Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20960/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 31st July 2014	**On 19th September 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALHAGIE KANYI
(Anonymity order not made)

Respondent

Representation:

For the Appellant: Mr Harrison – Senior Home Office Presenting Officer.
For the Respondent: Mr Hussian instructed by Burton & Burton.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Frankish promulgated on 18th October 2013 in which he allowed Mr Kanyi's appeal against the refusal of leave to remain in the United Kingdom and a direction for his removal to Gambia dated 20th May 2013.

2. The Judge accepted that the key factor in the case was the best interests of the children and that as there was no realistic prospect of

them or their mother returning to Gambia with him, proceeded on the basis they will remain in the United Kingdom.

3. In paragraph 20 the Judge found:

> 20. Under the respondent's student policy, the wife and children have been admitted from an incompatible culture (practice of FGM) to join the appellant as students dependents here. That same incompatible culture prevents their return. The appellant now plays a daily role in the lives of the children, seven days a week, the particulars which are itemised above. They, and the mother, want him to stay. In these circumstances it cannot be argued that it is in the best interests of the children for him to have to go and, therefore, it must be found to be disproportionate for him to have to do so.

Preliminary issue

4. Mr Hussain raised as a preliminary issue the fact the Secretary of State's renewed application for permission to appeal is out of time. The decision under challenge was promulgated on 18th October 2013 and the original application for permission to appeal date stamped 25th October 2013 as the date of receipt by the First-tier Tribunal. This application was refused by a judge of that Tribunal on the 6th November 2013. The renewed application to the Upper Tribunal was received on 2nd May 2014.

5. The explanation provided is that although the original application was in time an administrative error occurred within the Home Office. On 28th April 2014 the Presenting Officer who made the application was informed by another department within the Home Office that Mr Kanyi's representatives had enquired as to whether he will be granted leave to remain resulting in checks being made which established there was no record on the Secretary of State's CID internal case management system of the application for permission to appeal having been refused by the First-tier Tribunal and no record of that determination having been received. Further checks with HMCTS are said to have disclosed that the decision had been served "by hand" in November 2013 although there is no indication as to why the decision of the First-tier Tribunal was not recorded on the CID system or a copy sent to POU Angel Square in accordance with normal practice.

6. It was accepted by Mr Harrison that the application for permission is out of time by a number of months and that it will be necessary to provide good reasons to justify a grant of permission at this time. Mr Hussain referred the Tribunal to the decision of the Court of Appeal in YD (Turkey) v SSHD [2006] EWCA Civ 52 in which the Court stated, at paragraph 25,:

25. It is one thing to say that a power to direct the suspension of removal directions exists on an "out of time" application. It is quite another to say that the court will be ready to exercise this power in any but an exceptional case, and whether it will do so will largely depend on the merits of the substantive application for permission to appeal out of time……

7. More recent Tribunal jurisprudence on this issue includes the cases of **Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC)** in which the Tribunal held that where permission to appeal to the Upper Tribunal has been granted, but in circumstances where the application is out of time, an explanation is provided, but that explanation is not considered by the judge granting permission, in the light of AK (Tribunal appeal - out of time) Bulgaria [2004] UKIAT 00201 (starred) and the clear wording of rule 24(4) of the Asylum and Immigration (Procedure) Rules 2005, the grant of permission to appeal is conditional, and the question of whether there are special circumstances making it unjust not to extend time has to be considered, and, Samir (FtT Permission to appeal: time) [2013] UKUT 00003 (IAC) in which it was held that the UT may extend time on an application for permission to appeal, even if the application was out of time and an application for permission made to a Judge of the First-tier Tribunal had not been admitted.

8. In relation to the required 'test', in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC**),** the Tribunal said that the expectation is that it will be an exceptional case in which permission to appeal to the Upper Tribunal should be granted where the lodging of the application for permission is more than 28 days out of time.

9. There appears to have been a failing within the system which is not an uncommon submission within this jurisdiction from the Secretary of State. The starting point with any such application is, however, the explanation provided. If the administrative difficulties arose as a result of the refusal of permission by the First-tier Tribunal not having been served in the normal manner, such that the procedures for recording such a decision would not be engaged, fault may not lie with the Secretary of State. If, however, handing such documents over is part of the normal procedure for serving the Secretary of State any failures thereafter may be hers. Such an explained does not, in isolation, provide a satisfactory explanation for the delay. This explanation is however the starting point and it is also necessary to consider the merits of the appeal although having strong merits does not necessarily mean leave must be granted as otherwise those with a good case may consider that they are not required to meet the time limits set out in the procedure rules.

10. It was accepted by Mr Hussain that the merits would have to be strong to allow the application to be admitted after this time and also that the resources of the Secretary of State were a relevant consideration. I accept this submission in principle and such elements have been taken into account.

11. To refuse permission at this stage based upon the Secretary of State's administrative failings will be to preserve a determination that is fundamentally flawed. Paragraph 20 of the determination, which purports to be a proportionality assessment, is clearly defective as it is a decision that appears to have been arrived at solely on the basis that in the mind of the Judge the best interests of the children are the determinative factor; rather than one of the elements that need to be considered as part of a properly conducted proportionality balancing exercise, albeit one of considerable importance as per ZH (Tanzania). On this basis, to preserve the determination as it stands may amount to a fundamental breach of the interests of justice. Permission to bring the renewed application is therefore granted out of time on the basis that this is considered to be the appropriate exercise of the Tribunal's discretionary case management powers in relation to this element of the case.

Error of law

12. Mr Kanyi is a Gambia national born on the 2nd February 1973. The Secretary of State sought permission to appeal on the basis that in paragraph 18 of his determination the Judge found that Mr Kanyi and his wife could not be trusted to protect children from FGM on return to Gambia, even though such claim is not substantiated, and thereafter went on to find the decision was disproportionate. The Secretary of State refers to findings made by the Judge that Mr Kanyi is in fact a man prepared to have his children exposed to FGM if they all relocated to Gambia, which is said to indicate that it is not in their best interests to have their father in the United Kingdom, and that the Judge failed to consider whether the alleged threat on return to Gambia is in fact credible. It is stated the Judge's approach to the best interests of the public interest is unlawful as the best interests of the children being treated as the determinative factor is contrary to case law.

13. As stated above, paragraph 20 of the determination is defective. This was a refusal of an application for further leave to remain, accompanied by a removal direction made pursuant to section 47 Immigration, Asylum and Nationality Act 2006, on the basis Mr Kanyi had not demonstrated that he was able to satisfy any of the requirements of the Immigration Rules. The Judge was therefore required to consider (a) whether Mr Kanyi could, in fact, satisfy the Rules and, if not (b) whether in accordance with domestic case law it has been established there was a requirement/need to consider Article

8 ECHR as a freestanding element, and, if so, (c) the outcome of a properly conducted proportionality exercise.

14. Following a finding the Judge materially erred as he failed to adequately assess the merits of the case or, if he did so, to properly record or give adequate reasons to support his finding, the Upper Tribunal proceeded to remake the decision by receiving further submissions from the advocates.

Discussion

15. It was conceded by Mr Hussain that Mr Kanyi is unable to satisfy the requirements for leave to remain in the United Kingdom under the Immigration Rules and this basis of the decision is therefore lawful and correct

16. It is, therefore, necessary to consider the merits of the human rights claim in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have such an express mechanism such as that found in the deportation provisions, the approach in Nagre ([29]-[31] in particular) and Gulshan should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. The starting point was to look at the Rules and see whether the Applicant was able to meet their requirements. If not, the question arises whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further. The key question in relation to the assessment of Article 8 is whether the decision to refuse to grant leave will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time. On the material provided there was arguably not. This approach has been further confirmed by the Court of Appeal in the more recent case of Haleemundeen v SSHD [2014] EWCA Civ 55.

17. A further development in relation to this matter is that as the decision is being remade after 28th July 2014 it is necessary to apply the provisions of section 117B of the Nationality Immigration and Asylum Act 2002, as inserted by section 19 of the Immigration Act 2014.

18. The factual findings of Judge Frankish are to stand including the finding this is a family splitting case. It was submitted by Mr Hussain that the exceptional circumstances are that one of Mr Kanyi's children has been subjected to FGM, according to medical evidence. Mr Kanyi plays a role in their lives according to the evidence including transporting his son at weekends to play football. The child who suffered FGM is said to have been traumatised as a result, although the medical report mentioned by Mr Hussain was not provided to the Tribunal and an adjournment offered to secure the evidence refused on a costs basis.

19. It is also submitted that the Mr Kanyi's leave was as a post study worker and not as a student and that he has a role to play in the lives of the children as a father such that it is disproportionate for him to be removed.

20. When asked to specify the consequences of removal upon the children Mr Hussain submitted was (a) the emotional impact upon the children which can manifest itself in the children becoming upset, (b) that there will be changes in the routines of the children, (c) that the children would not have their father with them and that the educational well-being of the children may suffer in his absence.

21. It was also submitted that Mr Kanyi came to the United Kingdom in 2004 and could qualified on the basis of ten years residence shortly after the hearing as he is resided lawfully in his own right, but this is not determinative as he cannot satisfy the Rules which now require twenty years leave. It was accepted, however, that this is not an argument based upon legitimate expectation.

22. Mr Hussain submitted that if Mr Kanyi is removed the children's mother will become dependent on the State, as she will be unable to work as she will have to care for the children, but that is a matter for the Secretary of State and many single parents undertake full or part time work to accommodate the needs of their children.

23. The family life relied upon is that between Mr Kanyi and his children only because the evidence before the court is that the relationship between him and his wife has broken down. In paragraph 7 of the determination under challenge it is accepted that the parties have separated.

24. The problem in this case, as with many, is the poor quality of the evidence being relied upon to support the contention that the impact

upon the children is such that the appeal must succeed. This is a case in which the mother and father of the children have separated and in which the father has contact to his children. There is no independent evidence of any adverse impact upon the children if their father is removed, submissions not being evidence, although I accept that the effect on a child loosing contact with a parent with whom they have a parental/child relationship can be traumatic in some cases. It is also accepted that if removal is undertaken there may have to be a period of readjustment within the family unit in relation to activities and the role played by the children's mother, but it was not shown this could not be achieved. There is mention of previous behavioural issues at school with his son but, again, there is no evidence that if these are repeated they cannot be managed with the assistance of the school or other services if Mr Kanyi was to be removed.

25. This is not a case in which Mr Kanyi has sole responsibility for the children as his role appears to be limited to attending parent's evenings, collecting and returning the children, and to having ongoing contact.

26. In relation to section 117B, this details in an Article 8 assessment the public interest considerations in all cases. Section 117B(6) states:

"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 a qualifying child, and

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

27. Section 117D is an interpretation provision which defies a 'qualifying child' as a person who is under the age of 18 and who (a) is a British citizen, or (b) has lived in the United Kingdom for a continues period of seven years or more, neither provision of which applies to the children in this case.

28. The best interests of the children are, in an ideal world, to be able to mature and develop within a household containing two loving parents who ordinarily will be their mother and father. In this case the parents have separated and the primary carer of the children is their mother with additional support provided by their father which is said to have had a positive impact in relation to their eldest son. The best interests of the children in this case are, in fact, to remain with their mother who is able to meet all their basic physical and emotional needs and in relation to whom it has not been shown such needs could not be met in the absence of their father. Section 117 provides no assistance to Mr Kanyi in seeking to remain in the United Kingdom and the lack of

relevant evidence leads to a finding that he has not substantiated his claim that as a result of a further separation within this family unit, his removal will result in unjustifiably harsh consequences or exceptional circumstances. The Judge records a conflict within the evidence that either Mr Kanyi is such a monster that his wife and children must be protected from him and his family to avoid the daughters being subjected to FGM or secondly that he is such a marvellous father that it would be disproportionate to make him return to his home state. In relation to the first issue, if the children do need protecting from him it cannot be in their best interests for him to remain but if he is the father that he claims to be, that does not mean the appeal must automatically succeed as there is still an evidential and legal burden that he must discharge.

29. Notwithstanding the impact on the children and need to readjust, it is my primary finding that Mr Kanyi has failed to discharge the burden of proof upon him to the required standard to show that there would be any adverse impact upon the children such as to make the decision disproportionate if the eventual consideration of a freestanding assessment under Article 8 ECHR was the proportionality of the decision when weighing the situation of the family within the United Kingdom against the legitimate aim relied upon by the Secretary of State, and in considering the way in which public interest has to be assessed by virtue of the new statutory provisions.

30. It is settled law that Article 8 does not allow an individual to choose the place in which they wish to reside. The fact there is a child or children in the United Kingdom is not a trump card and it may be as a result of earlier decisions in which such a liberal interpretation of Article 8 was applied that the Secretary of State has now set out her position in relation to Article 8 in the Immigration Rules and now in statutory form, which reflects the will of Parliament as to how such matters are to be assessed within the United Kingdom. Based upon the material provided to this Tribunal, I find the Secretary of State has shown that the decision is proportionate, notwithstanding the separation of this family unit.

Decision

31. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. Mr Kanyi's appeal is dismissed.**

Anonymity.

32. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 19th September 2014