



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

Appeal Number: IA/15829/2013

THE IMMIGRATION ACTS

Heard at Field House

On 12th June 2014

**Determination
Promulgated**

On 10th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MS VICKY ADEYIKE WILSON
(ANONYMITY NOT RETAINED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ogbonna

For the Respondent: Mr Nath

DETERMINATION AND REASONS

Introduction

1. The Appellant born on 12th September 1960 is a citizen of Nigeria. The Appellant who was present was represented by Mr Ogbonna. The Respondent was represented by Mr Nath a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application to remain in the United Kingdom outside of the Immigration Rules based on Article 8 of the ECHR. That decision had been refused by the Respondent on 29th April 2013.
3. The Appellant had appealed that decision and her appeal was heard by Immigration Judge Fletcher-Hill sitting at Hatton Cross on 10th January 2014. The judge had dismissed the Appellant's appeal under both the Immigration Rules and under human rights.
4. The Appellant had appealed that decision on the basis that the judge had considered Immigration Rules post 9th July 2012 when the Appellant's application had been made on 30th January 2012 and arguably had therefore applied the wrong case law. First-tier Tribunal Judge Page on 8th May 2014 found there was an arguable error of law in this respect and permission to appeal was granted. The matter comes before me in accordance with directions following from that permission.

The Appellant's Submissions

5. Mr Ogbonna submitted in terms of the Grounds of Appeal that the judge had looked at the wrong Rules and had the judge applied the correct test it was probable that there would have been a different decision made. There was a concession that the Appellant's case did not fall within the Immigration Rules themselves.

The Respondent's Submissions

6. Mr Nath also accepted this case did not fall within the Immigration Rules but said regardless of the approach that may have been taken by the judge the Article 8 decision was sound and there was no error of law made such that there would have been a material difference to the decision reached.
7. At the conclusion I reserved my decision to consider this case. I now provide that decision with my reasons.

Decision and Reasons

8. The Appellant claimed to have arrived in the United Kingdom in 2002 illegally and had remained throughout in the UK unlawfully. Her application had been made on 30th January 2012 predating the change to the Immigration Rules brought in on 9th July 2012. It has been conceded and has always been the case that the Appellant could not have succeeded under the Immigration Rules as they were pre 8th July 2012 or postdating the new Rules introduced on 9th July 2012. The Respondent in their refusal of the application on 29th April 2013 had looked at the Appellant's claim within the terms of the new Immigration Rules i.e. under Appendix FM and paragraph 276ADE of those Rules. Having concluded the Appellant did not fall within the Immigration Rules they had considered the Appellant's case and had concluded that there were not exceptional

circumstances that justified her remaining in the UK. There have been no reference within the refusal letter to any particular case law that has arisen since the introduction of the new Immigration Rules.

9. The judge had noted the Respondent's approach to a consideration of the case under the new Immigration Rules and had concluded that the Appellant did not fall within the terms of those Rules. The judge had then clearly given careful consideration to all the Appellant's circumstances and her evidence in respect of her claim to be allowed to remain in the UK outside of the Immigration Rules.
10. In this respect at paragraph 65 of the determination the judge had correctly identified the burden and standard of proof. At paragraph 66 of the determination the judge had stated:

“In relation to Article 8 ECHR issues raised by the Appellant it is for the Appellant to show at the date of the appeal hearing and as the balance of probability standard that she has established a family and/or private life in the UK and that her removal from the UK as a result of the Respondent's decision would interfere with those rights. It is then for the Respondent to justify any interference caused. The Respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances. The leading case on this subject remains the House of Lords decision in **Razgar**.”

The judge had then given consideration of the evidence, her findings and her ultimate decision.

11. The new Immigration Rules laid before Parliament and approved and which came into force on 9th July 2012 in part set out to codify those circumstances in which an Article 8 claim to remain in the United Kingdom on either family or private life grounds would be allowed. In part the purpose of such codification was to set out the Executive's directions as to what would be regarded as the sufficiency of grounds for allowing an individual to remain in the UK under the terms of Article 8 of the ECHR. The case law that has arisen since the introduction of those Rules has directly or inferentially acknowledged that as a result of those Rules the judiciary need to give greater weight or be reminded of the need to give appropriate weight to the public interest when considering such cases. Such public interest was always inherent within Article 8(2) of the ECHR but without any clear or detailed guidance the interpretation has perhaps led to disparate views and interpretation over the years. A number of cases from the higher courts and the case of **Gulshan** have now provided clearer guidance as to the circumstances in which an individual may be granted leave to remain outside of the Immigration Rules under Article 8 of the ECHR.
12. As indicated above in this case this Appellant could never have succeeded under the Immigration Rules either as they stood at her date of application or post July 2012. The Respondent in the refusal letter had correctly

considered her case outside of the Rules and for reasons provided refused that application. It is noteworthy that the judge at the First-tier Tribunal whilst making reference to the new Immigration Rules and in that sense echoing the approach taken by the Respondent in the refusal letter made no reference to the recent case law including **Gulshan** identifying the approach that she then took when examining the case outside of the Rules under Article 8 of the ECHR. The only reference to case law is that which is quoted above where at paragraphs 65 and 66 of the determination the judge having correctly identified the burden and standard of proof referred to the fact that the Respondent's decision must be a proportionate response and made reference to the case of **Razgar**. Essentially therefore the judge was referring herself to the approach and the leading authority in terms of considering Article 8 of the ECHR prior to the implementation of the new Immigration Rules.

13. Thereafter the judge had given clear and careful consideration to the evidence and the Appellant's circumstances and gave proper reasons why in her view the removal of the Appellant would not be disproportionate. There is a reference in paragraph 70 to the judge having considered recent case law in relation to whether the Appellant continues to have ties with her country whether social, cultural or family. There is no specific mention of any individual case law and it is not necessarily clear therefore which cases she had in mind. However a consideration of the circumstances that would face the Appellant in Nigeria would have been an entirely proper consideration on any test of proportionality and in terms of whether the Respondent's decision to remove her to Nigeria would be a disproportionate response in all of the Appellant's circumstances.
14. I find therefore that in the judge's consideration of Article 8 the approach that she took and the matters that she considered were entirely compatible with the approach taken in Article 8 cases pre 9th July 2012. To that extent if the judge had perhaps incorrectly assumed that she needed to deal with this case in accordance with post July 2012 case law she had not approached her consideration in practice on that basis. She essentially applied the test in **Razgar** and reached conclusions that were entirely proper and open to her on a consideration of Article 8 of the ECHR in the manner adopted for those cases prior to the introduction of the new Immigration Rules. To that extent if there was an error it had no material effect on either her consideration of the evidence or the decision reached. I find therefore that there was no material error of law in this case.

Decision

15. There was no material error of law made by the judge and I uphold the decision of the First-tier Tribunal.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Lever