



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

**Appeal Number: IA/09667/2014
IA/09665/2014**

THE IMMIGRATION ACTS

Heard at Field House

On April 24, 2015

**Determination
Promulgated**

On May 1, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ADEDEJI OLUNAGBADE OSINLOYE
MRS OLUFUNMILAYO OLUWADARE
(NO ANONYMITY DIRECTION MADE)**

Respondents

Representation:

For the Appellant: Mr Parkinson (Home Office Presenting Officer)

For the Respondent: Mr Oke (Legal Representative)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The Appellants are citizens of Nigeria and are husband and wife.

The first named appellant entered the United Kingdom as a Tier 4 student on October 3, 2010 with leave valid until February 29, 2012. He lawfully extended his stay as a Tier 1 Post Study Work Migrant until February 2, 2014.. The second appellant had been given leave to enter as a dependant of the First-named appellant on March 17, 2012 valid until February 2, 2014. It was a condition of their respective leave that they were prohibited from employment as a doctor or dentist in training. On January 14, 2014 they submitted applications for leave to remain.

3. The respondent refused their applications on February 3, 2014 and took decisions to remove them pursuant to section 47 of the Immigration, Asylum and Nationality Act 1986.
4. The appellants appealed those decisions on February 13, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002. They argued they met the Immigration Rules or alternatively removal would breach the right to family and private life under article 8 ECHR.
5. Their appeals came before Judge of the First-tier Tribunal Tootell (hereinafter referred to as the "FtTJ") on October 16, 2014, and in a decision promulgated on November 25, 2014 he dismissed their appeals under the Immigration Rules but allowed their appeals under article 8 ECHR on a limited basis..
6. The respondent lodged grounds of appeal on December 1, 2014 submitting the FtTJ had erred by misdirecting himself in law and/or the FtTJ failed to have regard to all of the matters when considering proportionality. Judge of the First-tier Tribunal Brunnen found there was an error in law. He found no merit in the argument based on Gulshan [2013] UKUT 00640 (IAC) but found it arguable there was no basis to find the circumstances unduly harsh was arguable.
7. The matter came before me on the above date and the parties were represented as set out above.

PRELIMINARY ISSUE

8. Mr Parkinson invited me to revisit the grounds of appeal relying on the recent decision of the Court of Appeal in the Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387. I explained to him that I would consider his request as part of his overall submissions.

SUBMISSIONS

9. Mr Parkinson invited me to reinstate the first ground of appeal namely that as there was nothing exceptional about the appellant's claim the FtTJ should not have considered the appeal

under article 8 ECHR. He referred me to paragraph [44] of the recent decision of SS (Congo) which made clear that a case should only be considered under article 8 where there is a reasonably arguable case that had not been sufficiently dealt with under the Rules. Mr Parkinson argued that that there was no reasonably arguable case and the FtTJ had erred by considering the case outside of the Rules. In the alternative he argued that the FtTJ had failed to consider the obvious alternative namely that the second appellant and her husband could have returned to Nigeria and she could simply have forwarded her passport to the General Medical Council. The FtTJ only considered the appeal on the basis she had to be present in the United Kingdom and there was nothing before the FtTJ that suggested this was a requirement. By failing to do this the FtTJ failed to give reasons for why removal would be disproportionate and failed to give weight to the issue of Immigration control or section 117B of the 2002 Act.

10. Mr Oke argued that paragraph [44] of the decision in SS (Congo) did not alter the approach a Tribunal should take. He submitted that the case merely emphasised what weight should be attached to the argument and he submitted the FtTJ had considered the appropriate weight and was satisfied that there were sufficient factors enabling him to deal with the case outside of the Rules. He further submitted that the FtTJ had regard to the fact the defendant had been misled by the respondent and he referred me to paragraphs [19] to [20] of the first-named appellant's witness statement and the immigration stamp exhibited at page C of the respondent's bundle. The FtTJ accepted that the second-named appellant only had to produce her passport to qualify as a doctor. It was not practical to send a passport by post and Mr Oke submitted it was illegal to send the passport from Nigeria. The FtTJ recognised that the appellant wanted to conclude the process and then leave the United Kingdom. There were no Section 117B that affected the decision and the FtTJ was entitled to find article 8 was engaged and to allow the appeal on the basis he did. If the appellants were removed then following the decision of UE (Nigeria) EWCA Civ 975 there would be a loss to the public benefit if the appellants were ordered to leave.
11. Mr Parkinson responded to these arguments and maintained the respondent had not misled the appellants and the FtTJ had not made such a finding. The FtTJ had commented at paragraph [34] that the situation was confusing but he had not found the respondent had misled the appellants. There was nothing before either the FtTJ or this Tribunal that supported Mr Oke's submission that posting a passport was illegal. There was no evidence to support the argument that an appointment was necessary despite the FtTJ making such a finding. The appellants

had limited leave to remain and it is arguable their status was precarious and this was a factor to consider under Section 117B. The FtTJ should have refused the appeal under article 8 ECHR because there were no compelling factor that made removal unduly harsh.

12. Having heard the parties' representations I considered the papers before me and then gave an oral decision on the question of whether there had been an error in law.

ERROR OF LAW ASSESSMENT

13. I have before me an application that the FtTJ erred in allowing this appeal under article 8 ECHR. Linked to this application is an argument that the FtTJ was wrong in principle to consider the appeal under article 8 at all and reliance is placed on the recent decision of SS (Congo). I have considered the evidence placed before the FtTJ and his reasons for considering the appeal under article 8. It is clear he placed weight on the fact there was some confusion over a stamp in the first-named appellant's passport and the fact the second-named appellant was merely seeking an extension to complete the paperwork for her GMC acceptance and she was unable to do this without her passport. Based on his approach to the facts I accept the FtTJ could consider the claim under article 8 but for the reasons I shall hereinafter give I am also satisfied that he erred in finding removal was unduly harsh.
14. The FtTJ had two bundles of documents before him from the parties. There is no dispute the first-named appellant had a stamp in his passport allowing him Tier 1 HS Post Study Leave to remain. If there was confusion it was open to the appellants to clarify the position but I am satisfied too much weight was attached to this issue because ultimately the appellants accepted they did not meet the Immigration Rules and consequently any confusion should have been inconsequential.
15. I have reviewed the emails contained at pages [16] to [17] of the appellant's bundle particularly in light of Mr Oke's submission that the second-named appellant had to attend personally with her passport and it would be illegal to send a passport by post. Mr Parkinson does not accept it is illegal to send a passport by post and submitted to me that there was no requirement to personally attend at the GMC.
16. I have to agree on both counts with Mr Parkinson because on the evidence placed before the FtTJ there was nothing that supported either argument. The second-named appellant was in the United Kingdom as a dependant and there was nothing to prevent her carrying out activities as long as they did not breach her conditions of leave. The document at page [16] of the appellant's

bundle is dated March 20, 2014 and indicated that the appellant had met the required standard and she was able to apply for registration to practise. The pass would be valid for three years. The document at page [17] of the appellant's bundle is dated April 30, 2014 and stated that the GMC were unable to complete the identity check "without seeing your passport or a valid UK driving licence. We cannot accept a photocopy of your passport or any other document. If you do not have either of these we will need to close your application and issue you with a full refund. You will need to re-apply once you have your passport back from the home office"

17. The FtTJ interpreted this second email as meaning the second-named appellant had to personally present the documents but that is an erroneous view of the second email. All the appellant had to do was provide her passport. There was no requirement, according to the evidence before him, of a personal attendance.
18. By overlooking this issue the FtTJ failed to have regard to all of the relevant facts and in this appeal I find this was a material error. The second appellant's case was that she merely wanted to complete the registration process before leaving the country and applying for entry clearance. The FtTJ found that completion of the registration process would enable her to make the correct entry clearance application.
19. The failure to consider the obvious alternative is a material error, as it must impact the proportionality considerations.
20. I therefore set aside the decision to allow the appeal under article 8 ECHR.

FINDINGS AND ANALYSIS OF CLAIM

21. Mr Oke indicated he had further documents that he wished to adduce in support of his submission that the appellants needed to attend personally. Although no application had been lodged in accordance with the Rules I agreed to the admission of physical documents. I was not prepared to consider documents on a mobile phone. I was handed two further emails and in reconsidering this matter I have referred to them. I have also taken into account the submissions made both to the FtTJ and me.
22. The first document submitted was an email dated January 7, 2014 from the GMC registration department. This email is connected to the email dated March 20, 2014 as it advised the second-named appellant of where and when she had to take her exam and what she needed to bring with her. The later email (page [16] of the bundle) confirmed she had attended her test

date on March 6, 2014 and that she had passed and referred to how she could register her result. There is nothing in either of these emails that requires the second-named appellant to remain in the United Kingdom.

23. The second document was not shown to the FtTJ. It confirmed her application for registration had been closed because she had failed to provide her identity document namely her passport. The FtTJ was not told of this and whilst this document was put forward to support a claim that she needed to remain in the United Kingdom I am satisfied it did not actually serve that purpose. The email made it clear she could apply at anytime and again there is no requirement of personal attendance. The earlier email (page [17] of the bundle) made that clear and there is nothing in either email that suggests otherwise.
24. I am satisfied that the second-named appellant does not need to be in the United Kingdom to complete her registration and to suggest otherwise would be misleading.
25. The appellants do not meet the Immigration Rules although I am struggling to find a Rule that would enable them to remain to complete a registration. For that reason I am satisfied that the applications can be considered outside of the Immigration Rules.
26. The first-named appellant came as a Tier 4 student and his leave was lawfully extended as a Tier 1 post study migrant. He had no expectation of being allowed to remain here permanently. The second-named appellant did not come to the United Kingdom in her own right. She came as the first-named appellant's spouse and whilst here she has put her time to good use.
27. The only family life they have is with each other and I am satisfied in those circumstances removal would not breach their right to family life and consequently article 8 would not be engaged.
28. Little is known of the first-named appellant's private life and little evidence has been submitted in respect of the second-named appellant's private life save the evidence about her qualification with the GMC. She has no lawful entitlement to remain here although it would be open to her to make an entry clearance application once she secured her registration.
29. The appellants' appeals are based on the second-named appellant's desire to complete her registration because then she would be in a position to seek a position as a doctor. The second question set out by Lord Bingham in Razgar [2004] UKHL 00027 is where there would be an interference with her right to private life, if she were removed. I have already concluded that she does

not need to be in this country to complete her registration and it therefore must follow that removal would not interfere with her private life. She can still complete the registration requirements and it cannot therefore be argued that article 8 would be engaged. Her and her husband's article 8 claims fall at this hurdle.

30. Even if I had been persuaded that their private lives would be interfered with the decisions are in accordance with the Rules and for the purpose of immigration control. On the issue of proportionality I would have had regard to the fact they had been here lawfully, spoke English and had not been reliant on public funds.
31. It is also arguable that their immigration status was precarious because they did not satisfy any Immigration Rule and no attempt had been made to convince me that they met paragraph 276ADE HC 395.
32. In considering whether it was proportionate to remove them I have had regard to all of the matters contained herein and in the bundles provided. In the event I had reached lord Bingham's final question I would have concluded that removal was proportionate.
33. The appellants' appeals outside of the Rules both fail for the reason set out above.

DECISION

34. There was a material error. I have set aside the decision and I have remade the decisions.
35. I dismiss the appellants' appeals under the Immigration Rules and article 8 ECHR.
36. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

Signed:

Dated: **May 1, 2015**

Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no fee award.

Signed:

Dated: **May 1, 2015**

Deputy Upper Tribunal Judge Alis