**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/07201/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 16th January 2015** | **On 28th January 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**OLUSEGUN YAHAYA ABIJO**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Bahja, Counsel
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Nigeria whose date of birth is recorded as 15th May 1962. On 3rd April 2013 he made application for leave to remain in the United Kingdom on the basis of both long residence and, outside the Immigration Rules, on human rights grounds. On 8th January 2014 a

decision was made to refuse the application and he appealed. The Grounds of Appeal made reference to the Appellant having family life in the United Kingdom and indeed it is of note that considerable attention was paid by the Secretary of State to the contention of the Appellant that he had that family life.

2. The appeal in the First-tier Tribunal was supported by various documents including photographs of the Appellant's child her birth certificate. At some point a request was made for the appeal to be decided on the papers without a hearing. On 21st August 2014 the matter came before Judge Howard. He considered the evidence before him. He noted that the Respondent had considered paragraph 276ADE of the immigration rules together with the requirements of Appendix FM. Judge Howard found the Appellant's immigration history to be precarious and went as far as to say:

> *"To describe the Appellant's status throughout his time in the United Kingdom as precarious is to understate it. Put bluntly, he should not have been here. So it is notwithstanding the testimonials he has submitted from those he now counts as among his friends and who speak highly of him, by reason of his status, I attach little weight to the private life have as established during that time."*

Judge Howard also had regard to the evidence in relation to the Appellant's child but accepted other evidence which pointed to that child and her mother, by the time the matter reached the First-tier Tribunal, having returned to Nigeria.

3. I observe that the grounds which were eventually to bring the matter before me do not challenge in any way, or take any point, in relation to that evidence or the clear implicit finding on the part of the judge that there was no family life being enjoyed by the Appellant with his child in the United Kingdom because the child, and the mother of that child, were no longer in the United Kingdom.

4. In the event Judge Howard considered, albeit briefly, Article 8 ECHR outside the Immigration Rules because he makes reference to the case of **Razgar [2007] UKHL 27**, at paragraph 20 of the Decision. He was not satisfied that there were grounds for granting leave to remain outside the Rules and found there to be no family life so that there could be no interference in it. Regard was had to the provision of Section 117B of the Nationality, Immigration and Asylum Act 2002. Judge Howard found no sufficient private life deserving of protection.

5. Not content with the decision of the First-tier Tribunal by Notice dated 10th October 2014 application was made for permission to appeal to the Upper Tribunal. On 28th November 2014 Judge Levin granted permission. In granting permission Judge Levin said:

> *"The grounds maintain that the Judge erred in law in failing to consider adequately the Appellant's appeal on private life grounds*

*and in particular the fact that he had been in the UK for 18 years and therefore the issue of whether he had lost all ties with Nigeria.*

*Given that the Judge failed to consider paragraph 276ADE of the Immigration Rules and whether the Appellant met the requirements therefore in respect of having lost all ties with Nigeria, it is arguable that the judge's decision was materially flawed."*

6. It is clear from the grant of permission that the issue before me is whether or not Judge Howard dealt adequately or at all with the issue of the Appellant having lost "all ties" with Nigeria, being the exception to paragraph 276ADE requiring the Appellant otherwise to have lived twenty years in the United Kingdom, which on any view he has not. That is not in issue.

7. Mr Bahja submitted a skeleton argument. I have had the opportunity of reading it and clearly he has devoted some time to it. The skeleton argument reminds me that the line of cases which prefers the guidance in the case of **Huang v Secretary of State for the Home Department [2007] UKHL 11** as an explanation of what was said in the case of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** is to be preferred. In short there is no intermediate exceptionality test. I brought to the attention of the representatives the guidance of Judge Grubb, sitting as a Deputy Judge of the High Court in the case of **R (on the application of Halimatu SA Adiya Damilola Aliyu and Fatimah Oluwakemi Aliyu v Secretary of State for the Home Department [2014] EWHC 3919** in which Judge Grubb after a review of the leading authorities also concluded that the approach in **Huang** is to be preferred.

8. It follows that Judge Howard had open to him the opportunity and discretion to consider relevant factors in Article 8 but only against certain guiding principles. There has to be good reason to depart from the rules and Article 8 is not, and it is trite law to make this observation, a general dispensing power for a judge.

9. Mr Bahja accepted, after some discussion, that the Appellant really could not have the benefit of the family life he was contending for with his child and the mother of his child, both ways.

10. The application to remain in the United Kingdom had been made, in part, on the basis of a desire to maintain family life in the United Kingdom with the child and her mother. Mr Bahja sought to persuade that there had not been any family life enjoyed since 2012. He was not able, however, to point to any evidence that was before the judge to that effect and I remind myself that the judge was asked to deal with the matter on the basis of the papers. The evidence placed before the judge, in my view, laid great emphasis on the fact that there was this child in the United Kingdom together with her mother, which explains why the photographs of the child and the birth certificate were submitted. I also asked Mr Bahja to point to

anything which disabused the Secretary of State or the judge of the child being in the United Kingdom. He was not able to do so.

11. However there was evidence placed before the judge that the child and the mother of the child had left the United Kingdom for Nigeria. The grounds bringing the matter before the Upper Tribunal do not take issue with that and so for the Appellant now to say that he has lost all ties with Nigeria when the child and the mother of their child with whom he wished to enjoy family life in the United Kingdom were now in Nigeria is a point which is difficult, if not impossible, to make. In fairness Mr Bahja accepts the reality though without making any formal concession.

12. Mr Bahja accepted that in reality the appeal before me turned on whether or not there was a freestanding Article 8 issue before the judge in the First-tier Tribunal which ought to have been considered.

13. The question then is did the judge materially err if he did not consider all matters? (I am far from finding that the judge did not deal with the matter). However Mr Bahja pointed to eighteen years in the United Kingdom at a time when it had to be accepted that the Appellant's status was at all material times precarious. That was it. I asked Mr Bahja to point to other matters. He then said, “Well there were no ties”; a point already recognised by Mr Bahja as being one that could not really be pursued given the family having returned to Nigeria.

14. The judge considered paragraph 117B of the 2002 Act. He has made reference to ***Razgar*** and on the limited information and evidence that was before the judge I find no material error of law in this appeal. I should conclude by saying that whilst Mr Bahja did not concede the appeal, he recognised the difficulties he faced on behalf of his client and was realistic in his approach to this appeal.

**Notice of Decision**

15. The appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal is affirmed.

**Signed** **Date**

**Deputy Upper Tribunal Judge Zucker**