Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21609/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
on 28th February 2014	**On 08th April 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R I O
(Anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Richards – Senior Home Office Presenting Officer.
For the Respondent: In person but assisted by his wife S.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge L Murray promulgated on 12th November 2013 in which she dismissed the appeal under the EEA Regulations but allowed it under Article 8 ECHR.

Background

2. RIO was born in 1969 and is a national of Nigeria. The Secretary of State refused to issue him with a residence card as confirmation of a right of residence in United Kingdom as a family member of an EEA

national exercising Treaty rights on the basis he had failed to provide sufficient evidence that his wife S was exercising Treaty rights in the UK.

3. Judge Murray heard oral evidence from both RIO and his wife. It was not disputed that RIO married his wife in July 2012 [28]. Although S was found to be a credible witness she was not employed in the United Kingdom and she is the carer for her daughter C. S has been awarded carer's allowance as a result. C has been awarded higher rate DLA for both the care and mobility component as a result of her difficulties which includes a diagnosis of Autism Spectrum Disorder (ASD) for which she needs to be educated in a highly specialised environment. S's evidence to the First-tier Tribunal was that she is simply not in a position to undertake either effective employment or self-employment and not in a position to look for work as a result of her daughter's full-time care requirements and due to her own health issues.

4. It is accepted S is an EEA national as she is a citizen of Ireland. Her daughters are British and EEA nationals and she, as the primary carer for C, derives a right of residence under European law.

5. Judge Murray's finding that S is not an EEA national exercising Treaty rights is legally correct and so RIO cannot succeed under this avenue. This finding is not challenged by way of a cross-appeal and is a preserved finding. In paragraph 35 of her determination Judge Murray states:

> 35. It is also clear that the Appellant cannot meet the requirements of Appendix FM of the Immigration Rules. He arrived as an illegal entrant and does not fall for consideration under any of the paragraphs there.

6. At paragraph 36 Judge Murray stated she therefore considered the Appellants case under Article 8 ECHR and refers to MF Nigeria [2013] EWCA Civ 1192.

7. From paragraph 37 onwards Judge Murray examines the Article 8 claim by reference to the Razgar criteria only before concluding in paragraphs 45 and 46:

> 45. I find that there are no legitimate and proportionate reasons to exclude the Appellant from the UK in this case. I have considered the fact that he arrived in the UK as an illegal entrant and that there are inconsistencies in his account in relation to his immigration history. However, I do not consider that it would be reasonable for the family to relocate to Nigeria. The sponsor has three daughters in the

UK. One is now an adult. The second is dependent on her for her full-time care due to ADS and the third is in full time education. In ZH (Tanzania) v SSHD [2011] UKSC the Supreme Court considered the question of the weight to be given to the best interests of children who were affected by the decision to remove one or both parents from the UK and the question of in what circumstances it was permissible to remove a non-citizen where the effect would be that a child who was a citizen of the UK would also have to leave. The Supreme Court concluded that the 'best interests of the child' meant the well-being of the Child which involved asking whether it was reasonable to expect the child to live in another country. Relevant to that assessment would be the level of the child's integration in the UK, where and with whom he was supposed to live and the strength or relationships that would be severed if he had to move away. Although nationality was not a trump card it was of particular importance in assessing the best interests of the child. The intrinsic importance of citizenship should not be played down. In reaching decisions which will affect a child, a primacy of importance must be accorded to his or her best interests. It is not a factor of limitless importance in the sense that it will prevail over all other considerations one must rank higher than any other.

46. The sponsor is HIV positive and is dependent on medication here to which she is entitled. The Appellant is not the father of the sponsor's children but for family life to continue they would have to move to Nigeria as a unit. In view of her daughter's entitlement to education and the nature of the care required for [C], relocation to Nigeria could not be considered reasonable and in their best interests. In the circumstances the Respondent's decision is not a proportionate one.

8. Permission to appeal was granted on the basis it is arguable the Judge failed to give any express weight to the public interest or explain why the removal of the Appellant would result in unjustifiably harsh consequences to the Appellant or his family such that his removal would not be proportionate rather than "unreasonable".

9. It was submitted by Mr Richards that there are a number of legal errors in the determination. He referred specifically to the finding in paragraph 45 that there was no legitimate reason to exclude the Appellant from the United Kingdom which indicates the Judge failed to understand that the legitimate reason is the need for valid and workable immigration control. The Judge specifically refers to legitimate and proportionate reasons as two separate entities yet her failure to properly consider the former indicates that she has failed to

undertake the proper and necessary balancing exercise. It was submitted that it had not been proved that there are any exceptional circumstances such as to warrant leave to remain outside the Rules being granted and that the needs of S and C had not been weighed against the wider needs of immigration control. The Judge had failed to engage properly with the Appellant's circumstances and that the public interest deserved being given greater weight than it was.

Discussion

10. I find there is no error in the finding that it is not reasonable in all the circumstances to expect S, C, or her other daughters to leave the United Kingdom and relocate to Nigeria in light of the fact they are EEA nationals and such a decision would require them to leave the boundaries of the European 'state', and because of the specific needs identified by Judge Murray.

11. I do however find Judge Murray has erred in law. Mr Richards is correct to state that a reading of the determination does not disclose whether the competing interests were properly considered and if so what the outcome of that exercise was. The Judge refers to the need to strike a fair balance and the guidance provided in the case of Huang [40 - 41] but then fails to do so. In any event, Judge Murray was obliged to do more than she did. Although I accept in paragraph 36 there is a reference to MF (Nigeria) it is not clear that the approach advocated by the Court in that case was probably followed and there is no specific reference to other authorities which have provided definitive guidance on how a court should assess such cases in light of the provisions of the Immigration Rules which came into force after 9th July 2012.

12. Having concluded, quite properly, that RIO was unable to succeed under the Immigration Rules it was necessary for Judge Murray to consider the merits of the case 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.

13. The starting position for the Judge was to look at the Rules and see whether RIO was able to meet their requirements, which she did [35]. He could not, and so the next question to arise is 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 Secretary of State is of the view that having considered the merits of the case outside the Rules it should have been found there was no reason established to warrant a grant of leave on this basis. In light of the material the Judge was asked to consider it has not been arguably made out that the decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for RIO or any family member, such as to establish an arguable case at this time.

14. Appendix FM contains provisions enabling those who wish to remain in the United Kingdom as partners for parents or other family members to have their cases considered. The Rules and case law referred to above set out how the legitimate interest is to be assessed. The fact RIO was unable to succeed under the Rules means that it cannot meet the criteria set out by the Secretary of State for an individual to remain in the UK.

15. The fact RIO entered the UK illegally and has not had lawful leave would mean the Secretary of State is entitled to place very little weight upon relationships created at a time he had no right to be in the UK which is why he could not succeed under Appendix FM. In discussing whether the decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for RIO or any family member, such as to establish an arguable case at this time, S claimed that for the first time in two and half years C had come into their bedroom laughing and talking to RIO and that if he was to be removed any progress that had been made would be set back. RIO and S met in mid-2011 but any face-to-face contact with the children only occurred in December as a result of concerns regarding the children's needs.

16. S confirmed she had assumed that RIO had leave to remain and it was only when she asked him in January/February 2012 about his immigration status that he told her he did not. That was when they became engaged. She was therefore aware of the precarious nature of RIO’s status very early in the relationship both in relation to her and the children

17. S submitted that a lot of things could happen regarding her daughter if RIO was to be removed although it was clear that she is a very capable and competent mother who tries to deal with problems and issues herself rather than seeking outside assistance in the first instance. When asked what she would do if RIO was removed she stated she would try and put in place a regime to meet the needs of the children although if C did not want to go to school she may not be able to get her there. S thought she will be able to succeed with meeting most of C's needs but not all and that if not all needs are met her daughter could regress and her speech become affected. She stated that if C becomes upset she hits the wall which she uses to comfort/protect herself. S then tries to speak to her and to talk to her although she does not always respond. S is fully aware of her daughters needs.

18. I find the best interests of C are to remain with her mother, S, who has been her primary carer, who is aware of her needs, who is capable of meeting such needs alone or with assistance if needed, of both a physical and emotional nature. I find on the current evidence it has not been established that RIO needs to remain in the UK for those needs to be met.

19. S stated all she wants is a normal life.

20. When asked about the intervention of Social Services S confirmed there is no assigned social worker for C or the family, indicating there is no need for assistance/intervention, although she accepted professional services are available including parenting support groups and educational assistance. Notwithstanding this S maintains it will cause harm to C if RIO is removed.

21. Whilst I accept that S is the person best placed to know the needs of her daughter it is clear she also wants RIO to remain in the UK to enable them to continue with the family unit they have created here. It is accepted this is a family splitting case but the requirements of the Rules place an obligation upon an individual to show that the effects of removal will be such that the Secretary of State's view regarding the correct interpretation of Article 8 to be found in the Immigration Rules can be overridden. The difficulty in this case is the lack of evidence to support what is said regarding the impact upon C if RIO is removed. This is a relatively new relationship and the evidence appears to be that prior to it being formed S met all the needs of her children to a standard that did not require professional intervention. Where required, assessments have been undertaken and needs identified and the statutory services provided appropriate resources, such as specialised schooling, which would continue in RIO's absence.

22. The finding of this Tribunal is that RIO has not discharged the burden of proof upon him to the required standard to show that the Secretary

of State's decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for RIO or any family member. It is important to remember in such cases that there is a threshold to be crossed. In this appeal the problems experienced by C have been there from the outset, prior to the formation of the relationship. There is no independent expert evidence to support what is being claimed will be the consequence of RIO's removal for C.

23. At the end of the hearing it was indicated to S that if such evidence was to be obtained there is always the possibility of a fresh application being made to the Secretary of State which will need to be considered on its merits.

Decision

24. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

25. 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 that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the identity of the child C.

Signed.....
Upper Tribunal Judge Hanson

Dated the 7th April 2014