



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

**Appeal Number: VA/06587/2014  
VA/06588/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 October 2015**

**Decision & Reasons Promulgated  
On 6 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**E M O U  
P I I U**

**(ANONYMITY DIRECTION MADE)**

Respondents

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer  
For the Respondent: Mrs CO (appellants' mother)

**DECISION AND REASONS**

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants because of their young ages.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Khawar, promulgated on 25 June 2015. Which allowed the Appellants' appeals on article 8 ECHR grounds.

### Background

3. The first appellant was born on 9 May 2001 the second appellant is his sister. She was born on 1<sup>st</sup> February 2000. Both appellants are nationals of Nigeria.

4. On 17 September 2014 an Entry Clearance Officer refused the Appellants' applications to visit their mother in the UK for two weeks.

### The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Khawar ("the Judge") allowed the appeals against the Respondent's decisions on article 8 ECHR grounds.

6. Grounds of appeal were lodged and on 17 September 2015 Judge Cox gave permission to appeal stating

"I am not sure how carefully the author of the grounds has read the judge's decision. The Judge in fact did not really get to the fifth Razgar question of proportionality because he stopped at question three, finding that R's decision was not in accordance with the law. He gives reasons for that at [17] and [18], reasons that look very much like a rejection of the decision on the merits basis. Arguably, if he was going to look at the merits, the place to do so was in the proportionality assessment. Interestingly, I note from [19] that he says in terms "consequently I would be bound to rule in favour of the respondent on the issue of proportionality, the fifth and final question in Razgar.

4. Thus I feel bound to conclude that the Judge may arguably have materially misdirected himself in law, albeit on a somewhat different basis from that put forward in the grounds."

### The Hearing

7. For the respondent Ms Everett told me that the decision contains material errors of law. She took me straight to the final sentence of [19], which says "*consequently I would be bound to rule in favour of the respondent on the issue of proportionality, the fifth and final question in Razgar*". Ms Everett told me that, on the findings of fact made by the Judge, allowing the appeal was perverse; that there was no basis on which the appeal should have been allowed which is supported by the Judge's findings. She asked me to set the decision aside.

8. Mrs O was clearly nervous so I discussed with her [16] to [19] of the decision. I told her that I understood that she had come to tell me that there

was no material error of law in the decision and that she wants me to dismiss the appeal and allow the decision to stand. Mrs O told me that she deeply disagreed with the entry clearance officer's decision, because it stood in the way of regular contact to the appellants, who are in the early to mid-teens. She reminded me that both of the appellants have a good immigration history and told me that periodic brief visits to the UK was essential to the preservation and growth of her relationship with the appellants. She is in regular telephone contact with them but, given the ages and needs of the appellants there is no substitute for direct contact between mother and child.

### Analysis

9. The respondent's focus in the last sentence of [19] of the decision is misplaced. As is pointed out in the grounds of appeal, the decision in this case was not taken on the question of proportionality. It is at [17] and [18] that the Judge comes to the conclusion that the respondent's decision is not in accordance with the law. He does so by considering the facts and circumstances of the appellants' cases and comparing those facts and circumstances to the reasoning behind the respondent's decisions. Having completed that exercise, the Judge finds that the respondent's decisions are not in accordance with the law by reference to irrationality.

10. It is not surprising that the respondent does not challenge the Judge's findings at [17] and [18]. It is not surprising that the grounds of appeal do not seek to challenge the finding that the decision is not in accordance with the law. It is to Ms Everett's credit that she did not seek to argue that the third Razgar question should have been answered in the affirmative. However, the Judge should have gone on to either remit the matter to the respondent so that a decision which is in accordance with the law could be made or he should have considered the immigration rules and substituted his decision. He did neither. The incomplete assessment carried out by the judge amounts to a material error of law.

11. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) it was held that in appeals against refusal of entry clearance under Article, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. At paragraph 9 it was said that where the ground of appeal is limited to human rights " *Clearly there can be no question of entertaining an appeal on grounds alleging that the decision was not in accordance with the law or the immigration rules. These are not permissible grounds. However if ...the claimant has shown that refusing him entry ... does interfere with his ...family life then it will be necessary to assess the evidence to see if the claimant meets the substance of the rules. This is because... the ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance*". At paragraph 23 the Upper Tribunal said "*We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the*

*Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control. However it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case".*

12. In Adjei (visit visas - Article 8) [2015] UKUT 0261 (IAC) it was held that (i) The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition; (ii) As compliance with para 41 of HC 395 is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant. If the appellant were to make a fresh application for entry clearance the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41.

13. There is no criticism of the Judge's finding that the respondent's decision is not in accordance with the law. There is no criticism of his fact-finding nor of his self-direction. Ms Everett was correct to highlight the last sentence of 19. Whilst the Judge's findings up until that point are sustainable I cannot uphold his finding that the proportionality assessment would favour the respondent, because the proportionality exercise has not in reality been carried out.

14. The decision is tainted by a material error of law, because, having found that the decision is not in accordance with the law, the Judge neither remitted the case to the respondent for a decision to be made in accordance with the law, nor made his own decision after considering the Immigration Rules. I therefore find that the Judge's determination cannot stand and must be set aside.

15. Although I set aside the decision promulgated on 25 June 2015, I preserve the Judge's findings of fact and proceed to remake the decision myself on the basis of those findings of fact.

16. The facts of this case are that the appellants are the teenage children of Mrs O, a British citizen who lives in the UK. They live with their maternal grandmother in Nigeria. Their parents have divorced; their father continues to live in Nigeria and has regular supervised contact with them. The appellant's

mother is a victim of domestic violence. She last visited Nigeria in September 2014, when she was so scared of her ex-husband and his family that she only left her mother's home on three occasions throughout her visit, and on each of those occasions she was escorted.

17. I am satisfied from a combination of the Judge's findings of fact and the documentary evidence available to me that the appellants fulfil the requirements of paragraphs 41 to 43 of the immigration rules. The respondent relied on paragraph 41(i) & 41(ii) of the rules. The appellants have a settled life in Nigeria. Their home, their school, their friends and their father are all in Nigeria. The appellants have a flawless immigration history. On the balance of probabilities the appellants intend to come to the UK for a limited period of less than six months, and intend to return to their home, their education, their relatives and their established way of life in Nigeria at the end of the brief visit to the UK.

18. I therefore find that the appellants fulfil the requirements of the immigration rules. The cases of Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) & Adjei (visit visas - Article 8) [2015] UKUT 0261 (IAC) remind me that the ability to fulfil the rules is a factor which weighs in their favour in assessing the proportionality of the respondent's decision.

19. In the decision of 25 June 2015 the Judge found that family life was engaged and that the respondent's decision is a disproportionate interference with the right to respect for family life. I consider that this case turns on the question of proportionality. In determining this issue I am bound to give effect to the governing statutory regime, to which I now turn. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within **Razgar**.

20. The maintenance of effective immigration control is in the public interest. S.117B(4)(5) & (6) are not relevant to this appeal. The appellants speak English and are financially independent. Therefore there are more factors in section 117B of the 2002 Act weighing in favour of the appellants than weighing against them.

21. The effect of the respondent's decision is to prevent two children in their mid-teens from visiting their mother. Because their mother has been the victim of domestic violence (and still bears a residual fear as a result of her treatment at the hands of her ex-husband) meaningful quality contact is not available in Nigeria. The appellants have a flawless immigration history and have demonstrated that they can be trusted to adhere to the terms of the immigration rules. The public interest and effective immigration control is not compromised by allowing children who adhere to the immigration rules and

respect the need for immigration control to temporarily entered the UK to visit their British citizen mother. There is a significant benefit to both the appellants and their British citizen mother in maintaining regular contact and enhancing the already established means of contact (by electronic instantaneous communication) with regular visits.

22. I am therefore driven to the conclusion that the respondent's decision is a disproportionate breach of each of the appellant's rights to respect for family life within the meaning of article 8 ECHR.

### **Conclusion**

23. I therefore find that the Judge's decision is tainted by a material error of law. I remake the decision. **I set aside the decision of the First-tier Tribunal because it contains a material error of law. I substitute the following decision.**

### **Decision**

**24. Both of the appeals are allowed on article 8 ECHR grounds**

Signed

Date 26 October 2015

Doyle

Deputy Upper Tribunal Judge