again may well vary from context to context and from case to case" ([48] of **SS Congo**). As is made clear in **SS (Congo)** the term 'exceptional circumstances' is given a wide meaning in the context of the instructions covering any case in which proper analysis under Article 8 of the second stage it would be disproportionate to refuse leave.

29. At paragraph 62 of **Singh [2015] EWCA Civ 74**

> 'The Izuazu/Nagre approach has been applied in many cases in the Tribunals (though sometimes by reference to its later re-statement by Cranston J in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)). It was endorsed in this Court in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, [2014] 1 WLR 544 – see para. 46 (p. 561 F-H) – albeit that it was held not to be applicable in the case of the provisions relating to deportation of foreign criminals with which that case was concerned because those provisions constituted "a complete code"[7]. Neither party questioned it before us. The only points raised relate to the "slight modification" to the Izuazu guidance offered by Sales J at para. 30 of his judgment in Nagre, in which he says that if it is clear that **all the article 8 issues raised by an applicant have been adequately addressed by the consideration of the new Rules it is unnecessary to proceed to a further "full separate consideration of article 8**".

The key issue is whether the decision is disproportionate, **Huang v SSHD [2007] UKHL 11** confirmed,

> 'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8'.

That said, it would appear from paragraph 16 that the judge did follow **Iftikhar Ahmed [2014] EWHC 300 (Admin)** which stated that exceptional means "circumstances in which refusal would result in unjustifiably harsh circumstances for the individual or their family".

32. The challenge by the Secretary of State was predicated on the basis that at the date of the hearing access to the children was limited in that contact was to be indirect and removal would not change this.

33. In fact, as set out at paragraph 9 of the judge's determination, the court order of District Judge Pathak was that the children should continue to live with their mother and that there be 'no *direct* contact between the children and the appellant unless agreed between the parties and subject always to the wishes and feelings' of the children.

34. The judge also noted that a previous district judge had granted the appellant supervised contact with his son Habib on 22 July 2013. In fact the contact dates refer to contact between November 2013 and January 2014 and there was a later order dated 19th November 2013 which appeared to allow contact as required by the CAFCASS officer. At that stage it was to be considered whether unsupervised or staying contact was to be ordered.

35. Mr Jarvis referred to the fact that the First-tier Tribunal Judge appeared to ignore the court order and the fact that it only ordered indirect access when finding domestic

violence, and that although the judge stated there was no suggestion in the CAFCASS Report of the children having been directly physically or psychologically harmed by their father it had been seen fit to restrict access to indirect access. The appellant was cautioned in 2008 for common assault and this predates a court order for access and leave granted by the respondent to enable contact with his children. It would appear that the thinking behind the CAFCASS report in part is the domestic abuse witnessed by the children. Although the judge did refer to future contact and leaving the door open to future applications and the fact that there was no suggestion in the CAFCASS of the father directly physically harming the children (which is correct it would seem from the report) or psychological harm (bearing in mind the attack on the mother), the judge had clearly read the report and bore in mind the long term contact previously with the children, I am not persuaded that this is perverse or irrational for which the threshold is high, and further the judge noted that the County Court order had been worded in a way to leave the option of the resumption of contact open depending on the feelings and wishes of the children and that indirect contact had been ordered. The judge found that since August 2014 in fact the appellant had been visiting his children when they left school for about twenty minutes and also continued to make financial contribution to their upkeep by a standing order of £100 per month for the two children. There was no indication that this was challenged.

36. What is of relevance in this particular determination is **JA (meaning of access rights) India [2015] UKUT 00225 (IAC)** which found at section 3 of the head note:

> "The expression 'access rights' in paragraph E-LTRPT.2.4 (a) (i) may refer equally to parents who have 'indirect' access to a child by means of letters, telephone calls etc as well as to those who spend time with a child ('direct' access). A parent may also have 'access rights' where there is no court order at all, for example, where parents agree access arrangements (the 'no order' principle; section 1(5) of the Children Act 1989 (as amended))."

37. The judge was fully aware that the appellant had not been found to meet the eligibility criteria of paragraph 276ADE. On an overall reading of the judgment the judge took into account the appellant had become an important part of his aunt and cousin's family life and also built a substantial private life in the form of his working at Kings College Hospital.

38. I note from **SS (Congo)** that at paragraph 57 there is discussion of the respondent's referring to improvements in the position of their sponsors being on the horizon such that they would have a reasonable prospect, that they would in the future be able to satisfy the requirements of the Rules and whether this should be taken into account. The court gave short shrift to this argument, stating that the applicant should apply again when the circumstances have indeed changed and this reflected a fair balance between the interests of the individual and the public interest.

39. It seemed to be the Secretary of State's position in this instance that the appellant could indeed make further applications from abroad and that the judge was not entitled to take into account speculation regarding the contact. That said, as I have

pointed out above, access rights may indeed refer to parents who have indirect access by means of letters, telephone calls as well as to those who spend time direct contact time with their children and this did not appear to have been taken into account. The judge also pointed out that contact between the appellant and the children was not prohibitively barred and was still open to agreement between the parties and subject to the feelings and wishes of the children. Although the application for permission to appeal submitted that the appellant could conduct his relationship from abroad as he only had indirect contact, this observation was in itself couched in future terms and it was open to the judge to consider this option which she did.

40. Overall, the judge took into account that

> "The appellant has shown commitment to his children by virtue of his continued financial contribution and efforts at resuming contact with them through repeated applications to the Family Court. The appellant's removal to Nigeria would deprive of any chance of resuming contact in the future even if the children do recover and their wishes to have contact and the relationship with him changed."

41. However, I do not consider that she can be criticised for these findings as the judge observed, as stated above, and did specify that the court order was open to contact dependent on the children's wishes.

41. I turn to the challenge made by Mr Jarvis to Section 117 and although I am not inclined to accept an amendment at this late stage to the challenge to the decision. I make these remarks. I accept that **AM (Malawi)** confirms that the fact that an appellant can speak English and is not a financial burden should not necessarily be taken as a positive element but this was not the main basis of the judge's findings.

42. Although it was argued that the judge had not given sufficient weight to the public interest consideration, it is clear that the judge was not oblivious to the immigration history of the appellant and although little weight was to be given to a private life formed at a time when the person is in the UK unlawfully, the fact is however that the Secretary of State granted the appellant discretionary leave on 15 June 2011 in full knowledge of that immigration history. His immigration history was not a fact which was challenged in the application for permission to appeal.

43. It is clear from a reading of the determination that the judge placed weight on the family life of the appellant, albeit factoring in the private life and as Mr Jarvis acknowledged Section 117B does not enjoin the judge to attribute no weight to a private life or little weight to a family life when the person's immigration status is precarious. In particular I note Section 117(6) which states that in the case of a person who is not liable to deportation the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with the qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

There was no question as to whether the child should leave the United Kingdom and the question of parental relationship is not defined. The appellant had hitherto until 2013 had contact with his children and according to **JA** that the appellant does have access rights to the children.

Notice of Decision

46. On the basis of these considerations I find that the challenge by the Secretary of State is merely a disagreement with the findings of the judge which, albeit generous, disclose no material error of law and will stand.

Direction regarding anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 27th July 2015

Deputy Upper Tribunal Judge Rimington