



IAC-AH- -VI

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

Appeal Number: IA/29164/2014  
IA/29165/2014  
IA/29166/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 November 2015**

**Decision & Reasons Promulgated  
On 23 November 2015**

**Before**

**UPPER TRIBUNAL JUDGE GOLDSTEIN  
UPPER TRIBUNAL JUDGE WIKELEY**

**Between**

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

**Appellant**

**and**

**ATBS  
TBTC  
NC**

**(ANONYMITY DIRECTION MADE)**

**Respondents**

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer  
For the Respondent: Mr J Acharya, Acharyas, Solicitors

**DECISION AND REASONS**

### **Anonymity order**

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604). Neither party invited us to rescind the order. We continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

### **Introduction**

2. In this appeal, the Secretary of State appeals against a decision of the First-tier Tribunal (Judge Khawar) allowing the appeal of the appellant ATBS against a decision taken on 27 June 2014 refusing her application for leave to remain in the United Kingdom under Art 8 of the ECHR. At the same time Judge Khawar allowed the parallel appeals by ATBS's husband (TBTC) and their two year old daughter (NC) against decisions by the Secretary of State of the same date and to the same effect. For convenience, we refer to the parties as they appeared before the First-tier Tribunal.

### **Background Facts**

3. The appellant, a citizen of Zimbabwe, first came to the United Kingdom at the age of 15 in 1999 as a visitor. Similarly, the appellant's husband first came to the United Kingdom at the age of 16 in 2001. They were married here in 2010. They both have family in the United Kingdom, on whom they claimed to be both emotionally and financially dependant. Their full immigration history is set out in the First-tier Tribunal's decision (at [6]-[13]).
4. The appellant and her husband each last had legitimate leave to remain in the United Kingdom until November 2011 and August 2011 respectively (although the Judge recognised that they would not have been aware of the change in their status until the Secretary of State's decision of 10 September 2012, refusing them both further leave to remain).
5. On 25 September 2013 the appellant and her husband lodged applications for leave to remain on Art 8 grounds. On 29 October 2013 those applications were refused by the Secretary of State with no right of appeal. On 10 April 2014 the appellant was served with a One Stop Notice under section 120 of the Nationality Immigration and Asylum Act 2002. Following further representations, the Secretary of State issued the current refusal notice dated 27 June 2014, which was the subject of the appeal to the First-tier Tribunal.

### **The Appeal to the First-tier Tribunal**

6. The appellant and her husband both appealed to the First-tier Tribunal (and on behalf of their daughter). Following a hearing at Hatton Cross on 15 April 2015, and in a determination promulgated on 21 May 2015, Judge Khawar allowed the appeals of all three appellants under Art 8 of the ECHR.

7. There was no dispute that the appellants did not meet the criteria for leave to remain under Appendix FM and paragraph 276ADE of the Immigration Rules (at [21]). The First-tier Tribunal then considered the child's best interests under section 55 of the Borders Citizenship and Immigration Act 2009 (at [22]-[24]), before turning to the main part of its discussion of the issues under the heading "Consideration of the Appellants' appeals under Article 8 of the ECHR outside of the Immigration Rules" (at [25]-[39]).
8. Judge Khawar found that the family relationships in this case "go beyond normal emotional ties as between adult siblings and/or adult children and in particular the Appellant's mother. In addition the latter has a strong bond with her granddaughter, the third Appellant" (at [28]). He further concluded that removal was not proportionate and so the appellants' appeals succeeded under Art 8 (at [32] and [38]).

### **The Appeal to the Upper-Tribunal**

9. The Secretary of State sought permission to appeal to the Upper Tribunal on two grounds. The first ground went to jurisdiction, the Respondent arguing that the husband and child had never been issued with immigration decisions carrying an in country right of appeal. The second ground of appeal was that the First-tier Tribunal's proportionality assessment was materially flawed. For example, it was argued that the Judge had failed to have regard to the correct threshold as set out in *R (on the application of Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).
10. Judge Page of the First-tier Tribunal granted the Secretary of State permission to appeal on 28 July 2015. He observed that the first ground may not have been material, as if the appellant did indeed succeed with her appeal then the same result would have followed for all practical purposes for her two dependants. The second ground was "stronger", as the decision to allow the appeal on Art 8 grounds outside the Rules "appears to be a generous one to the appellants, so it is arguable that the proportionality assessment is flawed through inadequate reasoning." However, permission to appeal was granted on both grounds.

### **Summary of the submissions**

11. Mr Tufan, for the Secretary of State, started by wisely withdrawing the first ground of appeal. We need say no more about that.
12. Mr Tufan accordingly concentrated on the second ground of appeal. As he correctly observed, the principle set out in *Nagre* has now been confirmed by the Court of Appeal in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74. Mr Tufan's submission, however, was that there was a structural error in the First-tier Tribunal's decision in that it had failed to consider whether there were "compelling circumstances" such as to justify consideration of Art 8 outside the Rules. Rather, the Judge had gone directly into a proportionality assessment as set out in *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, without proper consideration of the threshold requirement as laid down by *Nagre* and now *Singh*. Further, even if the Judge had been right to consider Art 8 outside

the Rules, Mr Tufan argued that he had misapplied *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 in his consideration of the strength of the family ties.

13. Mr Acharya, for the appellants, whilst acknowledging that the First-tier Tribunal had not in as many words expressly referenced the “compelling circumstances” test, argued that it could be properly inferred that Judge Khawar had applied the correct test. Moreover he submitted the proportionality assessment had been properly carried out and reasoned through by the Judge. Furthermore, the First-tier Tribunal had been entitled to find that the dependency test for family life was satisfied. In particular, the facts of the present case were a long way removed from those in *Kugathas* and the extensive evidence adduced by the appellants had not been challenged by the Respondent’s Presenting Officer at the original hearing.

### **Discussion**

14. The first point to address is whether, as Mr Tufan submitted, the First-tier Tribunal had failed to apply the two-stage approach. It is well established that the Secretary of State’s intention is that the Immigration Rules should in the generality of cases satisfy the requirements of Art 8 of the ECHR. It is accepted that may not always be the case. In *Nagre Sales J* (as he then was) held as follows (emphasis added):

“29. Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are *compelling circumstances* not sufficiently recognised under the new rules to require the grant of such leave.”

15. In doing so, Sales J approved the approach adopted by the Upper Tribunal in *Izuazu (Article 8 – new Rules)* [2013] UKUT 45 (IAC), especially at [40]-[43], subject only to the following observation (*Nagre*, at [30]):

“... The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules.”

16. Subsequently Mr Michael Fordham QC, sitting as a Deputy high Court Judge in *R (on the application of Ganesabalan) v Secretary of State for the Home Department* [2014] EWHC 2712 (Admin), sought to summarise the current state of the law as follows:

“9. For present purposes and as relevant to the present case the correct position in law, in my judgment, is as follows. Where a person seeks leave to remain, relying on private life or family life or both, and relying on Article 8, and where the claim fails at the first stage by reference to the applicable Immigration Rules (Appendix FM and Rule 276ADE):

(1) There is always a "second stage" in which the Secretary of State must consider the exercise of discretion outside the Rules and must be in a position to demonstrate that she has done so.

(2) The extent of that consideration and the extent of the reasoning called for will depend on the nature and circumstances of the individual case.

(3) In a case in which the consideration or reasoning is legally inadequate, and leaving aside cases in which there is a right of appeal to a tribunal, it is open to the Secretary of State to resist the grant of judicial review if she is able to demonstrate that the decision would inevitably have been the same.”

17. In reviewing these authorities in *Singh*, Underhill LJ, giving the lead judgment, held as follows:

“66. Point (3) in Mr Fordham's summary broadly reflects earlier authorities, though there is a fuller and more authoritative exposition in the judgment of Beatson LJ in *Haleemudeen*, at paras. 59-61. I would not disagree with either of points (1) and (2); but I am conscious of how practitioners in this field can sometimes seek to exploit even the faintest ambiguity, and I would accordingly wish to make three comments about point (1):

(1) I should emphasise - though it is in truth entirely clear from the full judgment - that Mr Fordham's statement that "there is always a second stage" does not in any way qualify what Sales J says at para. 30 of his judgment in *Nagre*. Sales J's point is that the second stage can, in an appropriate case, be satisfied by the decision-maker concluding that any family life or private life issues raised by the claim have already been addressed at the first stage - in which case obviously there is no need to go through it all again. Mr Fordham's point is that that is a conclusion which must be reached as a matter of conscious decision in any given case and cannot simply be assumed. I agree with both points.

(2) The statement that the decision-maker "must be in a position to demonstrate" that he or she has given the necessary consideration is simply a reflection of the ordinary obligation to record a material decision. If the decision-maker's view is straightforwardly that all the article 8 issues raised have been addressed in determining the claim under the Rules, all that is necessary is, as Sales J says, to say so.

(3) It may not be entirely apt to describe a decision as to whether article 8 requires that an applicant be given leave outside the Rules as an "exercise of discretion".

67. In short, neither MM (Lebanon) nor Ganesabalan undermines the point made by Sales J in para. 30 of his judgment in *Nagre*, which in my view, together with his endorsement of the approach in *Izuazu*, remains good law.”

18. Returning to the present appeal, the question for us is whether Judge Khawar directed himself properly in accordance with these authorities. It is true there is no

specific reference to either *Nagre* or *Singh* in the First-tier Tribunal's decision. However, Mr Tufan rightly did not suggest that was fatal; what matters is whether the Judge properly applied the relevant legal principles. Mr Tufan's case, however, was that the Tribunal's "structural error" was evidenced both by the use of the heading before paragraph [25] (see [7] above) and the immediate reference to *Razgar*.

19. We are not persuaded by this line of argument. It is important to read the First-tier Tribunal's decision as a whole and in its proper context. The Secretary of State's refusal letter had set out in detail why the applications did not meet the criteria specified in Appendix FM and paragraph 276ADE. It then went on to consider whether there were any exceptional circumstances which would warrant a grant of leave to remain in the United Kingdom (paragraphs 48-60). Judge Khawar expressly acknowledged that approach in the Tribunal's decision (at [2]). In our view the Judge did not fall into the trap of considering Art 8 as simply an alternative route without more ado. Rather, his findings and reasoning at [25]-[30] demonstrate that he asked himself whether there were exceptional or compelling circumstances which justified consideration of Art 8 outside the Rules. The Judge's analysis of the five-stage *Razgar* assessment does not take place until the passage starting at [31]. We accept this is not the most polished of decisions, but we are nonetheless satisfied that the First-tier Tribunal did not err in law in the way that the Secretary of State seeks to persuade us.
20. Mr Tufan further argued that the First-tier Tribunal had misapplied *Kugathas*. Sedley LJ, giving the leading judgment in that decision of the Court of Appeal, held as follows:
  - "19. ... neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8."
21. Arden LJ held to similar effect:
  - "25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see *S v United Kingdom* (1984) 40 DR 196 and *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or *vice versa*..."
22. The Judge was well aware of the proper legal test as laid down by *Kugathas*, and directed himself correctly in accordance with those principles (see [28]). The actual assessment as to whether family life has been established as between the adults concerned is then ultimately an issue of fact. Judge Khawar had the advantage of hearing evidence in person from the appellant's mother and from her husband's two siblings (see at [5]). As Mr Acharya noted, the Home Office Presenting Officer at the hearing did not challenge their evidence as to the strength of the respective relationships (see at [16]-[18] and [30]). The weight to be given to that evidence was

then for the First-tier Tribunal to determine. Judge Khawar has explained briefly, but adequately, why he concluded that the mutual dependency satisfied the *Kugathas* test (at [26]-[30]). We also agree with Mr Acharya that the circumstances of the present case are a long way removed from the factual matrix in *Kugathas* itself.

23. We have considered the various other points made by Mr Tufan and also contained in the grounds of appeal, but are not satisfied that any of them disclose an error of law on the part of the First-tier Tribunal. Although the Tribunal did not refer in terms to section 117B of the Nationality, Immigration and Asylum Act 2002 (as inserted by section 19 of the Immigration Act 2014) it is clear from the decision that Judge Khawar had those considerations in mind. Thus he was entitled to have regard to the appellants' fluency in English and their earning potential (see section 117B(2) and (3)). Such consideration did not involve breach of the principle that an appellant can "obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources" (see *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC) at [18]).
24. Mr Tufan also referred to what he characterised as the "curious" paragraph [37] of the First-tier Tribunal's decision, where Judge Khawar found the "most significant aspect" of the case favouring the appellants' argument was that their family life could not be reasonably enjoyed through modern means of communication such as e.g. Skype. Mr Tufan prayed in aid the decision of the Strasbourg court in *Joseph Grant v United Kingdom* 10606/07 [2009] ECHR 26, in which the applicant, who had children in the United Kingdom, had been deported to Jamaica following a term of imprisonment. The Asylum and Immigration Tribunal had concluded that although there would be a breach of his family life if deported to Jamaica, this was not disproportionate in terms of being conducive to the public good. A subsequent application for judicial review was unsuccessful. The European Court of Human Rights ruled that there had been no breach of Art 8. In doing so, the Court observed that "Contact by telephone and e-mail could easily be maintained from Jamaica, and there would be nothing to prevent Naomi, or indeed any of the applicant's children or relatives in the United Kingdom, from travelling to Jamaica to visit him" (at [38]). We do not find this assists Mr Tufan. The factual circumstances of the two cases are very different in terms of the proportionality assessment. In the present case the Tribunal found as a fact, given the close nature of the family ties, that modern channels of internet-based communication were not sufficient. Moreover *Grant* does not purport to lay down any principle of law on this point.
25. In reaching our decision we have also borne in mind the following helpful observations of the Upper Tribunal in *AM (S 117B) Malawi* (at [8]):
  - "8. ... It is not necessary for the FtT to set out in full in each of its decisions each of the statutory provisions that it seeks to apply to the evidence placed before it in the course of an appeal. Still less is it necessary to make reference to statutory provisions that have no application to that evidence. What is required of the FtT is no more, and no less, than that its decisions should demonstrate that the relevant statutory provisions have been taken into account, and that they have been applied to the facts of the particular appeal; *AJ (India) v SSHD* [2011] EWCA

Civ 1191 at [43]. That is a requirement of substance, rather than of form, and in this respect we would respectfully reiterate the caution expressed by Dyson LJ in *Baker v SSCLG* [2008] EWCA Civ 141 at [37];

“The question in every case is whether the decision maker has in substance had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed.”

26. In conclusion, we can understand why Judge Page gave the Secretary of State permission to appeal to the Upper Tribunal, as on the face of it the First-tier Tribunal’s decision does appear to be somewhat generous to the appellants. However, what may seem to be a generous conclusion does not of itself amount to an error of law. On closer scrutiny we are not satisfied that any material error of law is disclosed.

### **Conclusion**

27. In our judgement, and notwithstanding the terms in which permission to appeal was granted, there is no merit in the grounds advanced. It was open to the Judge to reach the conclusion that he did, for the reasons that he gave. Those reasons were adequate, albeit not entirely polished, and disclosed that the relevant statutory provisions had been properly considered and applied. The grounds reveal no material error of law that requires the decision promulgated on 21 May 2015 to be set aside and remade. It is accordingly confirmed and the Secretary of State’s appeal to the Upper Tribunal dismissed.

### **Decision**

28. The making of the previous decision involved the making of no error on a point of law and we order that it shall stand
29. The anonymity order made by the First-tier Tribunal therefore also continues (see paragraph [1] above).

Signed



N Wikeley  
Judge of the Upper Tribunal

Date: 16 November 2015