UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/34913/2013**

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 20 October 2014	**On: 5 November 2014**
Prepared: 2 November 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS ESTHER ISIMEME OKOISE
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Ms L Kenny, Senior Home Office Presenting Officer
For the Respondent: Mr N Wray, counsel (KC Chambers)

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as "the secretary of state" and to the respondent as "the claimant."

2. The claimant is a national of Nigeria, born on 14th April 1980. Her appeal against the decision of the respondent dated 13th August 2013 to refuse to vary her leave to remain in the UK and to remove her by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 was allowed by First-tier Tribunal Judge Bart-Stewart.

3. It was not challenged at the hearing that the claimant did not meet the requirements of the Immigration Rules, and in particular the requirement set out in Appendix FM - [19].

4. It was common ground that the claimant entered the UK on 31st August 2004 with entry clearance. She obtained further extensions of leave to remain, the last of which expired on 24th November 2012. She made an in time application for further leave to remain on the basis of family life, contending that her removal would violate her rights under Article 8 of the Human Rights Convention. [2]

5. She entered into a relationship with Mr Olushol Oluyemi, a British national, in December 2008. On 9th April 2013 she gave birth to their daughter [4].

6. After giving consideration to her application under Appendix FM as well as pursuant to paragraph 276 ADE of the Immigration Rules, the secretary of state found that she was unable to meet the requirements under the rules.

7. There was further consideration given as to whether there were any exceptional circumstances warranting consideration by the secretary of state for a grant of leave to remain outside the rules. It was decided that there were not.

8. The Judge found the claimant entered the UK lawfully to study, completed those studies and obtained various extensions until 2012. By that time she had met her partner. They had a traditional marriage ceremony in Nigeria in April 2012.

9. There was a letter from her partner dated 10th November 2012 confirming their relationship for four years, stating that they had planned to marry on 16th February 2013. However, that was delayed as they were waiting for divorce papers which would be finalised in December 2012. The decree absolute was not produced at the hearing (it has subsequently been produced before the Upper-tier Tribunal). There was also a birth certificate of their child, born on 9th April 2013, confirming her partner as the father.

10. The Judge noted an inconsistency between the supporting letter from their solicitors dated November 2012 which stated that they were living together and the birth certificate showing that they lived at two different

addresses. She found that the "….inconsistencies undermine the suggestion of the relationship living together for over two years" (sic) [25].

11. The Judge considered whether there were any insurmountable obstacles to the relationship continuing in Nigeria. She found there was no evidence of such obstacles to family life taking place in Nigeria [26]. Her partner had spent a significant portion of his life in Nigeria. He had close family members resident there and a Nigerian passport. The claimant has family there, including siblings, having spent the majority of her life in Nigeria as well [26].

12. The Judge then went on to consider Article 8 under the Human Rights Convention, and in particular whether it is reasonable to expect the claimant to relocate. In that respect, she had regard to the fact that "her husband" is a British national, as is her child.

13. She had regard to the s.55 considerations as well as authorities such as **ZH (Tanzania)** and **Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)**. She considered the submission that it would be unreasonable to expect her daughter and partner to relocate and that it is in the best interests of the child that she remains in the care of both parents, "….and in the light of her British citizenship an entitlement to live in the UK that her best interests lie in the UK" [27].

14. The Judge found merit in that submission. The claimant has lived lawfully in the UK for ten years; she has been self supporting; she is in an established relationship with her partner; her partner would have to start afresh in Nigeria with his young family and he already has a home and job in the UK and is able to support them.

15. She found that the only purpose to be served in requiring the claimant to leave would be to apply for entry clearance from abroad. She would then have to leave her child or separate the child from her father. Accordingly, she found that the removal was unnecessary and disproportionate to the legitimate aim of immigration control [27].

16. On 12th September 2014, First-tier Tribunal Judge Ransley granted the secretary of state permission to appeal. Although he has recorded in the decision at paragraph 4 that "the determination has not been shown to involve an arguable error of law that might have made a material difference to the outcome of the appeal; permission is therefore granted" the parties agreed that the word "not" should be deleted from that paragraph. It was accepted by the parties that the Judge clearly intended to grant the secretary of state permission to appeal.

17. The grounds contending that the First-tier Tribunal Judge erred in allowing the appeal were that she failed to apply **Gulshan** namely, that it is only if there are arguably good grounds for granting leave to remain outside the rules would it be necessary to consider whether there are compelling circumstances not sufficiently recognised under the rules. The Judge however simply proceeded to assess "a free standing Article 8 claim."

18. Ms Kenny in line with the grounds submitted that the Judge did not consider the guidance from **Gulshan [2013]**. No findings in this regard were made and the Judge simply proceeded to undertake a free standing Article 8 assessment from paragraphs 20 onwards.

19. She submitted that in the absence of any finding as to "arguably good grounds and compelling circumstances not sufficiently recognised under the rules" it was not permissible for the Judge to have undertaken a free standing Article 8 assessment as occurred in this appeal.

20. She submitted that **Gulshan** is still relevant despite the Court of Appeal's decision in **MM [2014] EWCA Civ 985**, which was promulgated after the date of hearing but prior to the determination of the First-tier Tribunal Judge.

21. She submitted that the Judge in fact found that there were no insurmountable obstacles. Nevertheless, she found that it would be unreasonable to expect the claimant's daughter and partner to relocate.

22. Although the Judge appeared to rely on **Chikwamba v SSHD [2008] UKHL 40** the decision was not identified in the determination itself.

23. Ms Kenny did accept however that the issue of proportionality had been thoroughly addressed in the skeleton argument prepared on behalf of the claimant, and in particular at paragraph 13 where both **Chikwamba** and **Hayat [2012] EWCA Civ 1054** were set out. The Judge referred to the submissions made on behalf of the claimant, noting that counsel relied on her written skeleton argument [18].

24. On behalf of the claimant, Mr Wray, who did not represent the claimant before the First-tier Tribunal, submitted that the Judge had been "overly concise in giving reasons with regard to the proportionality test."

25. He submitted that the "three stage test" had been superseded by **MM** which had "brought back a more traditional assessment of Article 8."

26. It did not follow from the finding that there were no insurmountable obstacles that her return would not in the circumstances be unreasonable.

27. He referred to Appendix 4 of **MM**. That contained IDIs in respect of family members under the Immigration Rules. The process to be followed in considering exceptional circumstances is fully set out. Even if they are implicitly raised, such as where it is clear that the applicant has a child in the UK, there should be a consideration as to whether or not these factors might mean that a refusal would result in unjustifiably harsh consequences for the applicant or their family.

28. He submitted that the Judge had engaged with these issues, and in particular had regard to the "section 55 interests" of the child, a British national. She considered whether even temporary separation would be reasonable in the circumstances. The Judge had "been through the proper stages" in her assessment regarding proportionality and has given proper reasons why the decision would be disproportionate. The matters are properly collected and set out at paragraph 27.

29. In reply, Ms Kenny submitted that there was nothing exceptional about the claimant's circumstances. She had an option whether or not to continue to live together.

Assessment

30. In **MM, supra,** Lord Justice Aikens had regard to **R (Nagre) v SSHD [128]**. The secretary of state had issued guidance in the form of instructions regarding the approach of officials in deciding whether to grant leave to remain outside the rules in the exercise of the residual discretion that the secretary of state had to grant such leave.

31. It could be granted in "exceptional circumstances". He recognised that the new rules could not provide for all possible circumstances that might arise under Article 8. The new rules would guide the decision makers in most cases. In those cases not covered by the new rules, only if there is an "arguable case" that there may be good grounds for granting leave to remain outside the rules by reference to Article 8 would it be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances to grant leave.

32. At paragraph 135, Lord Justice Aikens stated that where the relevant group of immigration rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular immigration rule or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code would nevertheless entail a proportionality exercise. If the relevant group of rules is not such a "complete code" then the proportionality test will be more at large, albeit

guided by the **Huang** tests and the UK and Strasbourg case law – **MF (Nigeria)**, supra, at [45].

33. In **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**, the judgment of the court was that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. Accordingly, it is not correct that the decision maker is not "mandated or directed" to take all the relevant Article 8 criteria into account.

34. Even if wrong about that, the court went on to hold that it would be necessary to apply a proportionality test outside the new rules, as was done by the Upper Tribunal in **MF**. Either way, the result should be the same.

35. Although the context of the decision in **MF** related to the deportation of a foreign national criminal, said to have been contrary to Article 8 of the Human Rights Convention, the construction by the Court of the new rules applies equally to the present context.

36. Ms Kenny accepted that the relevant group of rules applicable in the claimant's case is not such a "complete" code as for example, in the case of that applicable to "foreign criminals". Accordingly, the proportionality test will be more at large, albeit guided by the **Huang** tests and the UK and Strasbourg case law.

37. I have also had regard to **MF (Nigeria)**, supra.

38. The Judge has properly engaged with the Article 8 claim. She has set out in some detail the immigration history of the appellant. Furthermore, although not referred to in argument by either representative, it is evident from the documentation provided to the First-tier Tribunal that a statement of additional grounds pursuant to s.120 of the Nationality, Immigration and Asylum Act 2002 was issued to the claimant. She responded to it and in terms of documents previously served and by a skeleton argument, she stated her additional grounds, namely that she enjoys family life with her one year old British daughter and her British partner.

39. The Judge found with regard to the relationship between the appellant and her partner, that while there would be some issue with regard to readjusting, there are no insurmountable obstacles to family life taking place in Nigeria. [26]

40. In considering Article 8 she asked whether it would be reasonable to except her to relocate [27]. She had regard to **ZH (Tanzania)** and **Sanade**, supra. She had regard to the best interests of the child. Those

were that she remains in the care of both parents. In that respect, she had regard to the child's British citizenship constituting an entitlement to live in the UK. She ultimately found that the child's best interests "lie in the UK." [27]

41. She had regard to the fact that the claimant herself has lived lawfully in the UK for ten years and has been self supporting[1]. She was referred to the authorities in **Hayat**, supra, and **Chikwamba**.

42. Having applied **Hayat**, she upheld the submission that there would be no sensible reason to require the claimant to return and re-apply for entry clearance. Her requirement to relocate even temporarily would result in disruption to the claimant. That would include separation of the child at a crucial early stage of her development, alternatively separation of the child from her father.

43. Having regard to the evidence as a whole, she found that the proposed removal would be unnecessary and disproportionate to the legitimate aims of immigration control.

44. Although the analysis, assessment and reasoning undertaken the First-tier Tribunal Judge may have been somewhat sparse, I do not find that the decision reached is in any way irrational or perverse; the findings are sustainable on the evidence before her.

Decision

The determination of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

No anonymity direction made.

Signed Date 2/11/2014

C R Mailer
Deputy Upper Tribunal Judge

[1] As a matter of fact it appears that as at the date of the decision, she was less than three months from completing ten years' lawful residence in the UK. Accordingly, she would arguably qualify for indefinite leave to remain on the grounds of long residence pursuant to paragraph 276B of the Immigration Rules.