



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/45441/2013

THE IMMIGRATION ACTS

Heard at Bradford  
On 10<sup>th</sup> July 2014

Determination Promulgated  
On 15<sup>th</sup> July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ADEYINKA AYODIJI AKINSANYA  
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mr M Diwyncz, Home Office Presenting Officer  
For the Respondent: Miss A Soloman, Legal Representative

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Cox) to allow the appeal against her decision to refuse the respondent's application for leave to remain, outside the Immigration Rules on the basis of his private and family life in the United Kingdom.

2. It will be convenient to refer to the parties according to their status in the First-tier Tribunal. I shall therefore refer to Mr Akinsany as 'the appellant' and to the Secretary of State as 'the respondent'.

*The decision of the First-tier Tribunal*

3. Before turning to consider the grounds of appeal in detail, it is first necessary to provide an overview of the Tribunal's determination of the appeal. The Tribunal began by considering whether the appellant met the requirements, under paragraph 276ADE of the Immigration Rules, for leave to remain on the basis of his private life in the United Kingdom [paragraphs 27 to 36]. Having done so, it concluded that the appellant was unable to meet the alternative requirements of at least 20 years' continuous residence in the United Kingdom or lack of ties (including social, cultural and family ties) to Nigeria. The Tribunal then considered the matter outside the Immigration Rules. Before doing so, it reminded itself of precisely the same passage in the determination of Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 that is quoted by the respondent in the grounds of appeal:

... 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

The Tribunal thereafter proceeded to consider a number of factors which it considered relevant to the proportionality of the appellant's removal for the purposes of its assessment under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. These factors included the appellant's "particularly close relationship with his mother" with whom he had lived for most of his life [paragraph 42], his membership of "a close-knit family" upon whom he was both economically and emotionally dependant [paragraph 43], and his private life in the UK "through his association with the local church and his charity work" [paragraph 44]. The Tribunal reminded itself of a passage in the judgement of Patel and others, in which it was said that sympathy for graduates who have been studying in the UK for some time cannot by itself provide a ground of appeal under Article 8 [paragraph 52]. The Tribunal distinguished the facts of that case on the basis of factors that it considered relevant to this appeal, which I have previously summarised [paragraph 52]. It thereafter concluded that it would be impossible for the appellant to "replicate" the private and family life he had in the United Kingdom in Nigeria. This was notwithstanding the availability of "modern forms of communication" for maintaining contact with family members in the United Kingdom [paragraphs 53 and 54].

*The rival arguments*

4. At the hearing before me, Mr Diwnyncz said that he wished simply to rely upon the written grounds of appeal. These may be summarised as follows. Firstly, it is said that

the Tribunal ‘misinterpreted’ and/or ‘failed to adopt’ and/or ‘misapplied’ the guidance given in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640. Secondly, even if the Tribunal could be said to have adopted the correct approach, it nonetheless took account of factors that were “fundamentally normal” and which did not therefore “amount to compelling circumstances”. Thirdly, whilst the Tribunal had referred to the ‘close bond’ that the appellant enjoys with his family members in the United Kingdom, it had not established how this bond amounted to more than normal emotional ties, “beyond giving limited reference to emotional and financial support”. Fourthly, the respondent contends that both the financial and emotional support afforded to the appellant by his family members in the United Kingdom can continue from Nigeria, whilst he is simultaneously strengthening his familial ties to relatives in Nigeria. Fifthly, it is said that the Tribunal misunderstood the judgement in Patel and others v SSHD [2013] UKSC 72, as explained in Nasim and other (Article 8) Pakistan [2014] UKUT 00025.

5. In summary, Mrs Soloman submitted that the Tribunal had directed itself appropriately and reached conclusions that were reasonably open to it on the evidence.

*Legal analysis*

6. There is no doubt that the Tribunal formally adopted the two-stage approach to the Article 8 assessment that was posited by the Tribunal in Gulshan. The respondent’s criticism is founded entirely upon the Tribunal’s consideration of the appeal at the second stage of that analysis. Thus, the charge that the Tribunal ‘misinterpreted’ and/or ‘failed to adopt’ and/or ‘misapplied’ the guidance in Gulshan is ultimately dependent upon what is meant by the phrase “compelling circumstances not sufficiently recognised under [the Rules]”; in particular, the words “compelling” and “sufficiently”.
7. It is important to note that the phrase “compelling circumstances” is not a term of art. There is thus bound to be an element of subjectivity in the assessment of those circumstances that may be appropriately characterised as “compelling”, as opposed to those which may be considered (to use the respondent’s phrase in this appeal) “fundamentally normal”.
8. The test in Gushan also contemplates the possibility that the circumstances in question may have received a degree of recognition under the Rules, but that the recognition in question may be ‘insufficient’.
9. However, whatever the precise meaning of the test for consideration outside the Rules may be, Gulshan undoubtedly serves to remind judges of the considerable weight that the new Rules attach to the public interest, and also that appeals ought not to be routinely allowed outside the Immigration Rules on the basis that the appellant’s removal would be incompatible with Article 8 of the 1950 European Convention for the

Protection of Human Rights and Fundamental Freedoms. This was expressly recognised by the First-tier Tribunal at paragraph 39 of its determination:

However, in my view, the Tribunal in Gulshan, is not suggesting that I do not consider an article 8 appeal, but is instead reminding judges of the weight to be attached to the rules, when assessing proportionality and that many human rights appeal can probably be considered on a cursory basis”.

10. I therefore conclude that a given set of circumstances may in principle lead to differing but equally reasonable views as to whether they are ‘compelling’, or ‘insufficiently recognised by the new Rules’. It is thus unhelpful to characterise a particular set of circumstances as “fundamentally normal” because that judgement will be ultimately dependent upon a subjective view of ‘normality’.

### *Conclusion*

11. I remind myself that what I have to consider, at this stage, is whether the Tribunal made an error of law in finding that there were compelling circumstances in this appeal that were insufficiently recognised under the new Rules. I consider that I am only entitled to conclude that it did so if its decision fell outside the band of reasonable conclusions that were open to the Tribunal on the facts as it found them. It follows from this that I am not entitled to find that it made an error of law merely because I may have reached a different conclusion upon those facts.
12. I note that the Tribunal specifically found that the appellant was financially dependent upon family members in the United Kingdom. The Tribunal did not, as is suggested by the grounds of appeal, make a “limited reference” to that dependency. On the contrary, it stated, at paragraph 16, that the appellant’s mother gave him between £200 and £300 a month, that his brother gave him a further £100 a month, and that his sister “will also help him out when he needs it”. Questions of whether that dependency was one of choice or of necessity, and whether (in either event) it could be maintained following the appellant’s return to Nigeria, would in my view only arise for consideration if I was called upon to remake the decision following a finding that there had been a material error of law. In other words, they cannot inform my decision as to whether there was such an error in the first place. In short, these are arguments that either were or should have been made at the hearing before the First-tier Tribunal. Finally, I note that the grounds of appeal do not specify in what manner the Tribunal is alleged to have “misunderstood” the judgements in Patel and Nasim, but it seems to me that its reference to a passage in the judgement of the former decision was intended simply to emphasise the fact that it had not allowed considerations of sympathy for the appellant to cloud its judgement in the overall assessment of the appellant’s private and family life.
13. Looking at the matter overall, I am satisfied that the Tribunal’s conclusion that there were compelling circumstances in this appeal that were insufficiently recognised

under the Immigration Rules is not one that falls beyond the range of reasonable conclusions that was open to it upon the facts as it found them. Thus, whilst that conclusion may not have been one that I would have reached, I am nevertheless satisfied that the Tribunal did not make an error of law in deciding that the appellant's removal would be incompatible with his right to respect for private and family life under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

*Decision*

14. The appeal is dismissed.

Anonymity not directed.

Signed

Date

Deputy Judge of the Upper Tribunal