Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/51608/2013
IA/00141/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st July 2014	**On 13th August 2014**

Before

UPPER TRIBUNAL JUDGE RENTON

Between

CHE CHARLES FONCHINGONG (FIRST APPELLANT)
JENNIFER ABONG TEKE EPSE CHE (SECOND APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Burrett, Counsel
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellants are both citizens of Cameroon. The first Appellant is the husband of the second Appellant. He was born on 31st May 1970, and his wife on 6th October 1976. They both first arrived in the UK in December 2004 when they were given leave to enter, the first Appellant as a student

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and the second Appellant as his dependant. Subsequently the first Appellant was granted leave to remain in the same capacity until January 2008, and as a work permit holder until 29th April 2013. The second Appellant was granted leave to remain in line as her husband's dependant. On 4th April 2013, the first Appellant applied for indefinite leave to remain as a work permit holder with his wife as his dependant. That application was refused on 14th November 2013 for the reasons given in a refusal letter of that date. At the same time it was decided to remove the Appellants under the amended provisions of Section 47 Immigration, Asylum and Nationality Act 2006. The Appellants appealed, and their appeals were heard by First-tier Tribunal Judge Oliver (the Judge) sitting at Richmond on 14th March 2014. He decided to allow the appeals on human rights grounds for the reasons given in his Determination dated 18th April 2014. The Respondent sought leave to appeal that decision, and on 8th June 2014 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside. It is to be noted that the Appellants have two children both born in the UK on 30th September 2005 and 13th August 2008 respectively. Further, in August 2011 the Appellants' leave to remain was curtailed as from 16th October 2011 because the first Appellant had changed his employment without permission. It is not in dispute that the Appellants were not notified of the curtailment.

3. The Judge's reasons for allowing the appeal on human rights grounds are given at paragraph 10 of his Determination. Applying the test given in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640**, the Judge found that there were sufficiently compelling circumstances to consider the Appellants' human rights outside the Immigration Rules, and then found that the Respondent's decision was not proportionate. This was because the Judge was of the view that had the Appellants' explanation for their ignorance of the curtailment decision been accepted, the application for indefinite leave to remain would have been successful. The Appellants had been blameless in the failure to notify them of the curtailment, and had always been exemplary citizens. As a consequence of the curtailment which led to the first Appellant losing his employment in March 2013, the family had suffered hardship as a result of having no income. Removal from the UK would result in a very substantial interference with the family and private life of the Appellants. Further, the Judge found that the Appellants' elder child met the requirements of paragraph 276ADE of HC 395 as she had resided in the UK for more than seven years. It was not in her best interests to remove her.

4. At the hearing, Mr Kandola argued that the Judge had erred in law in coming to this conclusion. He referred to the two grounds upon which the application had been made. The first was that the Judge had misdirected himself as to the **Gulshan** test in that he had not considered whether in this case the Appellants' circumstances were not sufficiently recognised

under the Immigration Rules. The second ground was that when the Judge concluded that the elder daughter of the Appellants satisfied the requirements of paragraph 276ADE(iv) of HC 395, he relied only on his finding that the elder child had lived continuously in the UK for at least seven years, and had not considered the second limb of the requirement which was whether it would be reasonable to expect the child to leave the UK. The Judge should have dealt with the factors set out in **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)**. The Judge had clearly attached considerable weight to his erroneous finding when assessing the Article 8 proportionality balancing exercise, which was accordingly infected.

5. In response, Mr Burrett argued that there was no error of law in the decision of the Judge. He argued that the recent decision in **MM v SSHD [2014] EWCA Civ 985** was that the **Gulshan** test was no longer necessary. In this case it was obvious that there was an Article 8 claim to be dealt with. The facts of the case were not in dispute, and there was a compelling case to look at the Appellants' human rights outside the Immigration Rules.

6. Finally, Mr Burrett submitted that even if the Judge had erred in respect of his paragraph 276ADE decision, the circumstances of the Appellants' elder child still added weight to the balance in favour of the Appellants.

7. I did find an error of law in the decision of the judge. I agree with the submission of Mr Burrett that following the decision in **MM**, the Respondent's first ground has no merit. However, I do agree with Mr Kandola's argument that the Judge made a flawed decision that the Appellants' elder child satisfied the requirements of paragraph 276ADE(iv) of HC 395, which influenced to a large extent his decision in respect of the disproportionate breach of the Appellants' Article 8 rights. This amounts to an error of law requiring the decision of the Judge to be set aside.

Remade Decision

8. I then proceeded to remake the decision of the Judge. There was no further evidence apart from the statement of the Appellants dated 11th July 2014. I did hear further submissions. Mr Kandola addressed me first when he argued that the removal of the Appellants did not amount to a disproportionate breach of their Article 8 rights. Mr Kandola referred to the refusal letter, and said that it was accepted that there had been no proper service of the curtailment decision. However, the Appellants did not satisfy the requirements of the relevant Immigration Rule to qualify for indefinite leave to remain as a work permit holder and his dependant. Further, it was not the case that the Appellants' elder child met the requirements of paragraph 276ADE(iv) of HC 395. It would be in the best interests of the child to remain living with her parents, and the family retained ties with Cameroon. The education and qualifications obtained by the Appellants in the UK would be of beneficial value to them in Cameroon.

9. In response, Mr Burrett submitted that the Appellants' removal would be disproportionate. The Appellants had been left in a very difficult situation by the failure to serve the curtailment decision properly. The Appellants and their children were a law-abiding family who had done nothing wrong. Mr Burrett then referred me to the Appellants' Bundle of Documents which revealed that one of the Appellants' children had impaired hearing. Mr Burrett argued that the best interests of the children had not been considered by the Respondent.

10. I will now consider if the removal of the Appellants would amount to a disproportionate breach of their Article 8 rights. In so doing I will take account of the rights of the Appellants' children, treating their best interests as a primary consideration. It is not in dispute that the Appellants and their children have a family life together, although I find that there will be no interference with that family life if they return together to Cameroon. It is also not disputed that the Appellants and their children have developed a private life in the UK since the first of them arrived towards the end of 2004. It is undoubtedly the case that that private life will be interfered with by their removal, but on balance I find that such interference is in accordance with the law and proportionate.

11. I find that considerable weight must be attached to the public interest. The Appellants have never had any form of permanent status in the UK, and they have always known that their permission to be in the UK was granted on only a temporary basis. What is more, the Appellants do not qualify in any way for indefinite leave to remain and it is therefore in the interests of immigration control that they do not remain longer in the UK. The Appellants have lived unlawfully in the UK since October 2011, although it is accepted that originally they were not aware of this. However, I do not agree with the argument of Mr Burrett that the Appellants are entirely blameless in this respect. The first Appellant's leave to remain was curtailed because he changed employment without permission and in breach of the terms of his leave to remain as a work permit holder. He is the author of their misfortune. Apparently the Appellants have not become a burden upon the State, but they are now in a position where they are unable to support themselves and have become dependent upon charity and the assistance of friends.

12. On the other side of the scale, I will first consider the best interests of the children. I accept that both children were born in the UK and have never known any other society, although they are not British citizens. They are both settled in schools where they have formed relationships and made progress. There is evidence in the Appellants' Bundle that the elder child has disabilities relating to her hearing and sight. The letter of Dr F Thomas of the East Kent Hospitals University dated 15 January 2014 states as follows:

> "Her parents report that Lorraine does struggle to hear when she has an ear infection or a bad cold. The most recent cold was in November where she had some discharge from the ears. She had oral

antibiotics to treat this. Her coordination is observed to be poorer when she has an ear infection. Apart from this she has been doing well."

From this I deduce that the impairment of Lorraine's hearing is not significant, and there was no evidence before me that she could not obtain the necessary treatment in Cameroon. The evidence produced relating to Lorraine's sight is mostly illegible. There is documentary evidence relating to Lorraine's special educational needs, but it does not say what they are. Upon this evidence, I find that it would not be unreasonable for Lorraine to leave the UK on medical or educational grounds.

13. There is no other direct evidence of how the best interests of the children would be damaged by their removal. I take into account the factors to be considered as given in **Azimi-Moayed**. The younger child is now still 5 years of age. I note that he is to be treated as being more focused on his parents rather than his peers and therefore adaptable. The elder child is now 8 years of age and I take account of what is said in **Azimi-Moayed** as to the circumstances of children of that age who have lived all of their lives in the UK. However, it is the starting point that it is in the best interests of such a child to be with both of her parents, and I am satisfied that she is still of an age whereby she can without great difficulty adapt to life and education in Cameroon. There was no specific evidence before me as to the detriment to the best interests of either child in returning to Cameroon.

14. Otherwise, I accept that this family have spent the best part of the last ten years living in the UK and I accept that for most of that time the Appellants were gainfully employed in worthwhile employment. However there is little or no evidence of the nature and extent of the private life which the Appellants developed over that period, and considering all these factors together I find that they do not outweigh the public interest, and that therefore the decision of the Respondent is proportionate.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I find no reason to do so.

Fee Award

In the light of my decision to remake the decision in the appeal by dismissing it, I have decided that no fee award can be made.

Signed   Date

Upper Tribunal Judge Renton