



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23007/2013
IA/22985/2013
IA/23018/2013
IA/23005/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 10th September 2014

Determination Promulgated
On 8th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR GEORGE EHIMHEN ODIJIE (FIRST APPELLANT)
MRS JOSEPHINE AIMIEDE ODIJIE (SECOND APPELLANT)
MISS TRINITA EBINEHITA ODIJIE (A MINOR) (THIRD APPELLANT)
MISS ANITA EBOSCREMHEN ODIJIE (A MINOR) (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Sadiq, Solicitor

For the Respondent: Mr G Harrison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first Appellant is a citizen of Nigeria born on 27th July 1974. The second Appellant is his wife and the third and fourth Appellants his minor children. The

appeals of the second to fourth Appellants ride and fall on that of the first Appellant. All references hereinafter in this determination are to the first Appellant unless specifically shown in the alternative to be directed at another Appellant.

2. The first Appellant was granted leave to enter the UK as a student on 25th January 2004. He was subsequently granted four extensions as a student expiring on 30th November 2008. Subsequent applications for leave to remain as a Tier 1 Post-Study Migrant and as a student were refused but on 25th January 2011 he was granted leave to remain as a post-study migrant until 25th January 2013. On 19th March 2011 a subsequent application for leave to remain pursuant to Article 8 of the European Convention of Human Rights was refused. On 25th January 2013 the Appellant made a combined application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system (PBS) and for a biometric residence permit (BRP). That application was refused by the Secretary of State on 29th May 2013 on the grounds that the Appellant did not meet the requisite provisions of Appendix A: attributes. The second Appellant first entered the United Kingdom on 8th January 2008 as a visitor. The Appellant obtained extensions to her visa as a dependant until 25th January 2013 when her application to vary leave to remain was refused.
3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Chambers sitting at Manchester on 14th October 2014. In a determination promulgated on 28th January 2014 the Appellant's appeal was dismissed under the Immigration Rules but was allowed pursuant to Article 8 of the European Convention of Human Rights.
4. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 5th February 2014. On 17th February 2014 First-tier Tribunal Judge Mailer granted permission to appeal. He noted the dates of birth of the first and second Appellants and that the third and fourth Appellants were born respectively on 14th December 2008 and 9th April 2010. He also noted the first and second Appellants have a third child aged 6 months. He observed that the Appellant had relied at the hearing on Article 8 grounds alone and that the Appellants contended that although the application failed on a technicality it was not of their making and that the defect was cured quickly but too late. The Appellants had stated in evidence that he had been here for almost ten years and set up a business as a consultant last year. He acknowledged that his uncles, aunts and remaining brothers and sisters were in Nigeria and although he could return to Nigeria and establish a business there it would not do as well as his businesses in the UK.
5. Judge Mailer noted that the First-tier Tribunal Judge had found that the evidential flexibility policy did not apply in this case and that in allowing the appeals under Article 8 he found that the lead Appellant had made business friends and acquaintances and that the two children were at school and had formed ties. He also noted that the second Appellant had a private life of her own and further that the Respondent's decision did not preserve or encourage the economic wellbeing of the

country. Judge Chambers had concluded that the first and second Appellant were contributors to the UK's wellbeing and that as a matter of fact the family was law abiding and of good character. He considered that "*on somewhat exceptional facts*" the need for immigration control was outweighed.

6. Judge Maller noted that the grounds asserted that the failure to provide the bank letter was not a "*technicality*" but a material failure to satisfy the Rules. Further the grounds asserted that the fact that the family was a law abiding family could not positively influence a proportionality assessment and that no proper reasons were given for the finding that their circumstances were "*exceptional*."
7. In granting permission Judge Maller considered that it was arguable that the judge had regard to irrelevant matters in the Article 8 proportionality assessment and that further the judge did not factor into the equation the Appellant's statement in evidence that he would be able to maintain his business in Nigeria. He also considered that it was arguable that the circumstances were not shown to have been "*exceptional*" as found and that the grounds overall were arguable.
8. No Rule 24 response was served by the Appellant's solicitors. It is on that basis that the appeal comes before me. For the purpose of continuity throughout the proceedings Mr Odijie and his family are referred to herein as the Appellants and the Secretary of State as the Respondent albeit that this is an appeal by the Secretary of State. The Appellant is represented by his instructing solicitor Mr Sadiq. Mr Sadiq is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State is represented by her Home Office Presenting Officer Mr Harrison.

Submissions/Discussion

9. Mr Harrison starts by reminding me that this case was considered outside the Immigration Rules under Article 8 and he relies on the Grounds of Appeal. He notes that it is set out within Judge Chambers' determination that it is common ground that the Appellants cannot succeed under Appendix FM and submits that the judge has not considered what compelling or exceptional circumstances would exist. He considers that the judge's conclusions under the Rules (i.e. that they were missed by a "*technicality*") and the fact that the Appellants were found to have been law abiding should not positively influence a proportionality assessment on Article 8 grounds. Further he contends that the family can continue to enjoy their family life together in Nigeria as they do in the UK and that their private life can be continued in its essential form in Nigeria. The Grounds of Appeal recite that the first Appellant stated at the appeal that he would be able to maintain his business from Nigeria. I put it that way because I refer later to this determination to that finding.
10. Mr Sadiq submits that the Appellant would now succeed under the Rules although if an application were made at date of hearing and due to the changes of the Rules he would not meet the requirements due to the way in which the money is held and its origins. He submits the judge has carried out a proper analysis albeit that there is no reference to authority, in particular *Gulshan (Article 8 – new Rules – correct approach)*

[2013] UKUT 640 (IAC). He further contends that the reference to the word “technicality” by the judge is not one that it is unfair to criticise him for as the judge has accepted that the Appellant fails under the Rules. He submits that the judge was entitled to use the word and that does not in itself constitute a material error of law. Mr Sadiq further emphasises that upon instruction from his client he vehemently opposes the suggestion that there has been any admission that he could carry out his business from Nigeria. His consultancy business is UK based and he also runs an IT based business centred in Liverpool. He submits that there is no way whatsoever that the existing business could be run from Nigeria and that perhaps what was misconstrued was the ability of the Appellant to run “a business” out of Nigeria which he submits would apply to probably virtually any Appellant who comes before the Tribunal and is of Nigerian origin who may face the prospect of being returned to his home country.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. 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 on Error of Law

13. Much turns herein with regard to the analysis carried out by the First-tier Tribunal Judge in his conclusions and findings to be found at paragraph 19 of his determination. I acknowledge that the judge has failed to go through the proper motions although as can be seen hereinafter whether his conclusions ultimately are right or wrong remains another matter. There is a requirement for the First-tier Tribunal to carry out a proper analysis pursuant to Article 8 outside the Rules and to

give due consideration to the effect of authorities. In addition I accept that the fact that the Appellants have shown themselves to be a law abiding family of good character does not of itself positively influence a proportionality assessment on Article 8 grounds. Consequently I am satisfied that there is a material error of law in the determination of the First-tier Tribunal Judge and I set aside the decision and proceed to remake it.

Remaking of the Decision

14. It is accepted that the Appellant cannot succeed under the Immigration Rules. His claim consequently has to be considered pursuant to Article 8 outside the Rules. The first Appellant has been in the United Kingdom for ten years. His three children have been born in the UK and he has already established a number of businesses in this country. There is no suggestion that his business acumen would not be of benefit to the UK. I am also satisfied that whilst the first Appellant could carry on a business in Nigeria the fundamental nature of the business activities in which he is involved are such that he would not be able to carry out current businesses and forthcoming proposed business ventures outside the UK.

15. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

“Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) 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.”

16. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

“Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker.”

17. The above authorities set out the current position of the law. As the High Court said in *MM (Lebanon)* if an applicant cannot satisfy the Rule (and the Appellant cannot in this instant case) then there either is or is not a further Article 8 claim and that has to be determined by the relevant decision maker. I have looked at the facts of this matter and I fully understand and appreciate the position from which the First-tier Tribunal Judge came from and despite setting aside his errors in indicating whether

or not the family is of good character as being a criteria and the fact that the Appellant has stated clearly that he is not in a position to maintain his business from Nigeria, the fact remains that this family has effectively been in this country for the whole of the lives of the children and in the case of the first Appellant for ten years and in the case of the second Appellant for six years.

18. The law under Article 8 is set out succinctly by the First-tier Tribunal Judge at paragraphs 12 and 13 where he recites Article 8 and at paragraph 14 where he sets out the test in *Razgar [2004] UKHL 27*. I adopt those paragraphs. He further accepts that the threshold for establishing the interference with private or family life is not a high one and that once the Article is engaged the focus moves to the remaining questions. In this case this is a family where the first Appellant has studied over many years in the UK. He is effectively integrated into UK society and he and his family live here and have established businesses. Those businesses I accept cannot be in their present form continued in Nigeria. Further whilst the failure to provide the appropriate documents cannot be considered a technicality I acknowledge that the defect was to all intents and purposes subsequently rectified although with the ever moving feast of the requirements to satisfy the Rules they may not be sufficient at the present time.
19. *CDS (PBS "available": Article 8) Brazil [2010] UKUT 00305 (IAC)* is authority for stating that where an applicant establishes belatedly by evidence that funds are in fact available, the strength of the public interest in removal might be weaker and thus a disproportionate interference with private life. Ultimately I agree with the decision of the First-tier Tribunal Judge that the facts of this individual case including the private life established by the first and second Appellant, the established school life and family life of the third and fourth Appellants and the history of the Appellant's life in the UK is such as to override the legitimate aim of the economic wellbeing of the country not being met by the Appellant in this particular case. I am satisfied that in the particular circumstances so far as it relates to this family (as indeed was Immigration Judge Chambers) and on the facts of this case the exceptional circumstances relating to those facts that the established private life of all outweighs the need for immigration control and applying the *Gulshan* and post-*Gulshan* authorities that this appeal succeeds under Article 8 outside the Immigration Rules. In such circumstances I remake the decision of the First-tier Tribunal allowing the appeal on human rights grounds.

Decision

20. The decision of the First-tier Tribunal contained a material error of law. I set aside the decision of the First-tier Tribunal, but in remaking the decision I remake it allowing the appeal of the Appellants pursuant to Article 8 of the European Convention of Human Rights outside the Immigration Rules and I dismiss the appeal of the Secretary of State.

21. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris