



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

Appeal Number: IA/39327/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 December 2014**

**Determination Promulgated  
On 5 January 2015**

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Secretary of State for the Home Department**

**Appellant**

**and**

**Kemi Okegbile  
Tinefe Zainab Okegbile  
[No anonymity direction made]**

**Claimants**

**Representation:**

For the claimants: MS G Brown, instructed by Danielle Cohen Solicitors  
For the appellant: Mr C Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The claimants, Kemi Okegbile, date of birth 21.9.71, and Tinufe Zainab Okegbile, date of birth 16.6.96, are citizens of Nigeria.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Lingham promulgated 2.9.14, allowing the claimants' appeals against the decisions of the Secretary of State, dated 16.9.13, to refuse their applications for leave to remain in the UK, and to remove them from the UK as illegal entrants under section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 4.6.14, but the decision was not drafted until 15.8.14.

3. First-tier Tribunal Judge Lever granted permission to appeal on 20.10.14.
4. Thus the matter came before me on 11.12.14 as an appeal in the Upper Tribunal.

### **Error of Law**

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Lingham should be set aside.
6. The relevant background can be briefly summarised as follows. The claimants made application on 22.12.12 for leave to remain outside the Rules, on the basis of human rights. The application was refused, with no right of appeal. Following an application for judicial review, the Secretary of State reconsidered the application, but refused it on 13.9.13, with a right of appeal. It follows that the application the subject of the appeal was made in 2011, prior to the coming into force of the new Rules on 9.7.12.
7. Judge Lingham relied on the decision of the Court of Appeal in Edgehill v SSHD [2014] EWCA Civ 402, for authority to consider that the applications should have been considered under the old Rules.
8. Rarely oddly, the judge made an article 8 assessment outside the Rules first, before going on to consider the Immigration Rules. The correct approach is to consider the immigration rules first, before going on, if necessary to consider article 8 ECHR outside the Rules. At §70 the judge found that the decisions of the Secretary to remove the claimants was disproportionate and thus the claimants succeeded under article 8 ECHR. The judge then went on to find in the alternative that whilst the second claimant succeeded under the Rules, the first claimant did not. The body of the discussion of these issues, particularly between §75 and §76 is rather confused as to which claimant is being referred to.
9. In essence, the ground assert that the judge erred in law by failing to identify which old Rules were relevant; erred in the reasonableness assessment; and failed to take account of section 117B of the 2002 Act as amended.
10. In granting permission to appeal, Judge Lever found that it was unclear from the decision of the First-tier Tribunal which old rules applied. "That is consistent with the judge having dismissed the first appellant (mother) case under the rules. However inconsistent with that approach the judge appears to have considered the second appellant (dependant child) appeal under the new rules and found she succeeded under those rules. It is arguable therefore that there was an error of law in making an inconsistent approach to the appellants and incorrectly considering the new rules in respect of the second appellant."
11. "Further it is arguable that the judge at no stage makes reference to, or appears to consider the statutory changes brought about by the Immigration Act 2014. This is perhaps pertinent as the judge arguably makes little or no reference to the public interest factors even when conducting a balancing exercise under Razgar in the determination."

12. At §27 of the decision, the judge relied on Edgehill to find that the Secretary of State had incorrectly “applied her mind to the new rules instead of the rules that were in existence at the date of application.” The grounds rightly criticise this finding, which does not there, or anywhere else in the decision, explain what ‘old rules’ should have been applied, or purport to apply any such old rules. If the judge considered that the Secretary of State’s decision was not in accordance with the correct law, the judge should have allowed the appeals to that limited extent, to the effect that it remained for the Secretary of State to make decisions which were in accordance with the law.
13. The transitional provisions accompanying the new Rules in force from 9.7.12 preserved the effect of the previous version of the Rules for applications made under the Rules prior to 9.7.12 but not decided by that date. However, this was a human rights article 8 ECHR application, made entirely outside the Rules on form FLR(O). There were no pre-9.7.12 Rules for dealing with article 8. The transitional provisions have no relevance to an application made entirely outside the Immigration Rules, as there was no equivalent provision under the old Rules for consideration of the application. The only framework for considering private and family life in existence at the date of decision was that of the new Rules under paragraph 276ADE and Appendix FM. The Secretary of State is required to undertake a proportionality assessment and the new Rules comprise the current framework for that assessment. This is entirely consistent with both Haleemudeen, and Edgehill.
14. In R(on the application of Rafiq) [2014] EWHC 1654 the claimant Pakistani national met and married a British citizen after his student visa had expired. His application for leave to remain in the UK as a spouse was refused after amendments were made to the Immigration Rules in July 2012. The Administrative Court distinguished Edgehill. The Court found that both before and after the changes to the Rules the overriding test was that of Article 8 of the ECHR and it was reasonable for decision-makers to approach the Article 8 claim using the tests in the new Rules, bearing in mind the provisions for exceptional circumstances. The Secretary of State’s conclusion that hardship did not amount to an insurmountable obstacle was rational and had been sufficiently explained in the decision letters. However, in R (on the application of Iqbal) v SSHD [2014] EWHC 1822 (Admin) it was held that the SSHD had wrongly applied Paragraph 276ADE and Appendix FM of the Immigration Rules to her initial decision on the Claimant’s case, but that defect was cured by a supplementary decision which, albeit applying those provisions, did so in a manner which was appropriate to applications both pre and post 9 July 2012 in substance and which ensured that all conceivable Article 8 considerations, including those not expressly provided for in the provisions of the new Rules, had been assessed.
15. In Haleemudeen v SSHD [2014] EWCA Civ 558 the Court of Appeal was not concerned by the fact that paragraph 276ADE had been considered even though the application preceded the new rules. It was said that paragraph 276ADE could not be disregarded even once it was clear that the case did not fall within the Immigration Rules, because although it was not dispositive, it provided guidance about the Secretary of State’s policy in the same way as paragraph 276ADE and Appendix FM.
16. In the circumstances, I find that decision of the Secretary of State was in accordance with the law and that she was correct to consider Appendix FM and paragraph

276ADE, before going on to consider whether there were exceptional circumstances in which refusal would result in unjustifiably harsh consequences such that it would be disproportionate to the claimants' private and family life rights under article 8 ECHR.

17. However, nothing of any significance follows from the application of the new Rules in the decision of the Secretary of State on the facts of the present case. That is because neither the Secretary of State nor the First-tier Tribunal Judge stopped short at the Rules. The refusal decision went on to consider whether there were compelling circumstances, which, exceptionally, would justify allowing the appeals on the basis of article 8 ECHR. On the facts of this case, it is inevitable that an article 8 assessment would have to be made, especially since Ganesabalan v SSHD [2014] EWHC 2712 (Admin) has made it clear that there can be no threshold requirement to consideration of article 8 ECHR, unless the Rules are a complete code, which they are not for consideration of article 8 ECHR cases other than deportation. Further, it is likely that article 8 has to be considered because section 86 of the 2002 Act requires determination of a claim on the basis of human rights.
18. I also find that the assessment of reasonableness in relation to the second claimant is fundamentally flawed. The fact that the second claimant has lived in the UK for over 7 years does not by itself establish that it would be unreasonable to remove her. The judge seems to have assumed that she had a right to continue education in the UK, when she and her mother are Nigeria citizens illegally present in the UK. The judge failed to consider a strong line of case authority, including Zoumbas v SSHD [2013] UKSC 74, and EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874, to the effect that it is entirely reasonable and not irrational to expect a child to leave the UK to return to their home country with their parent, with whom they have the basis of their family life. Although all things being equal it would be in the best interests of a child to remain in the UK, matters are not equal. The second claimant is not a British citizen and the UK cannot educate the world. I further find that the assessment in respect of the second claimant was made in absence of consideration of the position of the first claimant mother, who had no basis to remain in the UK and if there are best interests to be considered then the second claimant's best interests must be to remain with her mother and to leave the UK with her mother. Further, it should be noted that by the date of promulgation of this decision, the second claimant had turned 18 and was thus an adult.
19. I note that section 177B came into force after the hearing date, but before drafting of the decision and thus promulgation. It is a clear error of law that the First-tier Tribunal failed to properly address the public interest in conducting the article 8 proportionality assessment. Not only was section 117B not applied, in which little weight should have been accorded to the private life of either claimant, it is evident from the decision of the First-tier Tribunal that inadequate consideration has been given to the public interest in removal of the claimants.
20. In the circumstances, the decision of the First-tier Tribunal cannot stand and must be set aside and remade.

21. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
22. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the Secretary of State of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

### **Conclusion & Decision:**

23. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I remit the appeal to the First-tier Tribunal for a de novo hearing.



Signed:

Date: 31 December 2014

Deputy Upper Tribunal Judge Pickup

### **Directions**

24. The appeal has been listed for rehearing before the First-tier Tribunal at Taylor House on 15.5.15.
25. No findings of fact are preserved. The appeal is to be a de novo hearing.
26. The estimated length of hearing is 3 hours. No interpreter is required.

## **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

## **Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been remitted for rehearing to the First-tier Tribunal and thus the outcome of the appeal remains unclear at this stage.



Signed:

Date: 31 December 2014

Deputy Upper Tribunal Judge Pickup