



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

Appeal Numbers: IA/29731/2013
IA/29721/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 14 April 2014 and 3 June 2014**

**Determination Promulgated
On 6 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MR CHUKWUNWEIKE STEPHEN OKOH
MR OGECHUKWU MICHAEL OKOH
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Rendle of Counsel
For the Respondent: Ms Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are both citizens of Nigeria, born as to Chukwunweike Stephen Okoh on 14 September 1994 and Ogechukwu Michael Okoh on 3 January 1999; they are brothers. (Stephen and Michael)

2. On 25 July 2011 they both applied for leave to remain in the United Kingdom on human rights grounds outside the Immigration Rules. On 26 June 2013, the respondent refused the applications because she was not satisfied that they qualified under paragraph 276ADE or under Appendix FM and there were no exceptional, compassionate circumstances to justify the grant of leave outside the Immigration Rules.
3. The appellants' appeals against the respondent's refusal were allowed by Judge Miles (the judge) in a determination promulgated on 27 February 2014. The Secretary of State's grounds claimed the judge arguably made a material error of law in that he misdirected himself by finding that the appellants had been living in the United Kingdom continuously for seven years. The respondent said the appellants entered the United Kingdom as visitors on 20 December 2006 but at an unknown date soon afterwards they returned to Nigeria and re-entered the United Kingdom on the same basis on 30 March 2007 and had remained since. The Secretary of State argued that as the appellants entered the United Kingdom as visitors, they were not living in the United Kingdom continuously, particularly as they had returned to Nigeria before re-entering the United Kingdom as visitors. As such, the respondent argued that the judge's finding that the appellants had been living in the United Kingdom continuously was flawed and further, that his findings under Article 8 were equally flawed because he failed to identify any compelling circumstances.
4. Judge Kelly granted permission to appeal on 18 March 2014 because he found that in holding that paragraph 276ADE and the provisions of Appendix FM applied only to applications that were made on or after 9 July 2012 (see [21] of the determination) it was arguable that the judge failed to apply the "transitional provisions and interaction between part 8 Appendix FM and Appendix FM-SE" (with particular reference to paragraph A277C that were set out at the commencement of Part 8 of the Rules and that he thus erred by failing to adopt the approach set out in Gulshan when considering whether to allow the appeal on the ground that the appellants' removal would be incompatible with their rights under Article 8. It was also arguable that having decided that the new Rules were inapplicable to the facts of the appeal, it was inconsistent for the judge thereafter to calculate the period of the appellants' continuous residence in the United Kingdom by reference to the Home Office guidance relating to the application of those Rules. See [26] and [27] of the determination.
5. Following an error of law hearing, I found that the judge did not adopt the correct approach. He started out in error in terms of the applicability of the Rules and the rest of his determination was built upon that inadequate foundation such that I set aside his decision to be remade by me.

Evidence

6. The appellants' evidence is contained in the appeal bundle prepared for the hearing before the judge, the supplementary bundle before me including their statements dated 27 May 2014, the statement of Ryan Thompson, Social Worker and the oral

evidence of the appellants, Sarah Bass and Ryan Thompson. I will summarise the evidence as necessary in the course of explaining the reasons for my decision.

7. I have considered each item of evidence and have reviewed that evidence in the round. The fact that I have not specifically referred to any particular piece of evidence in my determination does not mean that the evidence has not been considered in the manner I have described.

Findings and Conclusion

8. In this appeal the burden lies with the appellants to prove the facts and matters they rely upon. Their case was advanced on the basis that they have established a private and family life in the United Kingdom since their arrival here in 2006 and that their removal in consequence of the respondent's decision would breach their rights under Article 8. The standard of proof is that of a balance of probabilities. See **EH (Iraq) [2005] UKIAT 00065**.
9. The development of the case law is significant. **MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC)** found that the new Immigration Rules were not a “complete code” when it came to Article 8 claims as decisions still had to be compliant with Section 6 of the Human Rights Act 1998 [25]. The assessment remained in two stages, first the application of the Rules and second, the application of Article 8 [32] – [41]. In one important respect, the new Rules affected the second stage Article 8 assessment because they gave greater specificity to which circumstances attracted the greatest weight in the public interest. The degree to which the new Rules changed the interpretation of the public interest should not be exaggerated. Previous case law held that the proportionality assessment did not treat the public interest as immutable such that the Upper Tribunal found that in most cases, the new Rules established an “**exceptionality threshold**” (my emphasis) for the public interest to be outweighed [42] – [45].
10. **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** See headnote:

“On the current state of the authorities:

- (a) *the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in **R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin)** said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;*
- (b) *after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not*

sufficiently recognised under them: **R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);**

- (c) the term “insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount: **MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new Rules) [2013] UKUT 00045 (IAC);** they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: **Nagre.**

The Secretary of State addressed the Article 8 family aspects of the respondent’s position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the guidance. Thus the judge should have considered the Secretary of State’s conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for him for Article 8 purposes to go on to consider whether there were **compelling circumstances** (my emphasis) not sufficiently recognised under the Rules.”

11. **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)**

- “(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
- (ii) “Maintenance of effective immigration control” whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of “prevention of disorder or crime” or an aspect of “economic wellbeing of the country” or both.
- (iii) “[P]revention of disorder or crime” is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.
- (iv) **MF (Nigeria) [2013] EWCA Civ 1192** held that the new Immigration Rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
- (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
- (vi) Where an area of the rules does not have such an express mechanism, the approach in **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)** ([29]-[31] in particular) and **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good

*grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are **compelling circumstances** (my emphasis) not sufficiently recognised under them."*

12. Article 8 of ECHR states:

- (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (ii) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13. In **Razgar [2004] UKHL 27** Lord Bingham gave guidance at paragraph 17 as to the correct approach when dealing with Article 8 as follows:

"In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must consider:

- (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
- (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (iii) If so, is such interference in accordance with the law?
- (iv) If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others?
- (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

14. The Court of Appeal has stated in a number of cases that the threshold for establishing an interference with private or family life is not high. In **AG (Eritrea) [2007] EWCA Civ 801**, Sedley LJ said at paragraph 28:

".....while an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement (the 'minimum level') is not a specially high one. Once the Article is engaged, the focus moves as Lord Bingham's remaining questions indicate, to the process of justification under Article 8(2). It is this which, in all cases which engage Article 8(1), will determine whether there has been a breach of the Article."

15. In many cases the issue of substance will be the proportionality of the decision. The Court of Appeal has emphasised on a number of occasions that the assessment of proportionality must be properly and adequately reasoned. **DM (Zambia) [2009] EWCA Civ 474**.
16. In **MM (Zimbabwe) [2009] UKAIT 00037**, the Tribunal summarised the higher courts indication of the process that the Tribunal must undertake in making the proportionality assessment.
17. In applying Article 8 **Beoku-Betts [2008] UKHL 39** provides that it is not just the applicant's family (or private) life that needs to be taken into consideration but that of his family members too.
18. A number of cases have considered how to approach the best interests of children, **LD (Article 8 - best interests of child) Zimbabwe [2010] UKUT 278 (IAC)**, **ZH (Tanzania) [2011] UKSC 4**, **Omotunde (Best Interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247 (IAC)**, **E-A (Article 8 - Best Interests of Child) Nigeria [2011] UKUT 00315 (IAC)**. The appropriate principles were paraphrased at [10] of **Zoumbas [2013] UKSC 74**:

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

19. In **Huang [2007] UKHL 11** the House of Lords confirmed that the ECHR confers no rights for individuals or families to choose where they prefer to live and that in most cases where the applicant complains of a violation of Article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of Article 8, the critical question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Their lordships said that a judgment on proportionality:

“....must always involve the striking of a fair balance between the rights of an individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of interference will call for careful assessment at this stage.”

20. In **VW [2009] EWCA Civ 5** the Court of Appeal held that in assessing proportionality and whether an appellant's family should return to his country of origin with him, the test is not whether there are insurmountable obstacles to prevent their going but whether it is reasonable to expect them to go. If there are insurmountable obstacles, they will succeed but if there are not, they will not necessarily fail.
21. Ms Holmes helpfully conceded that the appellants' circumstances reached the “compelling” and/or “extraordinary” requirement I have set out above at [9]-[11] above, such that she invited me to move on to carry out an Article 8 proportionality assessment. Mr Rendle confirmed that he was not pursuing what was described as the appellants' subjective fear of kidnap on return because of their Christian faith.
22. Ms Holmes did not dispute that neither of the appellants' parents were in the United Kingdom, that their current whereabouts and the whereabouts of Aunt Victoria (see below [23] were unknown.
23. It is not disputed that the appellants came to the United Kingdom in December of 2006 with their mother. They went first to London and then to Kent where their mother left them in the care of their aunt, Victoria Ngozi Okocha who in turn, in April 2011, left the appellants in the care of Sarah and Alan Bass.
24. None of the appellants' considerable achievements as found by the judge, during the almost eight years they have been in the United Kingdom are in dispute. The judge found as I do, that they have both excelled in terms of their educational achievements, sporting activities and conduct. There are glowing references for both appellants from Medway Council officers, Mrs Bass, their schools and others with whom they have come into contact. They have clearly been well integrated in their local community.

25. Paul Witchalls and Ryan Thompson, both Social Workers, have been looking after Michael and Stephen respectively. As regards Michael, Mr Witchalls had this to say in his report dated 2 June 2014:

"Michael has lived with "relatives and friends" foster carers, Sarah and Alan Bass at 132 Princes Avenue, Walderslade, Chatham, Kent ME6 8AJ since 02 April 2011.

Michael is 15 years old and relies upon the support he receives from Sarah and Alan Bass and Medway Social Services to provide for all his developmental needs.

He is currently in full-time education at Greenacre School, Walderslade, where he is currently achieving at high A Level which can be attributed to the overall support that he receives from Sarah and Alan Bass.

Michael would not be able to support himself financially apart from his foster carers or manage to excel at the level he has and continue in his development into a positive focused young man with the aspirations that he currently holds.

His older brother, Stephen Okoh, is not in a position to take charge of his younger brother's care as he too relies upon the financial, emotional and developmental support that he receives from Sarah Bass and Social Services.

Michael has no other family members in the UK from whom he could receive care and support.

Michael does not know of any family members in Nigeria, and would not be in a position to make contact with them for them to provide the support that Michael needs. Stephen is also in the same position."

26. As regards Stephen Okoh, Ryan Thompson had this to say in a letter attached to his statement dated 3 June 2014:

"I have been working with Stephen since approximately December 2012, following his 18th birthday when he ceased to be a looked after child. Stephen is now a care leaver (former relevant) and is therefore entitled to leaving care services, mainly consisting of advice and guidance. Stephen resides in a supported lodgings environment which is funded by the Leaving Care Team (Social Services).

Stephen has always been extremely focused on his football career, which potentially could see him turn professional. Should Stephen be granted leave to remain he will be able to sign a semi pro contract. Stephen is a very motivated young man who strives success. Stephen has gained excellent results through the Wrotham Schools Football Academy, including a distinction for BTEC Sport. Most recently Stephen applied for a Level 3 Engineering qualification at a local college but unfortunately due to his immigration status Stephen was not guaranteed funding therefore could not continue with his studies. Despite this disruption and the uncertainty around his immigration status Stephen has remained busy, focussed and polite to all those I have observed him having contact with.

Stephen is still engaging with support from Medway Youth Trust despite the fact he is unable to make applications until a decision has been made on his immigration status. He is actively looking at apprenticeships as well as attending regular training for two football clubs as well as exercising in the gym several times a week. It is very refreshing to have worked with young male like Stephen. Stephen is a law abiding citizen who not only works hard to achieve his goals on the football pitch, but academically too. Through no fault of his own Stephen has been left in this country by his family with no clear understanding of their whereabouts. As a result Stephen became looked after by the local authority.

In my professional opinion Stephen is very able on many levels. However, I also believe that he has little life experience and the trauma of being left by his care givers is a factor that continues to impact upon his emotional wellbeing. This requires a level of support currently being offered by the Leaving Team and its colleagues in the Medway area. Stephen also responds well to the emotional support offered by his current accommodation provider. Without this input I feel Stephen could quickly lose focus. Stephen has no experience of living independently, nor is he prepared or equipped to provide the level of support that his younger sibling, who is currently looked after, would require.

As both Stephen and his brother potentially face being returned to Nigeria, they would, in my professional opinion, still require the level of support they receive in the UK, which I do not believe he would be able to access. Without this, and the potential of Stephen being the responsible adult for his younger brother, I would be greatly concerned for their future, given the progress Stephen has made in the UK, achieved partly by his own motivation but with advice and guidance from others also.

My future role with Stephen, along with the assistance from his current accommodation providers is to prepare Stephen for independence."

27. Clearly, the respondent's decision interferes with the appellants' rights to family and private life and is lawful and legitimate in terms of the exercise of immigration control. The issue must be the proportionality of the decision with regard to the appellants' own particular circumstances.
28. Ms Holmes did not suggest that I should treat the appellants individually. I find I must treat the appellants as a family unit rather than individuals who could be potentially divided, for example by Stephen, now an adult being returned to Nigeria and Michael remaining here. I find they enjoy family life together within the household of Mr and Mrs Bass. They have never lived apart. Their lives are emotionally and physically inter-dependant.
29. Ms Holmes asked me to find that the appellants had not been as she put it, "entirely transparent" regarding their circumstances. There was a third brother Henry who Ms Holmes claimed was mentioned for the first time before me, although I find that he was referred to as being the son of Aunt Victoria in the refusal letter dated 26 June 2013. The evidence before me was that Henry is the older brother of the appellants,

the implication being that he is a full sibling of the same parents although his parentage was not explored in terms of what was said in the refusal.

30. Mrs Bass was clear that she would have liked to have been in touch with Henry on behalf of the appellants, however, save that she understood he had UK residence and had fathered a son, she knew nothing of him and did not know his whereabouts.
31. Ms Holmes asked me to find that the appellants remembered more of Nigeria than they were prepared to admit such that their circumstances were not so cut and dried as they wanted me to believe. Notwithstanding Ms Holmes submissions, no contradictions or inconsistencies emerged from the oral evidence before me.
32. It might be that the appellants have chosen to emphasise their lack of family and cultural ties to Nigeria because they hope to obtain status here. If that was true then it would have a bearing upon my view as to whether it was proportionate for the appellants to return to Nigeria. As it is, I found the appellants credible witnesses and their account was corroborated by not only Mrs Bass but also by the statement of Mr Witchalls. Mr Thompson was of the view that if returned to Nigeria, the appellants would still require there the level of support received in the United Kingdom and there was no suggestion from Ms Holmes that such support would be forthcoming. The view of Mr Thompson was that Stephen's life experiences had been such that there had been an adverse effect upon his emotional wellbeing and that without the continued support he receives here, he would suffer an emotional decline. Mr Thompson said that although he has been working with Stephen for approximately eighteen months, he still would not open up to him. Mr Thompson's view was that he might well need counselling and that for the moment, he was not ready to live independently of the support system that has been established here. Ms Holmes told me that she did not take issue with the views of the social workers nor did she seek to persuade me to go behind their reports.
33. If they were both to be returned, then they would be going back to a country which they left almost eight years ago, Stephen being at that time roughly 12 years of age or thereabouts and Michael being roughly 7 years of age or thereabouts. There have been great developments in their young lives in the meantime and they have grasped their opportunities here. See [24] above. Over the time they have been here they have adopted the cultural norms appropriate to their age and circumstances in the United Kingdom. They have no relatives or contacts in Nigeria. They would be returning to a country with which they are unfamiliar, notwithstanding that they are Nigerian nationals and have been living with Mrs Bass who is of Nigerian extraction, although she has lived here for 32 years. They speak no native Nigerian languages, only English. Stephen told me that he did not know the name of the town they lived in and only had a vague idea of the name of the State. Michael had less knowledge than his brother. All they could remember was that they lived in a compound with their mother and Henry and went to school locally. Their mother worked to support them. They might have had a maid.

34. I find their outcome on return to Nigeria would be unpredictable given that there would be no support, accommodation or means by which they could survive financially; neither of them have worked in the United Kingdom, such that they have no experience of earning a living. Ms Holmes did not suggest that there would be support facilities available in Nigeria in terms of accommodation and financial maintenance. I speculate that Stephen could eventually secure employment to support and accommodate them both, but their conditions would be precarious in the meantime.
35. Michael is still a child. Stephen is a young adult who I find to be vulnerable, as I accept Mr Thompson's evidence in that regard. See [26] above. I consider the best interests of Michael in terms of the case law I have set out at [18] above. At present he has a settled life with Stephen in the home of Mr and Mrs Bass. There is no expectation that the present arrangement should change in the near future. Clearly the appellants will form a separate life of their own at some stage but that is not anticipated at the moment. In removing the appellants to Nigeria, they will be taken from a secure, caring home to an unknown and potentially threatening future. In such circumstances I find that it is in the best interests of Michael and indeed for Stephen too, although he is an adult, to remain with Mr and Mrs Bass until they reach the requisite maturity to make their own way in the United Kingdom.
36. I find it is not reasonable to expect the appellants to relocate to Nigeria, only because they spent the first years of their lives there; there is no other link. I find the personal and cultural roots they have put down here should take precedence over their past lives in Nigeria.
37. For all of these reasons, I find that removal of either appellant would amount to a disproportionate interference with their right to family and private life. I remake the decision of the First-tier Tribunal by allowing the appeal.

Decision

38. The appeal is allowed on human rights grounds – Article 8.
39. No anonymity direction is made.

Signed

Date 3 June 2014

Deputy Upper Tribunal Judge Peart