



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/03795/2014

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 18 November 2014**

**Decision & Reasons
Promulgated
On 21 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

**MR DADA ADEBOYE MESHIOYE
(ANONYMITY DIRECTION NOT MADE)**

Claimant

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Ms E Daykin, Counsel instructed by DF
Solicitors

DECISION AND REASONS

1. This is an appeal by Mr Adeboye whose date of birth is 3 September 1983 and who is a citizen of Nigeria. He appealed against a decision made by the Secretary of State on 20 September 2013 refusing an application made by him, his wife and children under the Immigration Rules (App FM & 276ADE) and under Article 8 ECHR. The matter comes before me for

consideration as to whether or not there is an error of law in the decision made by the First-tier Tribunal (Judge Shanahan) promulgated on 4 September 2014 in which the appeal was allowed. In these proceedings the Secretary of State for the Home Department is the Appellant and therefore Mr Adeboye is the respondent, but for convenience in these proceedings I shall refer to the parties as “the Claimant” and to “the Secretary of State.”

Background

2. At the time the application was made the family were a unit, but before the refusal was made and by the time of the hearing the Claimant and his wife had separated. The Claimant’s wife made a separate application for her and the children to remain in the UK and leave was granted for a period of 2 and a half years’. The Secretary of State had not had the opportunity to reconsider the situation following that grant of leave to the Claimant’s wife and children.
3. In the determination the Tribunal concluded that the Immigration Rules were not met and found it could go on to consider Article 8 outside of the Rules, on the grounds that the appellant’s wife and children had, since the matter was considered by the Home Office, been granted two and a half years’ leave[18]. The Tribunal heard evidence from the Claimant and his wife and found [22] that the Claimant played an active role in looking after his children on a daily basis, in particular taking and collecting them from school. Both children were born in the UK in 2006 and 2008 and the Tribunal found that the eldest was a “qualifying” child, who had lived in the UK for over 7 years [13]. The Tribunal considered the best interests of the children and found family life established in the UK. It concluded that it was not reasonable to expect the children to return to Nigeria in light of the fact that they and their mother had been granted further leave. The Tribunal considered factors under Section 117B of the 2002 Act (as amended) [34].
4. In grounds of appeal the Secretary of State argued that the Tribunal erred in its assessment under Article 8; failing to follow **Gulshan [2013]UKUT 00640** and **Nagre [2013]EWHC 720** because it did not find exceptional and compelling circumstances, and gave no adequate reasons for finding that the refusal would lead to an unjustifiably harsh outcome.

Permission

5. Permission was granted by First-tier Judge Bird on 13 October 2014 on the grounds that it was arguable that the judge had

failed to consider **Gulshan** and **Nagre** as regards exceptional and compelling circumstances.

The hearing

6. This afternoon I heard submissions from Mr Walker and from Ms Daykin. A significant issue in this appeal is that the decision made by the Secretary of State was in respect of the family as a whole and by the time of the Tribunal hearing the Claimant's wife and children had made a fresh application and been granted discretionary leave on the basis that the eldest child was a qualifying child having lived in the UK and was settled at school in excess of seven years. At this time the Claimant and his wife had separated, but the evidence was that the Claimant played a continuing active role in the lives of the children on a daily basis. There was no challenge to the current relationship and role as between the Claimant and his children. The Claimant's wife was employed and he was able to look after the children by taking and collecting them from school every day and seeing them at weekends.
7. It was accepted that the Claimant could not meet the Immigration rules as neither his wife nor children were British citizens or settled in the UK [16 & 17]. The Claimant relied on Article 8 arguing before the First-tier Tribunal that there were exceptional circumstances outside of the Rules in line with **Gulshan** as the best interest of the children had not been considered since they had been granted leave to remain. At [18] the Tribunal found arguably good grounds existed to go on to the next stage under Article 8. It then carried out a proper assessment following **Razgar** [19] and having regard to factors under section 117 of the 2002 Act (as amended), and in particular S.117B(6) regarding the public interest [20 & 26]. In so doing the Tribunal placed weight on the changed circumstances for the family, the fact that the mother and children had leave, and found that the best interests of the children (one of whom was a qualifying child) did not lie in having to uproot to Nigeria, a country where they had never lived, in circumstances where their parents had separated and their family life with their father remained strong and established. In the event that the Claimant were removed that family life with their father would cease [27]. The Tribunal considered that it would not be reasonable to expect the "qualifying" child to live in Nigeria having been granted leave in the UK and be separated from their father. Reliance was placed on **Omotunde(best interest-Zambrano applied-Razgar) Nigeria[2011] 00247(IAC)** as to unjustifiably harsh outcome [33].

8. Although the Tribunal did not refer in terms to exceptional and compelling circumstances, I am satisfied that there was no material error of law. The Tribunal had in mind all the relevant issues and evidence in reaching its conclusion. The Tribunal clearly had in mind the two stage approach for family and private life in and outside of the Rules and in considering proportionality under Article 8 made a sustainable decision based on exceptional and compelling circumstances.
9. Accordingly I am satisfied that the Tribunal did follow the correct approach with regard to Article 8 and that any apparent error under **Gulshan** and **Nagre** would have made no difference to the outcome and was not therefore material.
10. Accordingly I find that there was no material error of law in the determination which shall stand.

Notice of Decision

The appeal is allowed under human rights.

No anonymity direction is made.

Signed
2014

Date **20 November**

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed
2014

Date **20 November**

Deputy Upper Tribunal Judge G A Black