



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

Appeal Numbers: IA/24579/2014
IA/24571/2014
IA/24578/2014
IA/24580/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 16th December 2014**

**Decision & Reasons
Promulgated
On 13th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MS LATEEFAT FOLASADE SALAMI
FAUZ ANROLAOLUWA ADENEKAN (A MINOR)
FADLULLAH FEYISAYOHI OWOLABI (A MINOR)
FAKHR OLUWATONILOBA ADENEKAN (A MINOR)
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S Brown

For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nigeria. The first Appellant was born on 29th September 1976. The second to fourth Appellants are her three children born respectively on 20th January 2010, 13th March 2007 and 18th September 2011. The appeals of the second to fourth Appellants rise and

fall on that of the first Appellant and unless otherwise specifically stated herein all references are made to the first Appellant. The first Appellant claims to have entered the United Kingdom in May 2003. On 29th November 2010 she submitted an application for an EEA residence card on the basis that she was a family member of Mr Marek Ziga a Slovakian national. That application was refused with a right of appeal on 19th September 2011 and although an appeal was lodged on 11th November 2011 it was withdrawn on 23rd December 2011.

2. On 13th February 2012 the first Appellant submitted an application for leave to remain on human rights grounds. That application was refused with no right of appeal on 28th May 2013. The second to fourth Appellants who were all born in the United Kingdom but retain Nigerian nationality were parties to that appeal.
3. By way of consent order dated 4th February 2014 agreement was reached to reconsider the Appellants' application for further leave in the United Kingdom and on 23rd May 2014 the Secretary of State issued a Notice of Refusal having reconsidered the Appellants' application under Article 8 taking into account Section 55 of the Borders, Citizens and Immigration Act 2009 and the Immigration Rules put in place on 9th July 2012. In reconsidering the application the Secretary of State gave consideration to the family life of the Appellants under Article 8 which from 9th July 2012 fell under Appendix FM of the Immigration Rules.
4. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Levin sitting at Manchester on 2nd September 2014. In a determination promulgated on 16th September 2014 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.
5. On 15th September 2014 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds asserted that the judge erred in failing to apply *Edgehill v The Secretary of State for the Home Department [2014] EWCA Civ 406*. The grounds contended that the applications were made prior to the July 2012 Rule change and that the judge should have considered Article 8 without reference to the 2012 Rules. Alternatively the grounds argue that the judge's findings regarding the relationship of the parents was flawed given the existence of two children of the relationship and that the removal of the children and mother would have an unjustifiably harsh result.
6. On 6th October 2014 First-tier Tribunal Judge Astle granted permission to appeal. On 16th October 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response notes that it is discernable from the Grounds of Appeal and the grant of permission that the issue in contention is the application of the ratio of *Edgehill*. The Rule 24 response submits that the date on which the application is made is immaterial and that the new Rules provide case workers and the court with a structure for conducting the proportionality assessment which

properly reflects the public interest as the Secretary of State and Parliament have expressed it to be. The response further contended that the importance of having regard to the material provisions of the new Rules when conducting the Article 8 proportionality assessment including in cases where the material application was made before the new Rules came into force was recognised by the Court of Appeal in *Haleemudeen v The SSHD [2014] EWCA Civ 558* and that that case stands as clear authority for the proposition that when addressing Article 8 proportionality that assessment must be conducted with proper regard to the new Rules and the public interest they reflect. The Rule 24 response opposes the Grounds of Appeal.

7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant's appeal is by their instructed Counsel Ms Brown. In support of her submission Ms Brown has produced a detailed skeleton argument dated 15th December 2014 running to some 28 paragraphs all of which I have read and considered. In addition she has attached to that skeleton the authority of *Odelola (FC) v Secretary of State for the Home Department [2009] UKHL 25* and the Grounds of Appeal dated 23rd September 2014 drafted by her colleague Ms Record. In addition she refers me to the original skeleton produced by Mr Plowright of Counsel dated 2nd September 2014 and authorities referred to therein. There are thus three skeleton arguments upon which effectively the Appellants rely all of which I have given due consideration to. The Secretary of State in this matter appears by her Home Office Presenting Officer Mr McVeety.

Submissions/Discussions

8. Ms Brown's starting point is to rely on the skeleton arguments stating that there has been no codification of Article 8 prior to the Immigration Rule changes and that the Immigration Judge should have gone on to consider a claim pursuant to Article 8 outside the Immigration Rules.
9. Ms Brown criticises paragraphs 21 to 25 of the First-tier Tribunal Judge's determination. She submits that the judge did not address the position of the two children of the Appellant's relationship with Mr Adenekan and therefore it was inappropriate for him to refer to the relationship the Appellant had with Mr Adenekan as casual. She comments that the analysis by the Immigration Judge at paragraphs 21 to 24 of his determination addressed the Immigration Rules in particular Appendix FM and submits that the analysis at paragraph 22 is a mistake because at that time the decision of the Supreme Court in *Odelola* was available and that this decision should have considered the Supreme Court's determination rather than that of the Court of Appeal and that there were different findings made within the Supreme Court.
10. Ms Brown contends the First-tier Tribunal Judge failed to give due and proper consideration to the Appellant's witness statement and the family

and family life as a whole and argues that there are breaches of Article 8 as the decision would remove the children from their father. She notes the finding that had been made in particular at paragraph 47 of the determination and submits that the First-tier Tribunal Judge has not taken into account the removal of the children from their father and that it is unjustifiably harsh for that to take place. Ms Brown points out that Mr Adenekan works in London and then returns to Manchester to spend the weekends with the Appellants. She further points out that the first Appellant is currently pregnant. She submits that these factors were not considered by the judge. She relies on *Odelola v The Secretary of State for the Home Department [2009] UKHL*, *Edgehill v The Secretary of State for the Home Department [2014] EWCA Civ 402* and *Regina (on the application of Amin) v The Secretary of State for the Home Department [2014] EWHC 4071 (Admin)*. She refers me to the three stage test in *Amin* namely,

- “(a) Has the Defendant given full consideration to the Article 8 grounds advanced by the Claimant in his application?”*
- “(b) Would the Defendant’s decision have been different if the new rules had not been taken into account?”*
- “(c) Is the Defendant’s conclusion irrational or otherwise unlawful on Article 8 grounds?”*

She submits that the answer to (a) is no on the basis that the First-tier Tribunal Judge failed to take into account the effect of removal on the whole family life as set out above and that the answer to (b) and (c) is yes because the evidence was not considered by the Immigration Judge. She asked me to find material errors of law and to set aside the decision of the First-tier Tribunal. Mr McVeety starts by taking me to the original skeleton argument on behalf of the Respondent and to the concession made therein by Mr Plowright who was the advocate who attended on the Appellant’s behalf before the First-tier Tribunal. He notes that Mr Plowright acknowledges that the Appellant did not meet the Rules as they were prior to the immigration changes on 9th July 2012 and that the appeal is therefore solely under Article 8 and that it is acknowledged that the Tribunal can take into account the current provisions under paragraph 276ADE when considering her Article 8 claim. He submits that that is what the First-tier Tribunal Judge has done and that Judge Levin was invited to consider the application under the new Rules and therefore there cannot be any error of law in his determination.

11. Mr McVeety submits that that is the correct approach. He reminds me that we were not setting aside the old Rules and that this was not a direct challenge to the Rules. Thereafter he submits that Judge Levin went on to consider *Razgar* and the principles set out therein and that the judge found that there was no close relationship with the Appellant’s father and that none of the children were British citizens. He indicates that the judge’s approach reflects the proper balancing exercise to the question of

proportionality, and that the Appellants have no legal basis to remain in the UK and the judge has carried out this analysis and therefore there are no errors of law. He asked me to dismiss the appeal.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. 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

14. I start by reminding myself that it is not the role of the Upper Tribunal when considering whether or not there is a material error of law in the decision of the First-tier Tribunal to rehear the matter. The role of the Upper Tribunal is to correct errors that might arise within a First-tier Tribunal Judge's determination. Providing a judge has carried out a proper analysis and applied the facts and evidence appropriately and thereafter exercised his discretion in a proper manner it is not for the Upper Tribunal to interfere in his decision. The main thrust of the Appellant's appeal is that the judge erred in failing to apply *Edgehill* on the basis that the application was made prior to the July 2012 Rule change and that the judge should have considered Article 8 without reference to the 2012 Rule change. In the alternative it is submitted that the judge's findings regarding the relationship of the parents were flawed given the existence of two children of the relationship and that the removal of the children and mother would have an unjustifiably harsh effect.
15. Despite Ms Brown's submission to the contrary I consider it is important to take into account the concession made by Mr Plowright both in his

skeleton argument and before the First-tier Tribunal especially as it was on that basis that Judge Levin heard the appeal. In any event I consider that that was the correct approach and that no material error of law is disclosed on such an analysis. It has to be remembered that this was not a direct change to the Rules as there were no old Rules to preserve in the manner in which there was for example in *Odelola*. All the Rules did was to reflect the rights of public interest that is reflected both in *Edgehill* and more recently in *Haleemudeen [2014] EWCA Civ 558*. Further that case is also authority for stipulating that for leave to remain to be granted outside the provisions of the Immigration Rules there need to be compelling or exceptional circumstances not sufficiently recognised under the new Rules that outweigh the public interest in deportation. It is appropriate to look at the findings of the First-tier Tribunal Judge. Judge Levin starts by noting Mr Plowright's submission that the Secretary of State was wrong to have considered the application under Appendix FM and that the appeals fell to be determined under Article 8 outside the Immigration Rules, he found that the Appellants' application was made outside the Rules given that the first Appellant on her own admission entered the UK illegally and that she had no right to remain under the Rules. He found that the transitional provisions did not apply to the Appellant's application and his analysis relating to that albeit challenged is correct. I do not find the fact that the judge referred to the Court of Appeal in *Odelola* rather than the Supreme Court to create a material error of law and the judge was entitled to find that the Respondent was correct to consider the Appellant's application with reference to Appendix FM on the grounds of family life and under paragraph 276ADE on the grounds of private life.

16. Thereafter in a very detailed analysis the judge goes on to consider both the factual circumstances of this matter and the claims made that the Appellant is entitled to succeed outside the Immigration Rules. The determination is thorough in the extreme and whilst I acknowledge that there is an ever-changing scenario regarding the case law he has made reference to that that was relevant before him, considered the definition of Article 8 and applied the principles in *Razgar*. He has gone on to consider whether or not the Appellant was entitled to rely on a qualification for leave to remain under Section EX and has then given due and proper consideration to Section 117B of the 2002 Act relating to the issues of public interest and also considered Section 55 of the 2009 Act relating to the best interests of the children.
17. This is a determination that has given a very full and thorough analysis of the position and the judge has considered within that determination the position of the Appellants' father and his relationship with the children and has made findings of fact which he was entitled to. In such circumstances the judge was perfectly entitled to reach the conclusion that he did and the decision discloses no material error of law and the appeal must fail.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal of all three Appellants is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge D N Harris