



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

Appeal Number: IA/02754/2014

THE IMMIGRATION ACTS

**Heard at: Manchester
On: 4th November 2014**

**Decision Promulgated
On: 22nd January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

**Adesewa Ifeoluwa Adebisi
(no anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Charles, Leslie Charles Solicitors

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria date of birth 25th September 1994. She appeals with permission¹ the decision of the First-tier Tribunal (Designated Judge Baird) to dismiss her appeal against the Respondent's decision to remove her from the United Kingdom. The Respondent's decision followed rejection of the Appellant's application for leave to remain in the UK on the basis of her long residence and Article 8 rights.

¹ Permission granted on the 3rd October 2014 by Designated First-tier Tribunal Judge French

2. The Appellant had made her original application on the 2nd March 2012. She completed a FLR(O) and asserted that her removal from the UK would be a disproportionate interference with her private life. She claimed that she came to the UK aged 10 and that she had been here ever since.
3. On the 8th August 2012 the Respondent rejected the application and certified it as clearly unfounded. There was therefore no right of appeal to the Tribunal. Judicial review proceedings were launched and were eventually settled by consent, the Respondent agreeing to withdraw the certification, to give substantive consideration to the application and if a fresh decision was made, to make it one that attracted a right of appeal.
4. The Appellant issued a refusal letter on the 12th December 2013. It gave consideration to paragraph 276ADE, to Appendix FM and to whether there were any “exceptional circumstances” warranting leave to remain outside of the Rules.
5. The matter came before the First-tier Tribunal. The determination first addresses paragraph 276ADE. It is noted that the date of application was March 2012 so to establish 7 years residence at that point the Appellant would need to show that she had been in the UK since March 2005. There was no evidence to show that she had arrived in the UK in March 2005. By her own account she arrived in July 2005 and the only supporting evidence started at that point. She could not therefore succeed with reference to 276ADE(1)(iv). By the date of the appeal the Appellant was an adult and in light of this the determination goes on to address 276ADE(1)(vi). It is found that the Appellant had not shown herself to have “no ties” to Nigeria. The appeal is therefore dismissed with reference to the Rules. At paragraph 25 the Tribunal refers to Gulshan (Article 8- new rules correct approach) [2013] UKUT 640 (IAC). The determination then goes on to set out some of the factors in the case, including a finding that the Appellant cannot have been unaware that she had no status in the UK. The determination concludes with the following: “I find there are no exceptional or compelling circumstances that render her removal disproportionate” (at paragraph 27).
6. The grounds are not clearly set out and in many places amount to a disagreement with the First-tier Tribunal but as far as I can tell the Appellant applied for permission to appeal on the following grounds:
 - a) The Judge erred in fact when she found there was no evidence that the Appellant had been here since July 2005;
 - b) It was irrational and unfair to hold against a child the fact that she had no leave;

- c) That the finding that the Appellant has ties to Nigeria was not based on the evidence.
7. Permission was granted on the 7th August 2014 by Designated Judge Shaerf. He was not impressed with much of the argument in the grounds. He did however grant permission in the following terms:
- “[the determination] was promulgated on 9 July, a month after the hearing. However on 7 July the Court of Appeal handed down its judgement following a hearing on 4 and 5 March of the appeal in The Queen (oao MM and Ors) v SSHD [2014] EWCA Civ 985. At paragraphs 128-134 the Court found the judgement in The Queen (oao Nagre) v SSHD [2013] EWHC 720 (Admin) added nothing to the Article 8 debate and re-asserted the existing jurisprudence flowing from Huang v SSHD [2007] UKHL 11. The effect was to find what has become known as the ‘Gulshan gateway’ has no application. In her treatment of the claim under Article 8 of the European Convention outside the Immigration Rules, the Judge relied on the ‘Gulshan gateway’ test and so did not address the Article 8 claim outside the Immigration Rules”.
8. Before me Mr Harrison adopted the permission grant of Judge Shaerf and conceded that the ‘Gulshan gateway’ had been disapproved in MM. He agreed that in this case the Judge’s approach to Article 8 ‘outside of the rules’ had clearly been taken with Gulshan, and the Appellant’s failure under the Rules, in mind. He pointed out that this was of particular significance in this case since the Appellant had made her application before the new rules, which seek to codify Article 8 within the Rules, had even been introduced. He agreed with Mr Charles that in fact the Respondent, and the Tribunal, should simply have approached this application as one made ‘outside of the rules’ to which the new rules, in whatever form, had no direct application. This was a ‘Huang/Razgar’ Article 8 assessment. The only relevance of the Rules as presently drafted was to offer a guide as to where the Respondent considers the balance to be struck. The parties therefore unanimously invited me to find an error of law in the determination of the First-tier Tribunal (per Judge Shaerf’s grant of permission) and to remake the appeal by allowing it as ‘not in accordance with the law’.
9. I myself am not so confident that the First-tier Tribunal did apply the ‘Gulshan gateway’. Although the relevant part of that case is cited it is not clear that Judge Baird *did* decline to consider Article 8 ‘outwith the Rules’. It is at least arguable that paragraphs 26 and 27 are an Article 8 consideration. I accept however that if it is an Article 8 consideration it was perhaps excessively coloured by the Appellant’s failure to meet the new rules. In light of the concession of Mr Harrison I therefore find there to be an error of law as identified by Judge Shaerf and set the decision aside.

10. The grounds in addition take issue with some of the findings of Judge Baird. There is no merit in the ground that there was some error in finding there to be no evidence of residence from July 2005. That is because that is not what the determination even says. The determination expressly acknowledges that there *is* evidence from that period: the sentence at the end of paragraph 19 refers to March 2005. Nor is there any merit in the ground that the Judge acted unfairly in finding that the Appellant must have known about her lack of status. That the Appellant was a minor for much of that period was clearly very much in her mind: “I have given a great deal of thought to the fact that it was not the Appellant’s decision to come here and build a private life but that does not outweigh the facts looked at in the round”.
11. I therefore set the decision aside and remake it by allowing the appeal as ‘not in accordance with the law’. I do so in light of Mr Harrison’s express concession that the Respondent’s decision should simply have addressed Article 8. Whether or not that concession is correctly made, I note that as of today’s date the Appellant is now aged between 18 and 25 years and has spent at least half of her life living in the UK. She *prima facie* qualifies for leave to remain under paragraph 276ADE (1)(v). No doubt this is something which the Respondent will wish to consider when re-evaluating this *Razgar* Article 8 application.
12. My apologies for the delay in promulgating this decision.

Decisions

13. The determination of the First-tier Tribunal does contain an error of law and it is set aside.
14. The decision is re-made as follows: “the decision is not in accordance with the law and the appeal is allowed on that limited basis”.

Deputy Upper Tribunal Judge Bruce
17th January 2015