



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

Appeal Numbers:

IA/50498/2013  
IA/50499/2013  
IA/50500/2013

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**On: 23<sup>rd</sup> July 2014**

**Determination  
Promulgated**

**On: 6<sup>th</sup> August 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

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**and**

**Kehinde Akinwunmi  
Master Abdulkhalid Ayomide Akinwunmi  
Master Basit Olafimihan Akinwunmi  
(no anonymity order made)**

Respondents

For the Appellant: Mrs Kenny, Senior Home Office Presenting Officer  
For the Respondents: Mr Saini, Counsel instructed by Greenland Lawyers  
LLP

**DETERMINATION AND REASONS**

1. The Respondents are all nationals of Nigeria. They are respectively a mother and her two minor children. On the 28<sup>th</sup> April 2014 the First-tier Tribunal (Judge Foulkes-Jones) allowed their linked appeals against decisions to remove them from the United Kingdom pursuant

to section 10 of the Immigration and Asylum Act 1999. The Respondent now has permission to appeal against that decision.

2. The case before the First-tier Tribunal was, in essence, that although the First Respondent had been an overstayer for many years, had worked illegally and had in fact been convicted of offences relating to the use of false documents, the family should nevertheless be permitted to stay on the grounds that their removal would be a disproportionate interference with their private lives in the UK. Central to that submission was the fact that the two minor Respondents had been born here and had lived here all their lives. At the date of the appeal before Judge Foulkes-Jones the children were aged 8 (weeks from his 9<sup>th</sup> birthday) and 7.
3. The First-tier Tribunal noted that the applications had been refused in November 2013 with reference to the new immigration rules brought into force in July 2012. The determination recited the reasons that the applicants could not meet the requirements of those Rules. Having made a detailed note of the evidence, including the First Respondent's convictions and immigration offending, Judge Foulkes-Jones goes on to address Article 8 outwith the Rules, following the framework approved by Lord Bingham in Razgar<sup>1</sup>. In doing so she pays particular regard to the best interests of the children. She finds that the removal of the family would be a disproportionate interference with their private lives. She allows the appeal under the Rules.
4. The Secretary of State now appeals against that decision on the following grounds:
  - a) The appeal was allowed under the Rules erroneously;
  - b) The Judge did not consider the guidance in Gulshan<sup>2</sup>, namely that (only) "if there are arguably good grounds for granting leave outside the Immigration Rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules;
  - c) Nor does the Judge make any findings in this regard before she goes on to conduct a "free-standing" Article 8 assessment
  - d) "It is submitted, without making findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules, an immigration judge cannot undertake a free standing Article 8 assessment"

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<sup>1</sup> Razgar v SSHD [2004] UKHL 27

<sup>2</sup> Gulshan v SSHD [2013] UKUT 640 (IAC)

5. In response Mr Saini pointed out that in fact these applications were made prior to the rule change in July 2012 and that the new Rules had no application in light of the decision in Edgehill<sup>3</sup>. He submitted that even if Edgehill was decided wrongly the Judge clearly had the new Rules in mind – they are set out in the determination – and had attached appropriate weight to the public interest. The failure to mention Gulshan cannot be said to be material.

## **Error of Law**

6. I find the grounds are without merit. The applications which led to these appeals were made as long ago as June 2010. Although there were subsequent representations the last of these was in January 2012. All of that significantly predates the statement of changes in the Immigration Rules that introduced formal codification of Article 8. It follows that this was simply an old-style *Razgar* assessment.
7. The Respondent's only criticism of the proportionality balancing exercise in this determination is that it is 'free-standing'. That was all it could have been, following Edgehill. I note from paragraph 5.2 of the determination that the presenting officer on the day appeared to accept that this was the case.
8. Even if that were not so, and the claims had been made post 9<sup>th</sup> July 2012, I do not find that this determination contains any error such that it should be set aside. That is because the Judge has undertaken a careful proportionality balancing exercise, having clear regard to the factors militating against giving this family leave. For instance the determination makes repeated reference to Mrs Akinwunmi's poor immigration history and criminal offending: see 2.6, 2.9, 4.5, 5 (xviii), 5 (xxii), 5 (xxiv) and at 5 (iv) where the Judge considers the decision to be taken in pursuit of the 'prevention of crime and disorder' as well as the protection of the economy. The Judge was entitled, indeed obliged, to give weight to the best interests of the children, and that is quite properly a focus in her assessment. She was also entitled to take into account her own findings of fact about what awaited the family if returned to Nigeria. The Judge accepted Ms Akinwunmi's evidence about the social difficulties she faced in Nigeria as a child and young woman, and did so in the full knowledge of Ms Akinwunmi's dishonesty in respect of her criminal conviction. There is nothing wrong with this assessment of proportionality.
9. It follows from this that the Judge considered there to be compelling reasons to go on and look at Article 8. The fact that she did not specifically cite Gulshan or Nagre is therefore rather irrelevant. As Aikins LJ finds in MM:

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<sup>3</sup> Edgehill and Anr [2014] EWCA Civ 402

**“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”.

## **Decisions**

10. The decision of the First-tier Tribunal contains no error of law and it is upheld.
11. I make no direction as to anonymity. None was in place before the First-tier Tribunal and I was not asked to make one in the Upper Tribunal.

Deputy Upper Tribunal Judge Bruce  
23<sup>rd</sup> July 2014