



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/44287/2013**

Appeal Number:

IA/46964/2013

THE IMMIGRATION ACTS

Heard at: Manchester

Determination

Promulgated

On: 7th July 2014

On 21st July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

**Dominic Itodo + 3
David Oche Itodo
(no anonymity order made)**

Respondents

For the Appellant: Ms Johnstone, Senior Home Office Presenting Officer
For the Respondents: Mr Ceesay, IAS Manchester

DETERMINATION AND REASONS

1. The Respondents are all nationals of Nigeria. The first Respondent was born on the 27th May 1967 and he is the father of the second Respondent born on the 30th March 2004. The three dependents to his appeal are his wife and other two children. On the 20th March 2014 the First-tier Tribunal (Judge VA Lowe) allowed their linked appeals against the Secretary of State's decision to refuse to vary their leave to remain and to remove them from the United Kingdom pursuant to s47 of the Immigration, Asylum and Nationality Act

2006. The Secretary of State now has permission to appeal against the decision.

2. The First Respondent had been in the UK since 2008 with valid leave, his family having joined him in 2009. He had come here as a student. He was already a qualified doctor, having graduated in medicine in Nigeria. He is not however able to practice in the UK, furthering his career and gaining clinical experience, until he has passed his PLAB exams. He has been pursuing this, and in 2011 was awarded an MPhil from the University of Manchester in Clinical Neuroscience. He had, at some point prior to the completion of that degree, been refused an extension of his leave to remain and had successfully appealed this decision on human rights grounds. The determination of the First-tier Tribunal in that appeal (by Judge Simpson) had found the removal of the family to be a disproportionate interference with their private lives, having particular regard to the fact that the First Respondent was part way through his PLABS, he had invested a considerable amount of money in his education here, he and his wife were both working and contributing to the economy, their children were settled here and it would be contrary to their best interests to remove them. The Secretary of State accordingly granted further leave to remain, valid until the 16th August 2013.
3. The family then made a further application for leave to remain that is the subject of the appeal before me. The applications were refused with reference to Appendix FM and paragraph 276ADE of the Rules. None of those provisions availed this family. Their submission was that they should be given a grant of further leave outside of the rules *inter alia* to enable the First Respondent to complete his PLABS. The Secretary of State was not however satisfied that there were any exceptional circumstances and rejected the applications.
4. On appeal the Respondents gave numerous reasons why they did not want to return to Nigeria at present. Apart from the private life arguments surrounding the First Respondent's education and career in the UK (in which respect they relied heavily on the earlier determination of Judge Simpson), there was the on-going inter-religious violence in their native northern Nigeria, the evidence that the children were very unsettled and afraid of returning to their home town because of Boko Haram, and that they were settled at school. It was submitted that it would in all the circumstances be contrary to their best interests for them to leave the UK at the moment. There was a considerable amount of country background evidence submitted, relied upon because the family are from Kaduna and the First Respondent is a church leader.
5. The determination sets out the evidence with great care. It was accepted by the Respondents that they met neither the provisions of Appendix FM nor paragraph 276ADE. This application had always been for 'leave outside of the rules' because the rules contained no provision that addressed their particular situation. The First-tier Tribunal nevertheless dealt in detail (at

paragraphs 20-22) with why the Respondents did not qualify under any of the 'Article 8' provisions in the Rules. Having done so Judge Lowe states "I also note that the reference to discretionary leave outside the immigration rules where warranted by family and/or private life is a tacit acceptance by the decision-maker that there are some circumstances where Appendix FM and para 276ADE do not cover all the eventualities envisaged by Article 8". Finding that Article 8 still has "a role to play", the determination goes on to consider it outside of the Rules and in line with the approach advocated by Lord Bingham in Razgar [2004] UKHL 27.

6. The determination sets out the legitimate Article 8(2) aims that the Secretary of State pursues in making the decision and acknowledges the weight to be attached to the Secretary of State's right to control our borders. It goes on to discuss the scope of the Tribunal's power to review, the authorities of Izuazu, Nagre, and Gulshan and the "two part test" suggested by the latter two. Having done that the determination goes on to identify a number of factors which taken cumulatively, amount to "arguable good grounds" to look at Article 8 (paragraph 30) and ultimately to render the decision disproportionate (paragraphs 31-34). These are i) that the couple have always had lawful leave to remain and may have been badly advised about what applications to make because it seems that they may have qualified for leave under a different points-based system category, ii) that the Secretary of State paid inadequate regard to the First Respondent's largely self-funded medical research at two UK universities and his research contract with the NHS, iii) the fact that both adults were working in the NHS and contributing in tax payments, iv) that the family are well integrated into their community, that v) Judge Simpson had found removal to be contrary to the children's best interests and that it would be disproportionate to remove them. In respect of that last matter Judge Lowe noted that the family's private life had only grown "stronger and deeper" in the three years since Judge Simpson's decision. In conclusion Judge Lowe found there to be "genuinely exceptional circumstances" and that there would be "unjustifiably harsh consequences for the family concerned". He allowed the appeal on Article 8 grounds.
7. The Secretary of State now appeals on the grounds that Judge Lowe failed to clearly identify why there were "arguable good grounds" to go on to examine Razgar Article 8 per Gulshan.

Error of Law

8. The grounds of appeal are entirely without merit and amount to no more than a disagreement with the findings made by Judge Lowe. This determination clearly identified the relevant case-law and the Judge directed himself to give careful consideration to the evidence. He was clearly aware of the Secretary of State's view about the weight to be attached to the Rules, and that the number of cases that were likely to succeed outside of the Rules would be small in number.

9. I note that the grounds of appeal take no issue with the actual proportionality balancing exercise. It is in these circumstances nonsensical to challenge the decision on the basis that some additional hurdle was not surmounted first. The guidance in Nagre and Gulshan does not in fact introduce an additional hurdle. There is no “two stage test”. All these decisions say is that where there is no arguably good case *it is not necessary* to go to on conduct a full Razgar proportionality assessment. They do not introduce any prohibition to so doing. They underline the very great weight to be attached to the Secretary of State’s view about where the balance should be struck. Judge Lowe has done that in the course of a perfectly reasonable proportionality assessment as well as in assessing, as he in fact does at paragraph 30, whether there is “an arguable good case”.
10. The determination contains no error of law.

Decisions

11. The decision of the First-tier Tribunal contains no error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
17th July 2014

Post-Script

This is the written determination of my oral decision delivered in court on the 7th July. Since the hearing my decision has been fortified by the decision in MM and Ors v SSHD [2014] EWCA Civ 985 at paras 127 - 134 where Aikens LJ holds that there is no utility in imposing the “further, intermediary test” thought to have been introduced by Nagre and Gulshan.