



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/16730/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 September 2015
Oral decision**

**Decision & Reasons Promulgated
On 11 September 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MISS MERCY EBELE AKANBI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright, instructed by Perera & Co Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge I Ross promulgated on 2 December 2014.
2. The appellant is a citizen of Nigeria who arrived in the United Kingdom, she says in 2004. She has a daughter who was born here on 15 February 2008. On 28 November 2008 she applied for an EEA residence permit which was refused. Further

applications were made for leave to remain most recently on 30 May 2012, followed by further representations on 5 March 2014.

3. The Secretary of State had considered that the appellant did not meet the requirements of the Immigration Rules, either Appendix FM or paragraph 276ADE. She also considered, having had due regard to the best interests of the child, that there were no exceptional circumstances such that she should not be removed from the United Kingdom. The daughter did not have a right of appeal against the decision.
4. On appeal, Judge Ross heard evidence from the appellant. He also heard evidence from her former partner who is the father of the appellant's daughter who was at the time of the decision aged 6½. It was accepted before Judge Ross that the appellant could not meet the requirements of the Immigration Rules and thus the issue before the First-tier Tribunal was whether, notwithstanding that the Immigration Rules could not be met, it would nonetheless be disproportionate in article 8 terms to remove the appellant.
5. Judge Ross directed himself that he should approach the matter in line with the decision in **Gulshan (Article 8 - new Rules - correct approach) [201] UKUT 640** and concluded, on an acceptance by Mr Plowright who appeared below as well as in front of me, the only factor in the appellant's favour was her daughter who enjoyed twice weekly contact with her father. The judge considered although this was an important factor he noted that the daughter was born in the UK but was not a British citizen and never had leave to remain here. The judge noted that whilst there was twice weekly contact this did not weigh heavily in the appellant's favour given that the appellant is the primary carer for her daughter and they would be removed to Nigeria together, it therefore being in the daughter's best interests to remain with the appellant.
6. The judge's decision is further amplified at paragraphs 15 and 16 as to the balancing exercise to be undertaken.
7. Permission to appeal to the Upper Tribunal was sought and on 28 May 2015 Upper Tribunal Judge McWilliam granted permission noting in particular at paragraph 4 "it is arguable that the decision of the child's best interests would be to return to Nigeria with her mother is inadequately reasoned in the light of the evidence of contact with her father which was accepted by the judge."
8. I heard submissions from both representatives. Mr Plowright relied primarily on his grounds and submitted that the reasoning was inadequate particularly in the failure to deal adequately in the light of the decision of **MK [2015] UKUT 223** in that the analysis was inadequate.
9. Mr Clarke submitted that there was no material error and that although this case might have adequately better been dealt with in light of the decision in **Singh & Khalid** which of course was promulgated after the decision of Judge Ross, there was

no material error drawing my attention in particular to the issues in **EV (Philippines)** in the Court of Appeal.

10. I am satisfied that in this case there has not been a proper analysis of the child's best interests given that there is no finding with respect to whether there was a family life between the child and her father. It is in the circumstances where there is a birth parent involved difficult to conclude that was not so. The best interests of the child seemed to have been confined in the analysis to the situation of the mother and whilst I bear in mind what was said in **EV (Philippines)** at [60] there is a difference here in that it appears that the father did have the right to remain in the United Kingdom. There will therefore be a severing of that family relationship. In the circumstances therefore I am satisfied that the judge did err in failing to have proper regard to the child's best interests and properly to analyse what that involved particularly in light of the contact with the father who it was not in dispute before the judge had the right to remain in the United Kingdom. For these reasons I consider that the decision did involve the making of an error of law.
11. I am satisfied also that the decision is material given that it cannot properly be said that the result would have been the same. Further, it appears that on the facts as found by Judge Ross with respect to the child's father that she may indeed have a right to remain in the United Kingdom given that she would appear prima facie to be a family member of an EEA national. As her father is married to an EEA national she would therefore appear to fall within Regulation 7 of the Immigration (European Economic) Area Regulations 2006. As the position of the daughter appears to be substantially different from as it appeared to Judge Ross and there would need to be an extensive additional fact-finding, I am satisfied that on the particular facts of this case it would be appropriate for the matter to be remitted to the First-tier Tribunal.

Summary of conclusions

1. The decision of the First-tier Tribunal did involve the making of an error of law. I set it aside.
2. The appeal is remitted to the First-tier Tribunal for a fresh determination on all issues.

Signed

Date: 10 September 2015

Upper Tribunal Judge Rintoul