



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

Appeal Numbers: VA/19317/2013
VA/19318/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 13 March 2015**

**Determination
Promulgated
On 13 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

THE ENTRY CLEARANCE OFFICER, LAGOS

and

**BLESSING ONAGHINOR
BEAUTY ONAGHINOR
(NO ANONYMITY DIRECTION MADE)**

Appellant

Respondents

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr Komolafa, Legal Representative

DECISION AND REASONS

1. The appellant in this case is the Entry Clearance Officer, who appeals with the permission of the First-tier Tribunal against the decision of Judge of the First-tier Tribunal Abebrese to allow the appeals of Ms Blessing Onaghinor and Ms Beauty Onaghinor, Nigerian nationals born on 3 September 1994 and 5 May 1990 respectively, against decisions 18

October 2013 refusing them entry clearance in order to visit their brother, Mr Henry Onaghinor in the UK. The appeals were allowed by Judge Abebrese who found the requirements of paragraph 41 of the Immigration Rules, HC395 were met. The judge did not consider any other ground of appeal.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. From now on I shall refer to Ms Blessing Onanghinor and Ms Beauty Onaghinor as “the appellants” and to the Entry Clearance Officer as “the respondent”.
3. I was not asked and saw no reason to make an anonymity direction.
4. The parties were in agreement that the judge’s decision contains a material error of law such that it should be set aside.

Error of law

5. The respondent sought and was granted permission to appeal against Judge Abebrese’s decision in respect of the appellants on the ground that he failed to recognise that the grounds of appeal were restricted to human rights and discrimination. It clearly noted on the notices of decision that the grounds of appeal were restricted.
6. By virtue of section 52 of the Crime and Courts Act 2013, where applications are made for visit visas after 25 June 2013, the applicants will only be able to appeal on human rights and discrimination grounds.
7. It is plain that Judge Abebrese did not direct himself correctly and he failed to recognise that he had no jurisdiction to allow the appellants’ appeals under the rules. He made no reference at all to human rights or, for that matter, race discrimination. He exceeded his jurisdiction and I therefore set aside his decision.
8. I re-make the decision as follows.

Decision substituted

9. The grounds of appeal lodged against the respondent’s decisions argued the decisions interfered with the appellants’ rights under article 8 of the Human rights Convention, which protects the right to family life.
10. The burden of proof is on the appellants and the standard of proof is the ordinary civil standard of a balance of probabilities. Section 85(5) of the 2002 Act provides that I may consider only the circumstances appertaining at the time of the decision to refuse. In *AS (Somalia)* UKHL 32, the House of Lords held that section 85(5) applied to human rights grounds of appeal.
11. Article 8 states as follows,

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall 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 interests of national security, public safety or the economic well being 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.”

12. There is no provision within Appendix FM of the rules, which is expressly concerned with the application of article 8 to immigration decisions, to visitors. Appendix FM is concerned with family unity where the respective family members wish to live together permanently. It is now clear that, if after considering the rules, the Tribunal considers that the article 8 claim has been fully addressed, it is not necessary to go on to look outside the rules unless there are arguably good grounds for doing so, although there is no threshold test (*Singh and Anr v SSHD* [2015] EWCA Civ 74, see paragraph 66). Given the absence of any rule designed to protect family life in the circumstances of family visits, I shall assess the case by reference to the case law which set out the guiding principles prior to the amendment of the rules.
13. It is for the appellants to show there would be an interference with their right to family life, although in entry clearance cases the correct approach to this issue may be to assess whether the decision amounts to an unjustified lack of respect for family life, focusing on the UK’s positive obligations to facilitate family reunion (*Shamim Box* [2002] UKIAT 02212). Article 8 is a qualified right expressed in such a way as to allow for exceptions and it is for the respondent to show that the lack of respect is lawful and in pursuit of a legitimate aim. I then have to assess whether the decision is disproportionate to that aim.
14. I reminded myself of the five questions to be answered in determining an article 8 ground of appeal, as set out in paragraph 17 of *Razgar* [2004] UKHL 27, an approach confirmed in paragraph 7 of *EB (Kosovo)* [2008] UKHL 41. I also reminded myself that I am not solely concerned with the rights of the appellant but I must also consider the direct impact of the refusal on her family members (*Beoku-Betts* [2008] UKHL 39).
15. Mr Komolafa relied on the recent case of *Mostefa (Article 8 in entry clearance)* [2015] UKUT 00112 (IAC) to support his argument that ability to satisfy the Immigration Rules is capable of being a weighty, though not determinative, factor when deciding whether a refusal is a proportionate decision.
16. However, in the case he relied on the Upper Tribunal also stated as follows:

“24. It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be

extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

17. It is necessary therefore to consider whether the appellants' circumstances engage article 8.1.
18. The question of whether family life exists between adult family members was considered in detail in paragraphs 50 to 62 of *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160 (IAC). The guidance given by the Upper Tribunal in that case was subsequently approved by the Court of Appeal in paragraph 46 of *Gurung & Others* [2013] EWCA Civ 8. Most of the case law has been concerned with adult children living with their parents. The thrust of the guidance is that each case depends on its own facts.
19. There was scant evidence regarding the relationship before the entry clearance officer, despite an interview being held with one of the appellants, such that there was even doubt that they were related at all to the sponsor. The First-tier Tribunal heard oral evidence from the sponsor and accepted the relationships were as claimed.
20. I also heard brief oral evidence from the sponsor, Mr Henry Onaghinor, and his wife, Ms Angelique Rama. Mr Walker made no challenge to their evidence, which I accept was credible.
21. The following facts are clear. The appellants were, at the date of decision, pursuing undergraduate studies in Nigeria. They lived with their mother. They were aged 19 and 23 respectively. The sponsor left home in Nigeria in 1997. He lived in Germany and Spain before coming to the UK in October 2004. He visited Nigeria once in 2004, once in 2007 (with his wife) and again in 2008. The appellants have two other siblings in Nigeria and another in Spain. The sponsor has sent money to his mother for their upkeep since 1999. The sponsor did visit the family again in Nigeria in April 2014 but that was after the date of decision. The appellant's mother was granted entry clearance and has twice visited the

UK in 2013 and 2014. Again that was after the date of decision.

22. The available evidence falls considerably short of showing there is family life between the parties in this case. There is some evidence of financial dependency between the parties but little evidence of anything beyond the usual ties of affection between adult family members. The sponsor came to the UK when the appellants were very young and they have effectively grown up without their older brother being present in the household. During the sixteen years between his departure from Nigeria and the date of decision, the sponsor only visited Nigeria three times. Whilst he may speak to the appellants on the telephone when he calls his mother, there is no basis for saying that their relationship is sufficiently close to amount to family life for the purposes of article 8.

23. I must therefore dismiss these appeals. The appellants met the requirements of paragraph 41 but I cannot allow the appeals on *Mostefa* principles unless family life is shown. Article 8.1 was engaged in that case because the facts concerned a husband and wife. The circumstances of these appeals are far different.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made an error of law and I re-make the decision in the following terms:

The appeals are dismissed on human rights grounds.

No anonymity direction.

Signed

Date 13 March 2015

**Judge Froom, sitting as a Deputy Judge of
the Upper Tribunal**

TO THE RESPONDENT FEE AWARD

I have dismissed the appeals and therefore there can be no fee award.

Signed

Date 13 March 2015

**Judge Froom, sitting as a Deputy Judge of
the Upper Tribunal**

