IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/08243/2014
IA/08837/2014

THE IMMIGRATION ACTS

Heard at Field House
On 8th January 2015

Determination Promulgated
On 16th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS URIEL OJIUGO AKIODE (FIRST APPELLANT)
MISS OLUWAKEMI NGOZIKA AKIODE (A MINOR) (SECOND APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: In person
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nigeria. The first Appellant was born on 2nd November 1982. The second Appellant was born on 27th May 2008 and is her minor child. Unless otherwise specified herein all references to the Appellant refer to the first Appellant. The claim of the second Appellant rises and falls on that of the first Appellant.

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2. The first Appellant had first arrived in the United Kingdom on 12th December 2007 with leave to enter to join her spouse valid to 31st January 2009. She was subsequently granted an extension of stay as a Tier 1 Dependant valid to 25th February 2011. She returned to Nigeria on 28th August but returned to the United Kingdom with leave to enter as a Tier 4 (General) Student valid to 31st October. That leave was extended until 22nd December 2013. On 30th January 2014 the Appellant's application pursuant to Article 8 was refused by the Secretary of State. In making such refusal the Secretary of State noted that from 9th July 2012 consideration to family life under Article 8 fell under Appendix FM of the Immigration Rules. A similar application made on behalf of the Appellant's daughter Oluwakemi was also refused. In refusing the second Appellant's application her immigration history was noted in particular that she had been born in the UK.

3. The Appellant appealed and the appeal came before Immigration Judge Prior sitting at Hatton Cross on 20th August 2014. In a determination promulgated on 11th September 2014 the Appellants' appeals were dismissed on humanitarian protection grounds and human rights grounds.

4. On 14th September 2014 Grounds of Appeal to the Upper Tribunal were lodged. On 12th November 2014 Designated First-tier Tribunal Judge Baird granted permission to appeal. Judge Baird noted that it was submitted in the grounds seeking permission that the judge had erred in failing to give adequate consideration to the circumstances of the second Appellant, a child; in applying an "exceptional circumstances" test to the issue of Article 8 ECHR; in failing to consider the decision in *Razgar*; and in failing to properly consider the application in terms of the Immigration Rules. Judge Baird concluded that it may well be that another judge hearing the appeal would reach exactly the same conclusion given that Judge Prior found the evidence of the first Appellant to be wholly incoherent and inconsistent but considered that it was the case that the First-tier Tribunal Judge had failed to properly consider the Immigration Rules and Article 8 and therefore that the grounds were arguable.

5. On 20th November 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response opposed the Appellant's appeal. In particular it was contended that the Immigration Judge had noted at paragraph 16 of his determination that the Appellants accept they cannot succeed under the Rules and further at paragraph 20 of the determination the Immigration Judge had made an assessment of exceptional circumstances and weighing in the public interest in the balance had found for the Secretary of State on the removal issue.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law. The Respondent appears by her Home Office Presenting Officer Mr Bramble. There was no attendance either by a representative or by the first Appellant. I note that the first Appellant was represented by Counsel before the First-tier Tribunal. The court file indicates that there is no representative and papers have been

served on the first Appellant at her last known address. No papers have been returned. I therefore find that due service and notice has been given and the appeal will proceed in the absence of the Appellant.

Submissions/Discussion

7. In the absence of the Appellant I treat the Grounds of Appeal as her submissions. Grounds for permission to appeal contend that there was no adequate consideration given to the second Appellant's circumstances. The submissions in the Grounds of Appeal contend that the Appellant had claimed that neither she nor her daughter had ties with her native Nigeria and that it had been found by the First-tier Tribunal Judge that this was not an exceptional circumstance which might warrant a grant of discretion outside the auspices of the Immigration Rules. The contention was that the First-tier Tribunal Judge materially erred in applying an exceptional circumstance test to the consideration of whether discretion ought to be exercised in relation to the potential engagement of Article 8 and that such reasoning went against the guidance given in *MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)*. It was contended that the First-tier Tribunal Judge had omitted to deal with family life with regard to the first Appellant's child when considering the factual questions arising under paragraph 276ADE of the Immigration Rules and omitted to apply the five-stage test as set out in *Razgar*. Further it was contended that no proper consideration was afforded to the applicant's case under the Immigration Rules HC 194 and Appendix FM and that when the claimant did not meet the requirements of the Rules it would be necessary to go on to make an assessment of Article 8 applying the criteria established by law.

8. Mr Bramble in response to the Grounds of Appeal takes me to the determination of the First-tier Tribunal Judge starting at paragraph 13 where the judge had noted that it was the closing submission of the Appellants' Counsel that the Appellants did not rely upon the Immigration Rules and that the central issue in the appeal was the Article 8 rights and best interests of the second Appellant who had effectively lived continuously in the United Kingdom for six years.

9. Mr Bramble submits that the judge went on to consider the Respondent's case at paragraphs 15 and 16 and made findings on the Appellants' credibility at paragraphs 17 and 18. He points out that the judge gave full and proper consideration as to how long the second Appellant had been in the United Kingdom and at the end of paragraph 17 had taken in fully the position of the second Appellant. Further the issue of the health of the second Appellant had been fully addressed in paragraph 20 of the determination. He asked me to find that there is no material error of law.

The Law

10. 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.

11. 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

12. It is always difficult when an Appellant does not appear and no further evidence or documentation is provided to make an assessment and the Tribunal is forced to rely on the evidence that was before the First-tier Tribunal. In any event I remind myself that it is not the role of the Upper Tribunal to re-hear decisions but to correct material errors of law that might have arisen within a First-tier Tribunal determination. In this case there is clear evidence in the decision of the First-tier Tribunal Judge that the Appellant who was represented by Counsel did not seek to rely upon the Immigration Rules and that the issue to the appeal was the Article 8 rights and best interests of the second Appellant bearing in mind that the second Appellant had effectively lived continuously in the United Kingdom for six years. The position therefore considered by the First-tier Tribunal Judge was whether or not the Appellant could succeed on a claim pursuant to Article 8 outside the Immigration Rules. The starting point is the credibility of the first Appellant and it is clear from paragraph 17 of the determination that the judge did not find the first Appellant to be a credible nor a consistent witness and paragraphs 17 and 18 set out his reasons. Thereafter the judge indicated at paragraph 20 giving reasons that he was not satisfied that there were exceptional circumstances warranting the grant of leave under Article 8 outside the Rules. But we do not know what further evidence, if any, was put with regard to the second Appellant's further integration into the United Kingdom therefore even if there could be construed to have been an error I do not consider it could, be based on the evidence that is available, material.

13. In *MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)* the Upper Tribunal gave guidance on dealing with cases covered by the new Immigration Rules introduced by HC 194 on 9th July 2012. This case did not fall within the Immigration Rules. That would appear to be clear on the facts and by the admission made by the Appellants' Counsel. It is true as is set out in the headnote to *MF* and referred to in the Grounds of Appeal that:

> "vii. when considering Article 8 in the context of an Appellant who fails under the new Rules, it will remain the case, as before, that 'exceptional circumstances' is not to be regarded as a legal test and 'insurmountable obstacles' is to be regarded as an incorrect criterion."

14. The Grounds of Appeal seek to rely on that paragraph in isolation. It has to be remembered that the headnote goes on to state:

> "viii. However, as a result of the introduction of the new Rules, consideration by judges of Article 8 outside the Rules must be informed by the greater specificity which they give to the importance the Secretary of State attaches to the public interest."

In this case the judge concluded that there was no reason why the Appellants' family life could not continue in Nigeria and of course the second and first Appellant would be required to leave together. *MF (Nigeria)* was effectively followed in *Kabia (MF: para 298 – "exceptional circumstances") [2013] UKUT 00569 (IAC)* in which it was said that exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate. It does not appear to be argued anywhere that that threshold could be reached.

15. The hearing of the appeal before the First-tier Tribunal took place on 20th August 2014. From 28th July 2014 Section 19 of the Immigration Act 2014 came into force. That amended the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains Sections 117A, B, C and D. These provisions apply to all appeals heard on or after 28th July 2014 irrespective of when the application or immigration decision was made. Whilst there is no specific reference to the statute in the First-tier Tribunal Judge's determination paragraph 117B sets out the public considerations applicable in all cases and in *Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ* in considering *MF (Nigeria)* it was noted that the Immigration Rules are a complete code and that where the Article 8 element of the Immigration Rules is not met (as is the case here) refusal would normally be appropriate, *"but that leave can be granted where exceptional circumstances in the sense of 'unjustifiably harsh consequences' for the individual, would result"*.

16. Whilst the authoritative case law has consequently not been referred to by the First-tier Tribunal Judge he has effectively carried out an appropriate

analysis and in such circumstances I am satisfied that the judge has thoroughly looked at this matter and made an assessment which he was entitled to and that his decision discloses no material error of law. In such circumstances the appeal of both the first and second Appellants are dismissed and the decision of the First-tier Tribunal Judge is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity order is made.

Signed Date **16th March 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date **16th March 2015**

Deputy Upper Tribunal Judge D N Harris